BRB No. 00-1078 BLA

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| BERNARD MATTINGLY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' | ) | DATE ISSUED: |
| | ) | |
| COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Dorothy L. Page (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-0271) of Administrative Law Judge Thomas F. Phalen, Jr. on a duplicate claim[1] filed pursuant to the

[1] Claimant is Bernard Mattingly, the miner, who filed his first application for benefits with the Social Security Administration (SSA) on April 23, 1971, which was finally denied on April 18, 1973. Director's Exhibit 17. The miner took no further action on this claim, and subsequently, filed a duplicate application for benefits with SSA on February 17, 1976. Director's Exhibit 17. The most recent decision on the merits of this claim was issued by Administrative Law Judge W. Ralph Musgrove who determined that claimant failed to establish the existence of pneumoconiosis on January 22, 1991. Claimant appealed and the Benefits Review Board affirmed the denial of benefits. *Mattingly v. Director, OWCP*, BRB

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge adjudicated this duplicate claim[3] pursuant to 20 C.F.R. Part 718 (2000) and credited the parties' stipulation that the miner worked in qualifying coal mine employment for seven years and seven months. The administrative law judge considered the newly submitted evidence and determined that, because claimant failed to establish the existence of pneumoconiosis or total respiratory

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No. 91-0843 BLA (Sep. 28, 1992)(unpub.); Director's Exhibit 17. Subsequently, claimant appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, and the court dismissed claimant's appeal for want of prosecution. *Mattingly v. Director, OWCP*, No. 92-4245 (6th Cir. Jan. 21, 1993)(unpub. Order); Director's Exhibit 17. Claimant did not further pursue this claim. On February 8, 1999, claimant filed his third application for benefits. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Although the administrative law judge incorrectly stated that claimant filed his first claim on February 17, 1976, rather than April 23, 1971, we deem this error harmless inasmuch as it is not dispositive of the instant claim. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 2.

disability, he failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by failing to find the existence of pneumoconiosis and total respiratory disability. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the denial of benefits.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 18, 2001, to which the Director responded asserting that the regulations at issue do not affect the outcome of this case.[4] Based on the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.[5]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally

[4] Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on May 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[5] We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (3) and 718.204(c)(1)-(3) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 8 respectively.

disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has articulated the standard for adjudicating duplicate claims, holding that "to assess whether a material change in condition is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18 (6th Cir. 1994); *see* 20 C.F.R. §725.309.

Claimant first contends that the administrative law judge erred by finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis by relying too heavily on the qualifications of the physicians and the numerical superiority of the negative x-ray interpretations. Contrary to claimant's argument, however, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1); *Trent, supra*; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, in the instant case the administrative law judge properly determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as the only interpretations of the newly submitted x-ray were negative for the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 7; Director's Exhibits 8, 10. We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as this determination was supported by the record.

Claimant also argues that the administrative law judge irrationally found that the medical opinions of Dr. Yalamanchi and of the physicians from Mary Breckinridge Hospital, made subsequent to the prior denial, were insufficient to establish the existence of pneumoconiosis because these physicians treated claimant and rendered documented opinions. We disagree. The Sixth Circuit has held that the administrative law judge is not required to accord greater weight to the opinion of a treating physician, where, as in the case at bar, the opinion contains deficiencies. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *accord Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Peabody Coal Co. v. McCandless*, F.3d , BLR *slip op.* at 3 (7th Cir. 2001). The administrative law judge, within a permissible exercise of his discretion, discredited the diagnosis of "black lung" contained in Dr. Yalamanchi's report and the hospitalization records inasmuch as "there was absolutely no explanation" for the diagnosis.

*See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 8; Director's Exhibits 7, 15. Accordingly, we affirm the administrative law judge's determination that Dr. Yalamanchi's report and the records of Mary Breckinridge Hospital were not well documented or reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8. Consequently, we affirm the administrative law judge's determination that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis.

Claimant additionally argues that the administrative law judge erroneously failed to consider the exertional requirements of claimant's usual coal mine work in finding that claimant was not totally disabled. Claimant contends further that the administrative law judge failed to address claimant's age, education, and limited work experience, all factors precluding claimant from obtaining gainful employment outside the coal mine industry, in his total disability assessment. Claimant's arguments lack merit. It is well established that "consideration of the exertional requirements of a miner's work is 'unnecessary' in a case where the [administrative law judge] credited the reports of physicians who found that the miner 'had no respiratory or pulmonary impairment at all, and therefore, from a respiratory standpoint, could perform any kind of manual labor'." *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *see Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989)(administrative law judge may infer total disability when comparing exertional requirements of miner's coal mine job with physician's assessment of his working capability). In the instant case, the administrative law judge rationally found that the medical opinion of Dr. Wicker was insufficient to demonstrate total disability because Dr. Wicker stated that he was unable to assess claimant's respiratory capacity due to claimant's failure to comply with the testing protocol. *See Gee v. W.G. Moore & Son*, 9 BLR 1-4 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 8; Director's Exhibit 8. Hence, the administrative law judge, within a rational exercise of his discretion, found that Dr. Wicker's opinion was insufficient to demonstrate total respiratory disability inasmuch as Dr. Wicker was unable to address whether claimant suffers from any disability. Thus, we affirm the administrative law judge's determination that the medical opinion evidence failed to demonstrate total respiratory disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994)(to establish eligibility for benefits, miner must prove that he has totally disabling respiratory condition).

Inasmuch as the administrative law judge's finding, that because claimant failed to

establish the existence of pneumoconiosis and total disability, he failed to demonstrate a material change in conditions, is rational, supported by substantial evidence, and contains no reversible error, we affirm his determination. *See* 20 C.F.R. §725.309; *Ross*, *supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge