BRB No. 05-0326 BLA

BILLY R. CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/04/2005
	)	
Respondent	)	DECISION and ORDER

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

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-5744) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a claim filed pursuant to the 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). The administrative law judge credited claimant with at least twenty-six years of coal mine employment[1] pursuant to the parties' stipulation, and found that

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 3.

because the last employer for which claimant worked was bankrupt, any benefits awarded would be paid by the Black Lung Disability Trust Fund. Decision and Order at 2, 4; Hearing Transcript at 9; Director's Exhibit 21. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 7. After determining that the instant claim was a subsequent claim,[2] the administrative law judge noted the proper standard and found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 2-3, 7-14. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement that was previously adjudicated against him, and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant argues further that he was not provided a complete pulmonary evaluation as required by the Act and regulations. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly denied benefits and that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.[3]

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 applicable law, they are binding upon this Board and may not be

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[2] Claimant filed his initial claim for benefits on April 9, 1993, which was finally denied by the district director on September 14, 1993 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed a second claim for benefits on September 4, 1996, but withdrew it on March 8, 2001. Director's Exhibit 1. Claimant filed his current claim on April 19, 2001, which was denied by the district director on January 22, 2003. Director's Exhibits 2, 16, 18. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 17.

[3] The administrative law judge's length of coal mine employment and Trust Fund liability determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of two new x-rays in light of the readers' radiological credentials. Decision and Order at 9-10. Because the March 24, 2001 x-ray was read as positive by Dr. Baker, who has no radiological qualifications listed in the record, and as negative by Dr. Barrett, a Board-certified radiologist and B reader, the administrative law judge found this x-ray negative for pneumoconiosis. Decision and Order at 9. The administrative law judge further found that the August 8, 2001 x-ray was read as positive for pneumoconiosis by Dr. Hussain, who has no radiological qualifications listed in the record, and that there were no negative readings of this x-ray. Accordingly, the administrative law judge found that the August 8, 2001 x-ray was positive for pneumoconiosis. However, because Dr. Barrett, the only reader with radiological credentials, read the March 24, 2001 x-ray as negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). This was a proper qualitative analysis of the x-ray evidence. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and "may have" selectively analyzed the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding that Dr. Baker's medical opinion was not a reasoned medical opinion. Claimant's Brief at 4-5. We disagree. Dr. Baker diagnosed claimant with coal workers' pneumoconiosis, category 1/0, based on an x-ray and claimant's history of dust exposure, mild resting hypoxemia based on a blood gas study, and chronic bronchitis "based on history." Director's Exhibit 9 at 3. Dr. Baker indicated that "any impairment is caused at least in part . . . by [claimant's] coal dust exposure." Director's Exhibit 9 at 4. The administrative law judge was within his discretion to find that Dr. Baker based his diagnosis of coal workers' pneumoconiosis on an x-ray that was reread as negative by a more qualified reader, relied upon a non-qualifying blood gas study, and relied solely on history to diagnose chronic bronchitis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Claimant's assertion that Dr. Baker's opinion was well reasoned merely requests that the Board reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered two new medical reports. Dr. Hussain, who examined claimant on behalf of the Department of Labor, obtained "normal" pulmonary function and blood gas studies and diagnosed claimant with a "mild" impairment that was not disabling. Director's Exhibit 11 at 3, 5. Dr. Baker, claimant's physician, obtained a pulmonary function study interpreted as "normal," and a blood gas study revealing "mild" resting hypoxemia. Director's Exhibit 9 at 3. Dr. Baker concluded that claimant has a "Class I" impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, and that he is "100% occupationally disabled" because "persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id*. The administrative law judge found that Dr. Baker's opinion did not support a finding of total disability because Dr. Baker merely advised against any further exposure to coal dust, and because Dr. Baker's "documentation of limitations on [c]laimant's residual exertional capacity necessary to perform his duties as a coal miner is virtually non-existent." Decision and Order at 13, 14.

We reject claimant's allegations of error in the administrative law judge's finding that claimant did not establish total disability. The administrative law judge properly found that

Dr. Baker's recommendation against a return to a dusty environment did not constitute an assessment of total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Further, because the administrative law judge found that Dr. Baker's "mild" impairment rating was not credible, it was unnecessary for him to compare it with claimant's exertional job requirements.[4] *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). Additionally, contrary to claimant's contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White*, 23 BLR at 1-7. Finally, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's August 8, 2001 opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that he "is only required to provide each claimant with a complete and credible examination, not a dispositive one," and states that he met his statutory obligation in this case. Director's Brief at 2-3.

The Act indicates that "[e]ach miner who files a claim shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Hussain conducted an examination and the full range of

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[4] Similarly, it was unnecessary for the administrative law judge to compare Dr. Baker's diagnosis of a "Class I" impairment--a diagnosis of no impairment--with claimant's job duties. *See Vargo v. Valley Camp Coal*, 7 BLR 1-901, 1-903 n.1 (1985).

testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 11. Additionally, the administrative law judge did not find that Dr. Hussain's report lacked credibility or was incomplete. Rather, on the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Hussain's opinion was not a reasoned diagnosis of legal pneumoconiosis at Section 718.202(a)(4) because it was based solely on an x-ray reading and a reference to claimant's dust exposure without further explanation. As the Director notes, he is required to provide a complete and credible pulmonary evaluation not a dispositive one. Accordingly, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Hussain's report, with regard to Section 718.202(a)(4), establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because claimant failed to establish either the existence of pneumoconiosis or total disability, the elements of entitlement that were previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's decision denying benefits. I would remand the case for the Director to provide claimant a complete pulmonary examination as Congress directed in 30 U.S.C. §923(b).

The Director acknowledges he has a responsibility to provide claimant a complete

pulmonary examination but argues that he has discharged his responsibility in the case at bar: "Only where the examination provided by the Director is either not complete or not credible (*i.e.*, is not entitled to any weight at all) has the Director failed to meet his obligation. *See Cline v. Director, OWCP*, 917 F.2d 9, 11, [14 BLR 2-102, 2-105] (8th Cir. 1990)." Director's Response at 3. Although the Director implicitly acknowledges that Dr. Hussain, who examined claimant on behalf of the Director in the current claim, did not provide a reasoned diagnosis of pneumoconiosis, as the administrative law judge found, the Director asserts that Dr. Hussain provided a credible opinion on the issue of total disability which the administrative law judge relied upon. The Director's argument is that since Dr. Hussain's opinion was not rejected in its entirety, the Director has met his obligation.[5]

The Director misreads the administrative law judge's decision. According to the Director, Dr. Hussain's opinion that claimant has "the respiratory capacity to perform the work of a coal miner . . .," Director's Exhibit 14 at 4, is one of the bases of the administrative law judge's decision. The Director's states:

> Here, although the ALJ did not explicitly analyze Dr. Hussain's opinion of no disability, he did effectively credit that opinion, as he found the medical opinion [evidence] insufficient to establish total disability. Thus, as Dr. Hussain's negative disability opinion--which is supported by all other credible evidence on disability--is credible and was effectively relied on by the ALJ in denying benefits, his report satisfies the Director's obligation under Section 413(b). Any possible defect in Dr. Hussain['s] opinion with respect to the existence of pneumoconiosis would, thus, not matter.
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> Director's Response at 3.

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[5] In the instant case, the Director advocates a minimalist view of his statutory duty which contrasts with that discussed by the Eighth Circuit in *Newman v. Director, OWCP*, 745 F.2d 1162, 1165, 7 BLR 2-25, 2-31 (8th Cir. 1984), the seminal case on this issue:

> [A]dministrative personnel ought to have informed Newman of his statutory right to have the Department of Labor arrange, and pay for, a complete pulmonary evaluation. 30 U.S.C. §923(b) (1982); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977). We cannot say that the Department of Labor fulfilled its responsibility for providing a complete pulmonary evaluation by arranging to obtain an informed medical opinion regarding Newman's condition, but then rejecting that opinion as not credible. On remand, administrative personnel should either accept the import of the medical opinions of record, or obtain a more reliable medical opinion.

The record reflects that in the second sentence of his discussion of Dr. Hussain's opinion on the existence of pneumoconiosis, the administrative law judge observed: "Dr. Hussain made no reference to any particular employment history in his medical report." Decision and Order at 11. When the administrative law judge addressed 20 C.F.R. §718.204(b)(2)(iv), which provides for a finding of total disability based upon medical opinion evidence, the only medical opinion he discussed was that of Dr. Baker. The administrative law judge explained: "There are no other newly submitted medical reports in the record on which to base my opinion." Decision and Order at 14. However, in addition to basing his decision on Dr. Baker's opinion, the administrative law judge also could have supported his decision with consideration of Dr. Hussain's opinion, if the administrative law judge had credited that opinion. It seems clear that because Dr. Hussain had diagnosed a mild respiratory impairment and his opinion reflected no knowledge of the exertional requirements of claimant's usual coal mine employment, the administrative law judge recognized it was not a credible medical determination under *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Decision and Order at 11, 12. The only reasonable interpretation of the administrative law judge's decision, including: his comment that Dr. Hussain did not refer to claimant's employment history; his reference to the requirements of *Cornett*; his omission of any reference to Dr. Hussain's opinion when discussing the issue of total disability, is that the administrative law judge rejected as unreasoned Dr. Hussain's opinion on total disability. Even if it is not entirely clear that the administrative law judge rejected the opinion, there is absolutely nothing in the administrative law judge's decision to support the Director's argument that the administrative law judge found Dr. Hussain's opinion credible and relied upon it. Furthermore, it cannot be disputed that Dr. Hussain's opinion on total disability is not credible in light of the teaching of *Cornett*. Since the record belies the Director's assertion that Dr. Hussain provided a credible opinion on total disability and the Director concedes the doctor did not provide a credible opinion on the existence of pneumoconiosis, it is clear that the doctor's opinion is entitled to no weight. Hence, the Director's argument that he discharged his statutory duty to provide claimant with a complete, credible pulmonary evaluation must fail.

The majority rejects claimant's argument that he was denied his right to a complete pulmonary examination by agreeing with the Director's assertion that claimant is not entitled to a dispositive examination. The majority concludes that the Director's failure to provide a credible opinion on the existence of pneumoconiosis at Section 718.202(a)(4) does not establish that claimant was denied a complete credible pulmonary examination.

The majority thereby ignores the standard which the Director stated applies to determine whether he was discharged his statutory duty: "Only where the examination provided by the Director is either not complete or not credible (*i.e.*, not entitled to any weight at all) has the Director failed to meet his obligation." Director's Response at 3. Under this standard, the majority cannot defend the Director's assertion he has discharged his duty

because the record belies the Director's claim that Dr. Hussain rendered a credible opinion on total disability, as well as his claim that the administrative law judge credited that opinion. The majority does not even attempt to defend these assertions by the Director. Because Dr. Hussain's opinion was not credible on either the issue of pneumoconiosis or total disability, it is not entitled to any weight at all. Neither the Director nor the majority can deny that since Dr. Hussain's opinion "is not entitled to any weight at all . . . the Director failed to meet his obligation." Director's Response at 3.

In sum, because the record demonstrates that the Director has not provided claimant a complete, credible pulmonary examination, I would remand the case to the district director for a complete pulmonary evaluation.

REGINA C. McGRANERY
Administrative Appeals Judge