BRB No. 05-0417 BLA

RODNEY D. ISOM Claimant-Petitioner v. PECKS BRANCH MINING COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/26/2005 DECISION and ORDER

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

Rodney D. Isom, Sparta, Tennessee, *pro se*.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Law Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance the counsel, appeals the Decision and Order – Denial of Benefits (02-BLA-5459) of Administrative Law Judge Thomas F. Phalen, Jr. on a

subsequent claim[1] 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). Initially, the administrative law judge credited claimant with "at least" fifteen years and nine months of qualifying coal mine employment. Decision and Order at 3. Next, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge concluded that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer/carrier urges affirmance of the administrative law judge's denial of benefits.[2] The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers

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[1] Claimant's first application for benefits filed September 13, 1995 was denied by the district director on October 1, 1997 for failure to establish the existence of pneumoconiosis, that the disease arose at least in part out of coal mine employment, or that the disease was totally disabling. Director's Exhibit 1. Thereafter, claimant filed a petition for modification and supporting evidence and the district director denied benefits on May 29, 1998. Director's Exhibit 1. On September 17, 2001, claimant filed a subsequent claim for benefits, which is pending on appeal. Director's Exhibit 3.

[2] Employer argues that the administrative law judge erred by excluding Dr. Fino's November 11, 2002 report as exceeding the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i) because Dr. Fino's November 2002 report was based on his review of records that were filed in the miner's prior claim and, not newly submitted evidence as the administrative law judge found. Employer's Exhibit 1; Employer's Brief at 9. Employer is correct that, contrary to the administrative law judge's finding, Dr. Fino's November 2002 report is based on a review of previously submitted evidence which is already contained in the evidence of record as part of claimant's prior claim, Decision and Order at 5 n.7; *see* 20 C.F.R. §725.309(d)(1); Director's Exhibit 1. We, nevertheless, deem the administrative law judge's exclusion of Dr. Fino's November 2002 report as harmless error inasmuch as Dr. Fino's opinion, that there is insufficient evidence to diagnose pneumoconiosis or a respiratory impairment, supports the administrative law judge's denial of benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final.

Relevant to Section 718.202(a)(1), the administrative law judge found that the newly submitted x-ray evidence consisted of four x-ray interpretations of two x-ray films: three interpretations were negative for the existence of pneumoconiosis; one interpretation was positive for the existence of pneumoconiosis; and one reading was for film quality only. Decision and Order at 10; Director's Exhibits 13-15; Employer's Exhibit 2. The administrative law judge, within a proper exercise of his discretion, considered the radiological expertise of the physicians interpreting the x-rays and found that the negative interpretations of Dr. Wheeler, a Board-certified radiologist and B-reader, and Dr. Dahhan, a B-reader, outweighed the positive interpretation of Dr. Baker, who does not possess any radiological qualifications. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. Hence, the administrative law judge conducted a qualitative and quantitative analysis of the newly submitted x-ray evidence in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, as the administrative law judge's determination is rational and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1).

Likewise, we affirm the administrative law judge's determination that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3). A review of the record reveals that there is no biopsy evidence; hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Similarly, a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) is applicable to the instant case as the record contains no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this

is a living miner's claim, *see* 20 C.F.R. §718.306.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are three newly submitted physicians' opinions of record. After conducting a complete pulmonary evaluation of claimant on November 19, 2001, Dr. Baker diagnosed "coal workers' pneumoconiosis 1/0" and chronic bronchitis due to coal dust exposure. Director's Exhibit 13. Based on an examination conducted on January 16, 2002, Dr. Dahhan found no evidence of coal workers' pneumoconiosis or any other respiratory or pulmonary disease secondary to coal dust exposure. Director's Exhibit 14. After reviewing an oximetry test and report on March 11, 2004, Dr. Fino concluded that this evidence did not change his opinion that claimant does not have a coal mine dust related pulmonary condition. Employer's Exhibit 1A.

The administrative law judge found that, while Dr. Baker set forth his clinical observations and findings, his opinion was entitled to less weight because he based his diagnosis of "coal workers' pneumoconiosis 1/0" upon claimant's coal mine employment history and his own positive x-ray interpretation, which was reread as negative by Dr. Wheeler, a physician who possessed superior radiological expertise. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003) (administrative law judge may not rely on physician's opinion that miner has pneumoconiosis when physician based his opinion entirely on x-ray evidence that was discredited by administrative law judge); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). In addition, the administrative law judge found that Dr. Baker's opinion was further undermined because it lacked any supportive, underlying documentation since the physical examination Dr. Baker conducted was normal and the pulmonary function studies and arterial blood gas studies he administered yielded non-qualifying results. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Consequently, the administrative law judge properly found that Dr. Baker's opinion constituted a mere restatement of an x-ray reading because Dr. Baker did not explain how the duration of claimant's coal mine employment supported his diagnosis of pneumoconiosis, and therefore, concluded that Dr. Baker's opinion was not a reasoned medical opinion for purposes of Section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Furgerson*, 22 BLR at 1-226 (credibility of physician's diagnosis of pneumoconiosis called into question when based on coal mine employment and positive x-ray that was reread as negative by physician with superior radiological qualifications); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111, 1-113 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Further, the administrative law judge rationally determined that Dr. Baker's diagnosis of chronic bronchitis was insufficient to establish the

existence of pneumoconiosis as defined in Section 718.201 because this diagnosis was based solely on claimant's symptomotology and lacked any objective medical evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Hess v. Clinchfield Coal Co.,* 7 BLR 1-295, 1-296 (1984); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-812 (1984); Decision and Order at 12. Hence, while noting that Dr. Baker was a Board-certified pulmonologist, the administrative law judge properly discounted Dr. Baker's opinion because it was inadequately reasoned and unsupported by objective evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge rationally found that the contrary opinion of Dr. Dahhan was more persuasive and, therefore, entitled to dispositive weight because Dr. Dahhan, who is Board-certified in internal medicine, pulmonary disease medicine and is a B-reader, based his opinion that claimant did not have pneumoconiosis on supportive, objective, diagnostic tests, *i.e.*, a normal physical examination, negative chest x-ray interpretation, and non-qualifying pulmonary function and arterial blood gas studies. Consequently, the administrative law judge concluded that Dr. Dahhan rendered a well documented and well reasoned opinion. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46 (1985); *Carpeta v. Mathies Coal Co.,* 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 12; Director's Exhibit 14. Because the administrative law judge's determination that Dr. Dahhan's opinion was sufficiently documented and reasoned is rational and supported by substantial evidence, we affirm his crediting of Dr. Dahhan's opinion over the contrary opinion of Dr. Baker pursuant to Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (crediting of physician's report as reasoned is a credibility determination within purview of administrative law judge); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3]

We next turn to the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). Relevant to Section 718.204(b)(2)(i), there are two newly submitted pulmonary function studies taken on

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[3] With respect to Dr. Fino's March 11, 2004 report wherein Dr. Fino reviewed claimant's oximetry test, the administrative law judge determined that Dr. Fino provided no objective data on which to base his opinion that pneumoconiosis was absent. Decision and Order at 12; Employer's Exhibit 1A.

November 9, 2001 and January 16, 2002, which yielded non-qualifying values.[4] Director's Exhibits 13, 14. The administrative law judge properly found that the pulmonary function study evidence produced non-qualifying values, and therefore, failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 13. Likewise, the administrative law judge properly determined that the two newly submitted arterial blood gas studies dated November 9, 2001 and January 16, 2002 produced non-qualifying values. Director's Exhibits 13, 14. Hence, we affirm the administrative law judge's determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 13. Similarly, we affirm the administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 13. Relevant to Section 718.204(b)(2)(iv), the newly submitted medical opinion evidence consists of the opinions of Drs. Baker, Dahhan, and Fino, all of whom opined that there is no evidence of a pulmonary or respiratory impairment and that claimant has the respiratory capacity to return to his usual coal mine work. Director's Exhibits 13, 14; Employer's Exhibit 1A. Because none of the physicians opined that claimant suffers from a totally disabling respiratory or pulmonary impairment, the administrative law judge, therefore, properly determined that the newly submitted medical opinion evidence failed to demonstrate that claimant was totally disabled pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 13. Inasmuch as the administrative law judge's analysis of the evidence is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.204(b)(2)(iv) determination. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Based on the foregoing, therefore, we affirm the administrative law judge's determinations that the credible evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b) and, that entitlement to benefits is precluded. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge