BRB No. 05-0908 BLA

TOMMY J. SAWYERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPOATED	)	
	)	DATE ISSUED: 08/30/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd and Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6718) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent 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 parties stipulated to, and the administrative law judge found, twelve years of coal mine employment. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and total disability at 20 C.F.R. §§718.202(a) and 718.204(b), finding that they were elements of entitlement previously adjudicated against claimant.[2] The administrative law judge determined that claimant failed to establish a change in any applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability at 20 C.F.R. §718.204(b)(2). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act and its implementing regulation at 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director responds, contending that he satisfied his obligation to provide claimant with a complete pulmonary evaluation, as required under the Act, by virtue of Dr. Simpao's assessment of claimant.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

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[1] Claimant filed his first claim for benefits on March 8, 1994. It was denied by Administrative Law Judge Frank D. Marden for failure to establish pneumoconiosis, on April 10, 1996. No other elements of entitlement were addressed. Director's Exhibit 1. The Benefits Review Board affirmed Judge Marden's denial of benefits on August 28, 1996, based on claimant's failure to establish the existence of pneumoconiosis. *Sawyers v. Shamrock Coal Co., Inc.*, BRB No. 96-1050 BLA (Aug. 28, 1996) (unpublished); *Id.* Claimant filed this subsequent claim on September 20, 2001, which was denied by the district director in a Proposed Decision and Order dated July 17, 2003. Director's Exhibits 3, 31. Claimant requested a formal hearing on July 25, 2003. Director's Exhibit 32. A hearing was held before the administrative law judge on October 6, 2004.

[2] As discussed, *infra*, the administrative law judge erred in considering the new evidence relevant to total disability at 20 C.F.R. §718.204(b) as total disability was not an element of entitlement previously adjudicated against claimant.

Under Section 725.309(d), the instant subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement" has changed since the final denial of the prior claim. 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Judge Marden based the prior denial on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 1. The Board affirmed his denial, based on claimant's failure to establish the existence of pneumoconiosis. *Sawyers v. Shamrock Coal Co., Inc.*, BRB No. 96-1050 BLA (Aug. 28, 1996) (unpublished).

Claimant must, therefore, establish the existence of pneumoconiosis based on the new evidence in order to have the instant subsequent claim considered on its merits. *See* 20 C.F.R. §725.309(d). The administrative law judge found that the new evidence did not establish either the existence of pneumoconiosis or total disability at 20 C.F.R. §§718.202(a) and 718.204(b), however, and concluded that claimant did not meet his burden at 20 C.F.R. §725.309(d).

As an initial matter, we address the administrative law judge's finding of no total disability at 20 C.F.R. §718.204(b), based on the new evidence. Because the denial in the prior claim was based solely on claimant's failure to establish the existence of pneumoconiosis, the administrative law judge, in the instant case, erred in his consideration of total disability, as the issue of total disability was not a condition on which the prior denial was based. *See* 20 C.F.R. §725.309(d).

Claimant specifically contends that the administrative law judge erred in finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[3] Claimant argues that the administrative law judge erroneously "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

Claimant's contentions lack merit. The new x-ray evidence consists of seven readings[4] of four x-rays dated February 6, 2001, October 18, 2001, March 15, 2002 and

[3]As claimant does not challenge the administrative law judge's findings of no pneumoconiosis based on the newly submitted evidence at 20 C.F.R. §718.202(a)(2) and (a)(3), we affirm them. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]In addition, Dr. Sargent read the x-ray dated October 18, 2001, for quality only. Director's Exhibit 12.

February 27, 2004. There are four negative and three positive readings. The positive x-ray readings consist of: an interpretation of the February 6, 2001 x-ray by Dr. Baker, a Board-certified radiologist; an interpretation of the October 18, 2001 x-ray by Dr. Simpao, listed as a Board-eligible physician; and an interpretation of the March 15, 2002 x-ray by Dr. Alexander, a dually qualified physician. Director's Exhibits 11a, 12, 28. The negative x-ray readings consist of: an interpretation of the March 15, 2002 x-ray by Dr. Broudy, a B reader; an interpretation of the October 18, 2001 x-ray by Dr. Hayes, a dually qualified physician; an interpretation of the February 6, 2001 x-ray by Dr. Scott, a dually qualified physician; and an interpretation of the February 27, 2004 x-ray by Dr. Dahhan, a B reader. Director's Exhibits 14, 29, 30; Employer's Exhibit 1. The administrative law judge rationally found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), based on the preponderance of negative readings by physicians with superior qualifications. *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); *Staton v. Norfolk & Western Ry. 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); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc)*; Decision and Order at 11. Further, claimant provides no support for his contention that the administrative law judge selectively analyzed the x-ray evidence. *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Based on the foregoing, we hold that, contrary to claimant's assertions, the administrative law judge properly considered both the qualitative and quantitative nature of the x-ray evidence. *Staton*, 65 F.3d at 55, 19 BLR at 2-271; *Woodward*, 991 F.2d at 314, 17 BLR at 2-77. We thus affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by substantial evidence.

Claimant also alleges error in the administrative law judge's finding that the new medical opinions are sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains four new medical reports and new treatment notes by Dr. Baker. By report dated October 18, 2001, Dr. Simpao diagnosed coal workers' pneumoconiosis of 1/1 profusion, based on multiple years of coal dust exposure. Director's Exhibit 12. Dr. Simpao specifically noted that claimant's occupational lung disease, which was caused by his coal mine employment, was based on "[f]indings on chest X-RAY along with physical findings and symptomatology." *Id.*

In a handwritten report dated March 2, 2001, Dr. Brandon diagnosed 1) black lung stage 1 by history, 2) "anx/dep", 3) "HTN", and 4) "chronic LBP" "secondary to osteoarthritis." Director's Exhibit 11a. Dr. Brandon repeated the diagnosis in a handwritten report dated April 6, 2001. *Id.*

Dr. Baker, claimant's treating physician, diagnosed coal workers' pneumoconiosis in progress notes dated January 10, 2002, March 7, 2002, April 30, 2002, and July 9, 2002. Director's Exhibit 27.

By report dated March 15, 2002, Dr. Broudy diagnosed depression, degenerative joint disease of the spine and hypertension. Director's Exhibit 14. Dr. Broudy opined that the miner did not have coal workers' pneumoconiosis. *Id.* Dr. Broudy further found that the results of the spirometry and blood gas studies indicate that the miner's dyspnea is non-pulmonary in origin and that there is no significant pulmonary disease or respiratory impairment that has arisen from the claimant's coal mine employment. *Id.* Dr. Broudy also found that there is no evidence that claimant has any chronic lung disease or chronic obstructive pulmonary disease associated with the inhalation of coal mine dust during his coal mine employment. Director's Exhibit 14 at 3.

By report dated March 10, 2004, Dr. Dahhan found no evidence of pneumoconiosis or pulmonary disability due to coal dust exposure based on the normal pulmonary function and blood gas studies, normal clinical chest examination, and negative x-ray reading. Employer's Exhibit 1.

Considering these new medical opinions of record at 20 C.F.R. §718.202(a)(4), the administrative law judge found Dr. Baker's treatment notes of little probative value, as the notes document dates of treatment and list diagnoses, but contain no discussion of claimant's conditions. Decision and Order at 13. Similarly, the administrative law judge found Dr. Brandon's opinion was entitled to less probative weight, as the physician failed to document what evidence he relied upon in reaching his diagnosis. Decision and Order at 12. The administrative law judge also found that the opinions of Drs. Broudy and Dahhan outweighed Dr. Simpao's opinion, as they are better reasoned, documented, and supported by the objective evidence of record. Decision and Order at 12-13.

Claimant asserts that "it can be concluded that the reports and opinions of Drs. Baker and Brandon are well reasoned" and thus the administrative law judge "should not have rejected them for the reasons he provided." Claimant's Brief at 5. Claimant also summarily asserts that the administrative law judge "appears to have" substituted his opinion for that of a medical expert.[5] *Id.* at 4.

The administrative law judge rationally found, however, that Dr. Baker's treatment notes are not entitled to probative weight as the notes merely indicate the dates of treatment and list the diagnoses, with no discussion of claimant's conditions. *Risher v.*

[5] We reject claimant's assertion that the administrative law judge substituted his opinion for that of a medical expert pursuant to 20 C.F.R. §718.202(a)(4) in the absence of any supporting evidence.

Director, OWCP, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion is based); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, under these circumstances, contrary to claimant's contention, the administrative law judge was not compelled to credit Dr. Baker's opinion, based on his status as claimant's treating physician. 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 12-13. Similarly, the administrative law judge rationally found that Dr. Brandon's opinion was incomplete and not well documented or reasoned, as he failed to indicate what objective evidence he relied on. Therefore, the administrative law judge properly found that Dr. Brandon's opinion was entitled to less probative weight. *Risher, supra*; *Rowe, supra*; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1985) *Fields, supra; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1983); Decision and Order at 12. Moreover, the administrative law judge rationally accorded greater weight to the opinions of Drs. Broudy and Dahhan, than to the opinion of Dr. Simpao, as he found these opinions better reasoned, documented and supported by the objective evidence of record, and as Dr. Simpao's opinion was supported by Dr. Brandon's poorly documented and poorly reasoned opinion. *Risher, supra*; *Rowe, supra*; *Clark, supra*; *Dillon, supra*; *Fields, supra; King, supra;* Decision and Order at 13. Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

Claimant also contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Claimant specifically argues that the Director failed to provide him with a credible pulmonary evaluation because Dr. Simpao's opinion of total disability was discredited by the administrative law judge. As noted by the Director, clamant does not argue that Dr. Simpao's opinion of the existence of pneumoconiosis is defective. Because we have affirmed the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), any defect in Dr. Simpao's opinion on the issue of total disability would not affect the outcome of this

case. We, therefore, deny claimant's request to remand this case for a full pulmonary evaluation.

As the administrative law judge properly found that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), claimant has failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits in the instant claim.

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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge