BRB No. 05-0998 BLA

JOSEPH YARBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2006
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6690) of Administrative Law Judge Jeffrey Tureck with respect to 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 determined that the claim before him was a timely filed subsequent claim.[1] The administrative law judge

[1] Claimant filed an application for benefits on October 16, 1979. Director's Exhibit 1. This claim was denied by the district director on April 15, 1980. *Id*. Claimant

weighed the newly submitted evidence and found that because claimant did not establish that he has pneumoconiosis, he did not demonstrate a change in an applicable condition of entitlement as required under 20 C.F.R. §725.309. The administrative law judge denied benefits accordingly.

Claimant argues on appeal that the administrative law judge erred in finding the existence of pneumoconiosis to be the only element adjudicated against claimant in the prior denial. Claimant also asserts that the administrative law judge did not properly weigh the x-ray, medical opinion, or CT scan evidence. Employer urges the Board to reject claimant's allegations of error. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not submit a brief in this appeal.[2]

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).

Claimant argues initially that the administrative law judge erred in determining that the existence of pneumoconiosis was the only element of entitlement that claimant failed to establish when his 1997 claim was denied. This contention is without merit. 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.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

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filed a second claim on August 13, 1997. Director's Exhibit 2. The district director denied this claim on January 13, 1998, indicating that although claimant had submitted objective evidence demonstrating that he is totally disabled, he needed to proffer evidence indicating that he had pneumoconiosis and that his total disability was caused by pneumoconiosis. *Id*. at 12. Claimant filed his third application for benefits on July 5, 2002. Director's Exhibit 3.

[2] We affirm as unchallenged on appeal the administrative law judge's finding that the existence of pneumoconiosis was not established under 20 C.F.R. §718.202(a)(2), (a)(3). Decision and Order at 3; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to claimant's most recent prior claim for benefits, filed on August 13, 1997, the district director issued a Notice of Initial Finding and Guide to Submitting Additional Evidence in which he stated that claimant had submitted objective studies which could be found sufficient to establish that he is totally disabled, but that claimant had failed to prove that he has pneumoconiosis and hence, he had also failed to prove that he is totally disabled due to pneumoconiosis. Director's Exhibit 2 at 12. Thus, the administrative law judge did not err in finding that the existence of pneumoconiosis was the element that had defeated entitlement in claimant's most recent prior claim. Decision and Order at 3. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Claimant further contends that in weighing the newly submitted x-ray evidence of record under 20 C.F.R. §718.202(a)(1), the administrative law judge should have addressed each film individually and then considered them as a whole, taking into account the age of the films, the readers' qualifications, the consistency of multiple readings, the pattern of progression noted, and other factors. These contentions are also without merit. In his Decision and Order, the administrative law judge reviewed each of the newly submitted x-ray readings, noting the date on which the x-ray was taken and the qualifications of the physicians interpreting the films. Decision and Order at 3-4. The administrative law judge acted within his discretion in according greatest weight to Dr. Wiot's negative readings based upon Dr. Wiot's "extraordinary [radiological] expertise regarding coal workers' pneumoconiosis." Decision and Order at 4; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge could have addressed the other factors to which claimant refers, but he was not required to do so. We affirm, therefore, the administrative law judge's determination that the newly submitted x-ray evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge determined that the newly submitted medical reports in which Drs. Houser and Cohen diagnosed pneumoconiosis were entitled to less weight than the contrary reports in which Drs. Repsher and Rosenberg indicated that claimant is not suffering from a coal dust induced lung disease. Claimant argues that the administrative law judge erred: by not addressing separately the issues of legal and clinical pneumoconiosis; by failing to consider the CT scan evidence on its own merits; by failing to weigh the medical opinion evidence together; and by discrediting the opinions of Drs. Houser and Cohen. Claimant also suggests that in light of the administrative law judge's treatment of Dr. Houser's opinion, this case should be remanded to the district director so that claimant can be provided with a complete pulmonary evaluation.

We do not find merit in claimant's allegations of error. Contrary to claimant's contention, the administrative law judge acted within his discretion as fact-finder in determining that the opinions in which Drs. Repsher and Rosenberg ruled out the

presence of any coal dust related lung disease are entitled to greater weight because they acknowledged that coal dust exposure can cause an obstructive impairment, and their conclusions are well-explained and are more consistent with the objective evidence of record, including the x-ray evidence and the pulmonary function study evidence showing a disproportionate reduction in claimant's FEV1/FVC ratio, the significance of which both physicians explained when they identified cigarette smoking as the cause of claimant's chronic obstructive lung disease. Decision and Order at 4-7; Director's Exhibit 22; Employer's Exhibits 8, 16, 17; *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002); *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Furthermore, the administrative law judge rationally determined that Drs. Houser's and Cohen's opinions do not contain explanations which are as thorough or that relate as specifically to claimant as those offered by Drs. Repsher and Rosenberg. Decision and Order at 5, 7; *Livermore*, 297 F.3d 668, 22 BLR 2-399.

Regarding the need to remand this case to the district director, the Act requires that "[e]ach miner who files a claim . . . 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*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Houser conducted an examination and the full range of testing required by the regulations. Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find nor does claimant allege that Dr. Houser's report was incomplete. On the issue of the existence of pneumoconiosis, the administrative law judge ultimately determined, within his discretion as fact-finder, that Dr. Houser's opinion was outweighed by opinions which provided more thorough explanations and were more consistent with the objective evidence of record. Decision and Order at 5, 7. Because Dr. Houser's opinion was ultimately found outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Houser's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation with respect to the element which defeated entitlement in this case. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-88 n.3.

With respect to the CT scan evidence, none of the physicians who read the CT scans diagnosed pneumoconiosis nor did they link any of the observed conditions to dust exposure in coal mine employment. Director's Exhibit 22; Employer's Exhibits 12, 13; *see* Claimant's Exhibit 2. Error, if any, by the administrative law judge in neglecting to address this evidence separately under Section 718.202(a) is, therefore, harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because the administrative law judge's determination that claimant has not established a change in an applicable condition of entitlement pursuant to Section 725.309(d) is rational and supported by substantial evidence, we affirm it. Consequently, we must also affirm the denial of benefits. 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:

_____
ROY P. SMITH
Administrative Appeals Judge

I concur in the result only:

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REGINA C. McGRANERY
Administrative Appeals Judge