BRB No. 06-0192 BLA

JOE J. BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/31/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Subsequent Claim of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joe J. Baker, Jellico, Tennessee, *pro se*.

Helen H. Cox (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, without the assistance of counsel, appeals the Decision and Order Denying Subsequent Claim (05-BLA-5062) of Administrative Law Judge Alice M. Craft on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1] Claimant, Joe J. Baker, filed his first application for benefits on January 11, 1993. Director's Exhibit 1. The district director denied this claim on March 1, 1993. Claimant took no further action on this claim and subsequently, filed a second application on December 10, 2001, which the district director denied on July 25, 2002. Director's Exhibit 2. Because claimant took no further action on this claim, the claim was administratively closed. On August 29, 2003, claimant filed a third application for benefits, which is the subject of the instant case. Director's Exhibit 4.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge initially credited claimant with eleven years of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that while claimant established total respiratory disability, claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge concluded that claimant failed to demonstrate that one of the applicable conditions of entitlement previously adjudicated against him 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 Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's *pro se* appeal, urging affirmance of the denial of benefits.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error, and we therefore affirm it. 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 one x-ray film: two interpretations were read as negative for the existence of pneumoconiosis; one interpretation was read as positive for the existence of pneumoconiosis; and one reading was interpreted for film quality only.[3] Decision and Order at 5; Director's Exhibits 10, 12, 13, 22.[4] The

[2] We affirm the administrative law judge's determination regarding length of coal mine employment, which is not adverse to claimant, because this determination is 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 4.

[3] The newly submitted evidence also consists of an x-ray dated March 8, 2002 that was read by Dr. Pathak, a dually-qualified radiologist, as positive for pneumoconiosis and by Dr. Barrett, also a dually-qualified radiologist, as negative for

administrative law judge, within a proper exercise of her discretion, considered the radiological expertise of the physicians interpreting the x-rays and found that the positive interpretation of Dr. Pathak, a Board-certified radiologist and B-reader, was outweighed by the negative interpretations of Dr. Barrett, a Board-certified radiologist and B-reader, and of Dr. Baker, a B-reader. This was rational. 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); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *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's analysis constitutes a qualitative and quantitative analysis of the newly submitted x-ray evidence, and we affirm her weighing of the conflicting readings and her resultant finding that the newly submitted 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 her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[5] *See* 20 C.F.R. §718.202(a)(1).

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pneumoconiosis. Director's Exhibits 12, 14. The administrative law judge declined to consider these interpretations because, even though the interpretations were conducted in 2004, she concluded that the March 8, 2002 x-ray predated the last denial of the previous claim, which was July 25, 2002, and accordingly, did not constitute "new evidence" for purposes of a subsequent claim. Decision and Order at 10 n.7; 20 C.F.R. §725.309(d)(3). Because an administrative law judge may properly decline to consider any evidence in existence at the time the previous claim was decided on the grounds that such evidence is not applicable in determining whether there has been a change in condition since the denial of the prior claim, we affirm her exclusion of the readings of the March 8, 2002 x-ray from consideration. *See Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997).

[4] Dr. Barrett read the December 4, 2003 x-ray film twice, on June 1, 2004 and February 22, 2005, and each reading was negative for pneumoconiosis. Director's Exhibits 13, 22; Decision and Order at 5.

[5] Further, the administrative law judge found, assuming *arguendo*, that she had considered the two readings of the March 8, 2002 x-ray, this evidence would not alter her ultimate finding that the x-ray evidence as whole failed to establish the existence of pneumoconiosis because both the positive and negative readings by dually-qualified radiologists rendered the film in equipoise. Decision and Order at 10 n.7; *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).

Likewise, we affirm the administrative law judge's determination that the 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 referred to in Section 718.202(a)(3) is applicable to the case at bar because the record contains no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the instant 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. Consequently, the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(3). We, therefore, affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3) because this determination is rational and supported by the evidence of record. 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304 - 718.306.

Turning to the administrative law judge's consideration of the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are two physicians' opinions of record. In a report dated December 4, 2003, Dr. Baker diagnosed chronic obstructive pulmonary disease attributable to "cigarette smoking/?coal dust exposure." Director's Exhibit 10. After reviewing the medical records on March 3, 2005, Dr. Sherman diagnosed chronic obstructive pulmonary disease due to claimant's extensive smoking history, which was reported as anywhere from 40 to 100 pack years. Director's Exhibit 22.

The administrative law judge found that the opinion of Dr. Baker, who is Board-certified in internal medicine and pulmonary disease, was entitled to diminished weight because, on the supplementary questionnaire accompanying his report, Dr. Baker unequivocally opined that claimant did not have an occupational lung disease attributable to coal mine employment; however, in the main portion of the report, he equivocally opined that claimant's pulmonary impairment was due to "?coal dust exposure." Consequently, the administrative law judge permissibly determined that Dr. Baker's opinion regarding the existence of statutory pneumoconiosis was equivocal and did not support a finding of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *see also Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986) (administrative law judge may reject physician's opinion found to be internally inconsistent and insufficiently reasoned); *Puleo v. Florence Mining Co.*, 8 BLR 1-198, 1-199 (1984); Decision and Order at 11; Director's Exhibit 10.

Similarly, the administrative law judge, within a reasonable exercise of discretion, found the opinion of Dr. Sherman, that claimant did not have pneumoconiosis,

"problematic as well" because the doctor relied on an inaccurate coal mine employment history of three years, contrary to the administrative law judge's finding of eleven years, and mistakenly reported the February 2, 2004 pulmonary function study as non-qualifying whereas this study yielded values that are qualifying. Therefore, the administrative law judge properly discounted Dr. Sherman's opinion. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988) (administrative law judge permissibly found physician's opinion "unreasoned" inasmuch as it was based on erroneous coal mine employment history); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 11; Director's Exhibit 22. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm her discrediting of the opinions of Drs. Baker and Sherman pursuant to Section 718.202(a)(4) and affirm her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We, likewise, affirm the administrative law judge's determination that because claimant failed to affirmatively establish the existence of pneumoconiosis under Section 718.202(a), he cannot establish that pneumoconiosis is a substantial contributor to his total disability pursuant to Section 718.204(c). *See* 20 C.F.R. §§718.202(a), 718.204(c)(5); Decision and Order at 12.

Because we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204(c), we also affirm the administrative law judge's finding 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 pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order Denying Subsequent Claim 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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BETTY JEAN HALL
Administrative Appeals Judge