BRB No. 06-0295 BLA

FRANK BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MCI MINING CORPORATION	)	
	)	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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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 (04-BLA-5986) of Administrative Law Judge Robert L. Hillyard 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). This case involves a subsequent claim filed on May 21, 2002.[1]

[1]The relevant procedural history of this case is as follows: Claimant initially filed a claim with the Social Security Administration (SSA) on May 7, 1973. Director's

After crediting claimant with twenty-five years of coal mine employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1992 claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.[2] The Director, Office of Workers' Compensation Programs (the Director),[3] has

---

Exhibit 1. The SSA denied benefits on October 10, 1973 and May 16, 1974. In a Decision dated March 26, 1975, Administrative Law Judge Robert B. Johnson denied benefits. *Id.* On December 9, 1980, the Department of Labor informed claimant that, although he met the disability standards for entitlement, he could not receive black lung benefits because the evidence showed that he was still working at his coal mine employment. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on June 19, 1992. Director's Exhibit 1. The district director denied benefits on November 20, 1992. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a third claim on May 21, 2002. Director's Exhibit 3.

[2]Claimant filed his petition for review on January 18, 2006. The regulations provide that, within thirty days after the receipt of a petition for review, each party upon whom the petition for review was served may submit to the Board a brief, memorandum, or other statement in response to it. 20 C.F.R. §802.212(a). Employer submitted its response brief on August 21, 2006, approximately six months past the due date. Although employer has submitted a motion to file its "Late Brief," it has not provided any explanation for its failure to comply with 20 C.F.R. §802.212(a). We, therefore, deny employer's motion and decline to consider its response brief in this case. *See* 20 C.F.R. §802.218(a).

[3]The Director, Office of Workers' Compensation Programs (the Director), asserts

filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[5] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1992 claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

---

that MCI Mining Corporation's liability for any benefits awarded claimant is secured by Aetna Casualty and Surety Company bond number 64S50642-2. Thus, the Director asserts that Travelers [Aetna] Casualty and Insurance Company of America (Travelers) has an interest, and the right to participate, in claimant's appeal to the Board. In an April 13, 1986 letter to Robert G. Lavitt, Bond General Counsel for Travelers, the Director notified Travelers of its potential interest in this matter and its right to request that it intervene as a party-in-interest. (The Director filed a copy of his April 13, 2006 letter, and related documents, with the Board on April 14, 2006.) Travelers has not indicated any intention to participate in this appeal.

[4]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

[5]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of interpretations of three x-rays taken on August 19, 2002, November 16, 2002 and December 11, 2002. In his consideration of the newly submitted x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9. The administrative law judge determined whether each x-ray should be considered positive or negative for pneumoconiosis. The administrative law judge noted that while Dr. Simpao, a physician with no special radiological qualifications, interpreted claimant's August 19, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 12, two physicians dually qualified as B readers and Board-certified radiologists (Drs. Poulos and Barrett) interpreted this x-ray as negative for pneumoconiosis. Decision and Order at 9; Director's Exhibits 13, 16. The administrative law judge, therefore, found that claimant's August 19, 2002 x-ray is negative for pneumoconiosis. Decision and Order at 9.

Contrary to the administrative law judge's characterization, Dr. Barrett did not interpret claimant's August 19, 2002 x-ray as negative for pneumoconiosis. Dr. Barrett interpreted claimant's August 19, 2002 x-ray for film quality only. *See* Director's Exhibit 13. Consequently, the administrative law judge erred in considering Dr. Barrett's x-ray interpretation to be negative for pneumoconiosis. However, even excluding Dr. Barrett's x-ray interpretation, the administrative law judge permissibly credited Dr. Poulos's negative interpretation of claimant's August 19, 2002 x-ray over Dr. Baker's positive interpretation, based upon Dr. Poulos's superior qualifications. Consequently, the administrative law judge's mischaracterization of Dr. Barrett's x-ray interpretation was harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge permissibly found that claimant's August 19, 2002 x-ray is negative for pneumoconiosis.

Dr. Baker, a B reader, interpreted claimant's November 16, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 14. Because there are no other interpretations of claimant's November 16, 2002 x-ray, the administrative law judge found that this x-ray is positive for pneumoconiosis. Decision and Order at 9.

Dr. Poulos, a B reader and Board-certified radiologist, interpreted claimant's December 11, 2002 x-ray as negative for pneumoconiosis.[6] Director's Exhibit 15.

[6]The administrative law judge noted that Dr. Poulos interpreted a December 1, 2003 x-ray. *See* Decision and Order at 5, 9. In fact, Dr. Poulos interpreted a December 11, 2002 x-ray. *See* Director's Exhibit 15.

Because there are no other interpretations of claimant's December 11, 2002 x-ray, the administrative law judge found that this x-ray is negative for pneumoconiosis. Decision and Order at 9.

The administrative law judge next noted that Dr. Halbert, a B reader and Board-certified radiologist, interpreted claimant's May 1, 2003 x-ray as negative for pneumoconiosis. Decision and Order at 9. Because there are no other interpretations of claimant's May 1, 2003 x-ray, the administrative law judge found that this x-ray is negative for pneumoconiosis. *Id.* Although claimant fails to allege any specific error in regard to the administrative law judge's consideration of Dr. Halbert's x-ray interpretation, a review of Dr. Halbert's x-ray report reveals that the doctor actually interpreted an x-ray that is not associated with claimant. Dr. Halbert interpreted the x-ray of an individual named Clifford Wooton. *See* Director's Exhibit 17. The administrative law judge, therefore, erred in considering Dr. Halbert's x-ray interpretation.

However, even excluding Dr. Halbert's x-ray interpretation, the administrative law judge's finding that the preponderance of the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis is supported by substantial evidence. Consequently, the administrative law judge's mischaracterization of Dr. Halbert's x-ray interpretation is harmless error. *Larioni, supra*. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7]

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends

[7]In challenging the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. In this case, the administrative law judge permissibly considered both the quality and the quantity of the newly submitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). We reject claimant's assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence" as claimant has provided no support for his assertion. Claimant's Brief at 3.

that the administrative law judge erred in finding Dr. Baker's opinion[8] insufficient to establish the existence of pneumoconiosis. We disagree. The administrative law judge permissibly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker in his November 16, 2002 report because the administrative law judge found that it was merely a restatement of an x-ray interpretation.[9] *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 14. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 14.

Dr. Baker also opined that:

---

[8]In a report dated November 16, 2002, Dr. Baker diagnosed "Coal Workers' Pneumoconiosis, Category 1/0, on the basis of 1980 ILO Classification – based on abnormal x-ray and significant history of coal dust exposure." Director's Exhibit 14.

[9]Dr. Baker also diagnosed chronic obstructive airways disease. Director's Exhibit 14. Because Dr. Baker did not expressly list an etiology for this disease, the administrative law judge properly found that this diagnosis is insufficient to constitute a finding of "legal" pneumoconiosis. 20 C.F.R. §718.201(a)(2); Decision and Order at 12.

> The patient has a Class 4 impairment with the FEV1 below 40% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 14.

The administrative law judge did not address whether this aspect of Dr. Baker's opinion was sufficient to support a finding of total disability. However, because Dr. Baker failed to explain the severity of a "Class 4 impairment" or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 4 impairment is insufficient to support a finding of total disability.

Because claimant fails to allege any additional error in regard to the administrative law judge's consideration of the newly submitted medical opinion evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

Claimant finally contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, claimant selected Dr. Simpao to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 11. Dr. Simpao examined claimant on August 19, 2002. In a report dated August 19, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/1.[10] *Id.* Dr. Simpao's diagnosis of clinical pneumoconiosis, based upon a positive x-ray, was neither unreasoned nor undocumented. Dr. Simpao's pulmonary evaluation was complete, documented, and

[10]On its face, Dr. Simpao's opinion is complete. Dr. Simpao conducted a physical examination, recorded claimant's symptoms as well as his employment, medical and social histories, obtained an x-ray, EKG, pulmonary function and arterial blood gas studies, and addressed all of the elements of entitlement. *See* Director's Exhibit 12.

inherently credible. As the Director notes, the administrative law judge discounted Dr. Simpao's diagnosis of pneumoconiosis "for reasons that do not implicate the Director's duty to provide claimant with a complete, credible examination." Director's Brief at 2. The Director accurately notes that the administrative law judge properly questioned Dr. Simpao's diagnosis of pneumoconiosis because the x-ray upon which he relied was interpreted by a better qualified physician as negative for pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 11; Director's Exhibits 12, 16.

Dr. Simpao also opined that claimant suffered from a severe pulmonary impairment. Director's Exhibit 12. The administrative law judge questioned Dr. Simpao's assessment because the doctor relied upon a nonconforming August 19, 2002 pulmonary function study. Decision and Order at 14. The administrative law judge noted that Dr. Burki invalided the results of claimant's August 19, 2002 pulmonary function study because claimant provided less than optimal effort, cooperation and comprehension.[11] *See* Director's Exhibit 14. Consequently, the Director notes that the "flaw in Dr. Simpao's opinion" was not the Director's fault, but was the result of claimant's "unacceptable effort." Director's Brief at 2. We agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges, supra*; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

[11]Because Dr. Burki invalidated the results of claimant's August 19, 2002 pulmonary function study, the administrative law judge found that the study was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because claimant does not challenge the administrative law judge's finding that claimant's August 19, 2002 pulmonary function study is invalid, this finding is affirmed. *Skrack, supra*.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge