BRB No. 07-0936 BLA

J.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 08/26/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Pikesville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (06-BLA-5751) of Administrative Law Judge Adele Higgins Odegard, on a subsequent claim[1] filed on

[1] Claimant filed his initial claim for benefits on March 3, 1998. Director's Exhibit 1. It was denied on July 2, 1998, for failure to establish the existence of a totally

March 12, 2002 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 credited claimant with twenty-four years of coal mine employment[2] based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Turning to the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and that claimant's totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination to exclude the depositions of Drs. Broudy and Jarboe from her consideration. Additionally, employer asserts that the administrative law judge's findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.204(b), 718.204(c), are not supported by substantial evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

---

disabling pulmonary impairment. *Id.* There is no indication that claimant took any further action in regard to his 1998 claim.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Employer initially asserts that, despite not having cited the depositions of Drs. Broudy and Jarboe in its pre-hearing statement, because the depositions were previously admitted into the record at the April 29, 2004 hearing before Administrative Law Judge Kane, the administrative law judge erred in failing to consider them pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.204(b), 718.204(c). Employer's Brief at 24-26. Employer does not challenge, however, the administrative law judge's finding that the depositions of Drs. Broudy and Jarboe simply repeated the opinions given by the physicians in their medical reports. Decision and Order at 13 n.17, 14 n.18. As a review of the physicians' depositions supports the administrative law judge's conclusion, and as the administrative law judge fully considered the medical reports of Drs. Broudy and Jarboe and explained her credibility determinations, the administrative law judge's error in declining to consider their depositions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next contends that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Specifically, employer asserts that, in finding claimant to be totally disabled under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge improperly relied on the, allegedly, "not well-reasoned, well-documented or credible" opinion of Dr. Alam. Employer's Brief at 24. Employer does not, however, explain why Dr. Alam's opinion is not well-reasoned or well-documented.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered three medical opinions. Drs. Alam and Jarboe opined that claimant was totally disabled, and Dr. Broudy questioned claimant's ability to perform his usual coal mine work.[3]

[3] Specifically, Dr. Alam opined that claimant was totally disabled from a respiratory standpoint, and explained that the results of claimant's pulmonary function and arterial blood gas studies indicated that claimant was not capable of completing an eight to ten hour shift in underground coal mining, requiring heavy exertion. Director's Exhibit 46 at 107, 140-41.

Finding Dr. Alam's opinion to be based on an understanding of the exertional requirements of claimant's last coal mine work, and the results of claimant's September 4, 2002 pulmonary function and blood gas studies, the administrative law judge rationally credited Dr. Alam's diagnosis of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552, (6th Cir. 2002)*; Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 124, (6th Cir. 2000); Decision and Order at 22-24; Director's Exhibit 46 at 140-141. Moreover, as Dr. Jarboe also found claimant to be totally disabled, and Dr. Broudy's opinion does not contradict the opinions of Drs. Alam and Jarboe, the administrative law judge rationally found that claimant established, by a preponderance of evidence, that he is totally disabled from a pulmonary perspective. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*); Decision and Order at 24. Consequently, we affirm the administrative law judge's findings at 20 C.F.R. §§725.309(d), 718.204(b)(2)(iv).

Turning to the merits of entitlement, employer asserts that the administrative law judge erred in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1). Specifically, employer contends that the administrative law judge erred in crediting the x-ray interpretations of Drs. Cappiello and Ahmed over the contrary interpretations of Drs. Broudy and Jarboe. Employer's Brief at 14-15. We disagree.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately noted that the newly submitted x-ray evidence consisted of three x-rays, each of which was interpreted once as positive for pneumoconiosis by a dually qualified, Board-certified radiologist and B reader, and once as negative by a reader with lesser radiological credentials.[4] Contrary to employer's contention, the administrative law

---

Dr. Jarboe opined that claimant was totally disabled from a respiratory standpoint, and commented that, although claimant's pulmonary function test results exceeded the level for disability, his blood gas studies showed severe hypoxemia. Director's Exhibit 24.

Dr. Broudy opined that "It is questionable whether [claimant] would retain the respiratory capacity to perform the work of an underground coal miner because of the obstructive airways disease due to cigarette smoking and his obesity." Director's Exhibit 23.

[4] The May 24, 2002 x-ray was interpreted as negative by Dr. Broudy, a B reader, and as positive by Dr. Ahmed, a dually qualified Board-certified radiologist and B reader.

judge permissibly relied upon the superior qualifications of Drs. Ahmed and Cappiello to find that the May 24, 2002, June 6, 2002, and June 12, 2002 x-rays were positive for pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); *Scheckler v. Clinchfield Coal Co*., 7 BLR 1-128, 131 (1984); Decision and Order at 9. Finding that the x-ray evidence in the current claim was consistent with that in the prior claim, the administrative law judge rationally concluded that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 10. Consequently, we affirm the administrative law judge's finding.

Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need for the Board to review the administrative law judge's finding as to the existence of legal pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). However, as the administrative law judge's finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) is inextricably linked to her finding that claimant established the existence of legal pneumoconiosis, we will address employer's challenges at Section 718.202(a)(4).[5]

In light of Dr. Ahmed's superior qualifications, the administrative law judge found this x-ray to be positive for pneumoconiosis. Decision and Order at 9.

The June 6, 2002 x-ray was read as negative by Dr. Jarboe, a B reader, and as positive by Dr. Ahmed. In light of Dr. Ahmed's superior qualifications, the administrative law judge also found this x-ray to be positive for pneumoconiosis. *Id*.

The June 12, 2002 x-ray was interpreted as negative by Dr. Patel, a Board-certified radiologist, and as positive by Dr. Cappiello, a dually qualified Board-certified radiologist and B reader. In light of Dr. Cappiello's superior qualifications, the administrative law judge found this x-ray to be positive for pneumoconiosis. *Id*.

[5] Although employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4), the record reflects that the administrative law judge did not make a separate and distinct finding as to the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). Rather, the administrative law judge addressed the credibility of the medical opinion evidence relevant to the existence of legal pneumoconiosis in conjunction with her disability causation analysis at 20 C.F.R. §718.204(c). Thus, her findings thereunder will be reviewed.

Relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge determined that the opinions of Drs. Broudy and Jarboe, stating that claimant's respiratory impairment was not caused by coal dust, were neither well-reasoned nor as persuasive as Dr. Alam's contrary, well-reasoned opinion. Decision and Order at 25-27. Employer challenges this finding, initially asserting that "the [administrative law judge] erred in not giving greater weight to the opinions of Dr. Broudy and Dr. Jarboe." Employer's Brief at 23. Employer does not specify, however, how the administrative law judge abused her discretion in discounting these opinions. Employer additionally asserts that the administrative law judge impermissibly relied on Dr. Alam's opinion which, according to employer, "does not meet the test of a well-reasoned, well-documented and credible medical opinion." *Id*. at 21. Again however, employer does not elaborate on this assertion or explain why the administrative law judge could not, within her discretion, credit Dr. Alam's opinion. Employer is asking for a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-113.

In discounting Dr. Broudy's opinion, the administrative law judge accurately noted that Dr. Broudy failed to explain how he was able to rule out coal dust exposure as a cause of claimant's impairment. Decision and Order at 26; Director's Exhibit 23. In discounting Dr. Jarboe's opinion, the administrative law judge accurately noted that, although Dr. Jarboe explained how Dr. Broudy's diagnostic test results were characteristic of an obstruction caused by cigarette smoking, he failed to explain why he considered Dr. Broudy's diagnostic test results to be more reliable than his own, which yielded somewhat different results. Decision and Order at 26; Director's Exhibit 24. As they are supported by substantial evidence, we affirm the administrative law judge's credibility determinations. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6.

Further, in crediting, as well-reasoned, Dr. Alam's diagnosis of chronic bronchitis caused in part by exposure to coal dust, the administrative law judge accurately noted that Dr. Alam's opinion was based in part on claimant's FEV1 not being amenable to treatment.[6] Decision and Order at 26. The administrative law judge observed this indicated an irreversible condition which is a hallmark of dust-related disease. *Id.* The administrative law judge further explained that Dr. Alam's opinion was entitled to significant weight because, unlike Drs. Broudy and Jarboe who based their opinions on observations of claimant at a single point in time, Dr. Alam had the opportunity to

[6] Specifically, Dr. Alam explained that, despite being treated with inhaler steroids, nebulizer therapy, and antibiotics for two years, no improvement was seen in claimant's FEV1 values. Director's Exhibit 46 at 108.

observe the effects of various treatments on claimant's respiratory impairment over two year's time, and thus had based his opinion on a more complete assessment of claimant's respiratory condition. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 17-18, 27. As substantial evidence supports these findings, and as employer fails to challenge the adequacy of the administrative law judge's reasons for crediting Dr. Alam's opinion, we affirm her findings at 20 C.F.R. §718.202(a)(4). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Griffith*, 49 F.3d at 186-187, 19 BLR at 2-117; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *see also Anderson*, 12 BLR at 1-113.

Employer next asserts that because Dr. Alam's opinion could not be credited at 20 C.F.R. §§718.204(b)(2)(iv) and 718.202(a)(4), the administrative law judge erred in crediting his opinion on the issue of disability causation under 20 C.F.R. §718.204(c). Our affirmance of the administrative law judge's credibility determinations at Sections 718.204(b)(2)(iv) and 718.202(a)(4), however, renders employer's argument moot. As employer raises no other arguments specific to the administrative law judge's findings at Section 718.204(c), we affirm the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

Therefore, as claimant has established each element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's award of benefits. *Trent*, 11 BLR at 1-27; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge