BRB No. 08-0109 BLA

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| R.H. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 08/14/2008 |
| SHAMROCK COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| JAMES RIVER COAL COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| 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 John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (06-BLA-5670) of Chief Administrative Law Judge John M. Vittone 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).[1] The administrative law judge credited claimant with at least thirty-four years of coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's previous claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, he determined that the new evidence did not establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director responds, urging the Board to reject claimant's argument that he did not receive a complete pulmonary evaluation.[3]

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[1] Claimant's prior claim for benefits, filed on February 12, 2001, was denied on August 25, 2003, by Administrative Law Judge Robert L. Hillyard because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*R.H.*] *v. Shamrock Coal Co.*, BRB No. 03-0833 BLA (June 14, 2004)(unpub.); Director's Exhibit 1 at 2, 41. Claimant filed this subsequent claim on July 25, 2005. Director's Exhibit 3.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 1 at 345; Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. If 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" 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 pneumoconiosis and that he was totally disabled from a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability, to obtain consideration of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to Section 718.202(a)(1), the administrative law judge considered two readings of one new x-ray dated August 18, 2005. Dr. Westerfield, who is a B reader, read this x-ray as negative for pneumoconiosis, and Dr. Barrett, who is a B reader and Board-certified radiologist, reviewed this x-ray for its film quality only.[4] Director's Exhibits 9, 10, 12. Finding that the August 18, 2005 x-ray was negative for pneumoconiosis, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis. Since the new x-ray evidence did not include any positive interpretations, we affirm the administrative law judge's finding that it did not 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). Consequently, we reject claimant's argument that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that he "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

[4] A third physician, Dr. Sison, whose credentials are not of the record, also read the August 18, 2005 x-ray, but did not mention pneumoconiosis. Director's Exhibit 9 at 22. Neither the administrative law judge nor claimant refers to this x-ray reading.

Claimant also argues that the administrative law judge erred in finding that the three new medical opinions did not establish total disability pursuant to Section 718.204(b)(2)(iv). Dr. Westerfield opined that claimant has no respiratory impairment and that from a pulmonary standpoint, claimant could return to his previous job. Director's Exhibit 12. Dr. Simpao diagnosed a mild pulmonary impairment, but stated that claimant is "not totally disabled from his pulmonary status." Director's Exhibit 9. Dr. Baker stated that coal dust exposure is the main cause of claimant's pulmonary symptoms of coughing, wheezing, and shortness of breath, but he did not specifically address whether claimant has a respiratory or pulmonary impairment.[5] Claimant's Exhibit 1. The administrative law judge found that "[a]ll of the physicians agreed Claimant is not disabled by a pulmonary condition and that Claimant could perform his usual coal mine employment." Decision and Order at 9.

Without referring to any specific medical opinion that was considered by the administrative law judge, claimant contends that an administrative law judge must consider the physical requirements of a claimant's usual coal mine employment in determining whether claimant is totally disabled. Claimant's Brief at 5. Contrary to claimant's suggestion, medical opinions such as that of Dr. Westerfield, diagnosing no impairment, need not be discussed in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge considered the nature of claimant's work as a heavy equipment operator, Decision and Order at 2, and Dr. Simpao described claimant's job duties as a heavy equipment operator before rendering his opinion that claimant is not totally disabled.[6] Director's Exhibit 9 at 4. Further, we reject claimant's allegation that, because pneumoconiosis is a progressive disease, it has worsened and thus, adversely affected his ability to perform his usual coal mine work. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *White*, 23 BLR at 1-7, n.8. Consequently, we reject claimant's contentions and affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's findings that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R.

[5] Dr. Baker did state that claimant's "pulmonary function studies are within normal limits." Claimant's Exhibit 1 at 1.

[6] On appeal, claimant does not allege any inaccuracy in Dr. Simpao's understanding of his job duties.

§§718.202(a), 718.204(b)(2), and thus did not establish that an applicable condition of entitlement has changed since the denial of the prior claim. 20 C.F.R. §725.309.

Finally, claimant asserts that the Director failed to provide him with a complete, credible pulmonary evaluation. Claimant states that the administrative law judge "concluded that Dr. Simpao's report was based merely upon an erroneous x-ray interpretation without adequately explaining his findings and that said physician was not a qualified specialist (Decision, page 6)." Claimant's Brief at 4. The Director responds that Dr. Simpao's opinion satisfies the Department's obligation, and that the administrative law judge merely found another physician's opinion to be more credible. Director's Letter at 2.

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); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulations provide that a complete pulmonary evaluation "includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Moreover, contrary to claimant's contention, the administrative law judge did not discredit Dr. Simpao's opinion as based merely upon an erroneous x-ray. Rather, he permissibly found that Dr. Simpao had not explained the basis for his opinion as well as Dr. Westerfield did, and he therefore found Dr. Westerfield's opinion that claimant does not have pneumoconiosis to be more persuasive. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Based on the foregoing, we reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-89-90.

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