BRB No. 01-0348 BLA

THOMAS M. GEORGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROBLEE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James R. Fox (Jory & Smith, L.C.), Elkins, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund - Employment Programs Litigation Unit), Charlestown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0248) of Administrative Law Judge Gerald M. Tierney on a duplicate claim[1] filed pursuant to the

[1] Claimant is Thomas M. George, who filed his first application for benefits on

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).[2] Adjudicating this duplicate claim pursuant to 20 C.F.R.

December 26, 1973, which was finally denied on February 29, 1980. Director's Exhibit 28. Claimant did not appeal this denial. Subsequently, claimant filed a second application for benefits on January 26, 1995, which was finally denied on June 12, 1995. Director's Exhibit 27. Claimant did not pursue this claim further, but instead filed a third application on February 6, 1998, which is the subject of the appeal before us. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Part 718 (2000), the administrative law judge considered all of the newly submitted evidence since the denial of the previous claim and found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) or total respiratory disability under 20 C.F.R. §718.204(c) (2000). Therefore, the administrative law judge determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by failing to find the existence of pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has

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Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). By order dated March 30, 2001, the Board granted claimant's request for additional time to file a Petition for Review and brief in support of his appeal in this case and also directed claimant to address whether the new regulations impact the appeal. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

filed a letter indicating that he will not participate in this appeal.

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 725.309 (2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, articulated the standard for adjudicating duplicate claims, holding that to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). In this case, the denial of the previous claim was based on claimant's failure to establish either the existence of pneumoconiosis or total respiratory disability. *See* Director's Exhibit 27.

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, contains no reversible error, and therefore, it is affirmed. Initially, claimant argues that he is entitled to invocation of the interim presumption of total disability set forth at 20 C.F.R. §727.203(a) (2000) based on his lengthy coal mine employment and medical evidence demonstrating a pulmonary impairment. Because this duplicate claim was filed after March 31, 1980, this claim is adjudicated under the provisions contained in Part 718. 20 C.F.R. §718.2. Claimant's argument, therefore, is without merit.

Relevant to Section 718.202(a)(1), claimant argues that the administrative law judge violated the holding in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), by relying on the negative x-ray readings and refusing to consider the x-ray evidence establishing the existence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge failed to consider the x-ray readings of Drs. Gaziano, Scattaregia and Corder, the report of Dr. Abdalla, and the findings of the West Virginia Occupational Pneumoconiosis Board. Contrary to claimant's contention, the administrative law judge properly considered the qualitative and quantitative nature of the newly submitted x-ray evidence by assessing the readings rendered by the Board-certified radiologists who are also B-readers and permissibly found that the sole positive x-ray reading of a film dated March 17, 1998 rendered by Dr. Gaziano, a B-reader, was reread as negative by Dr. Wiot, a Board-certified radiologist and B-reader, and that the administrative law judge properly found that

the most recent x-ray taken, August 10, 1998, was read as negative for pneumoconiosis, by Dr. Renn, a B-reader. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 3; Director's Exhibits 12, 14, 16. Likewise, contrary to claimant's argument, the administrative law judge rationally found Dr. Corder's x-ray finding of chronic scarring insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward, supra*; *Casey v. Director, OWCP*, 7 BLR 1-873, 1-876 (1985); Decision and Order at 3 n.2; Claimant's Exhibit 1. Similarly, the findings of pneumoconiosis contained in the medical report of Dr. Scattaregia and the West Virginia Occupational Pneumoconiosis Board do not constitute chest x-ray interpretations conducted and classified in accordance with Section 718.102 that form the basis for a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §§718.102, 718.202(a)(1); Director's Exhibits 14, 15. Further, contrary to claimant's contention, the administrative law judge did not err in not considering whether Dr. Abdalla's reading of an x-ray taken January 15, 1974 established the existence of pneumoconiosis as it was not part of the new evidence submitted in support of the duplicate claim. *See Rutter, supra*. Consequently, the administrative law judge properly accorded probative weight to the negative readings by the radiologists with dual qualifications, and hence, concluded that the preponderance of the newly submitted evidence failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). Because the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's finding relevant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). *Trent, supra*.

Relevant to Section 718.202(a)(4), claimant contends that the May 1995 finding of pneumoconiosis by the West Virginia Occupational Pneumoconiosis Board renders this issue final based on the principles of *res judicata* and collateral estoppel. Contrary to claimant's argument, however, the administrative law judge properly found that the findings of the state board were not binding on the claim before him. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984); *see also Rutter, supra*. Decision and Order at 7 n.3. Accordingly, we affirm the administrative law judge's finding in this regard.

Claimant additionally argues that the administrative law judge erred in not relying on the opinion of Dr. Corder, a treating physician, and the opinion of Dr. Scattaregia, a medical consultant retained by the Director, as opposed to physicians hired by employer who have a

tendency to be biased and unobjective.[3] While the opinions of treating and examining physicians deserve special consideration, the administrative law judge is not required to give them greater weight than opinions of other expert physicians. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Grigg v. Director, OWCP*, 28 F.3d 416, 420, 18 BLR 2-299, 2-307 (4th Cir. 1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993). Further, contrary to claimant's contention, the opinion of a physician retained by the Director is not required to be accorded any greater weight, for that reason, than the opinions of other physicians. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Moreover, it is well established that the administrative law judge need not accept the opinion of any particular medical expert, but must weigh all the evidence and draw his own conclusions and inferences. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, contrary to claimant's argument, while the administrative law judge stated that he gave "special consideration to the opinion of Dr. Corder as a physician who treated [c]laimant," he acted reasonably when he, nonetheless, found Dr. Corder's opinion undermined because Dr. Corder vaguely referred to his treatment of claimant as "off and on," did not specify the length of claimant's coal mine employment, Decision and Order at 5; *see Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985), failed to indicate the date of chest x-rays he referenced, and failed to indicate the date and include the test results of a pulmonary function study claimant performed, *see Trumbo*, *supra*; *Clark*, *supra*; *King*, *supra*; *Lucostic*, *supra*. Likewise, the administrative law judge rationally found the opinion of Dr. Scattaregia less persuasive because Dr. Scattaregia did not indicate what caused him to change his opinion on the issue of the existence of pneumoconiosis. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Lucostic*, *supra*; *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

[3] In a report dated August 2, 2000, Dr. Corder noted that claimant had a sufficient duration of coal dust exposure to warrant a diagnosis of coal workers' pneumoconiosis and that claimant's "shortness of breath is certainly out of proportion to what exposure he could have had just from smoking alone." Claimant's Exhibit 1. On March 17, 1998, Dr. Scattaregia diagnosed chronic bronchitis and found no evidence of coal workers' pneumoconiosis. Director's Exhibit 14. However, in a second report dated May 11, 1998, Dr. Scattaregia diagnosed coal workers' pneumoconiosis. *Ibid*.

Finally, claimant contends that the new regulation found at Section 718.104(d) requires the administrative law judge to accord greatest weight to the opinion of his treating physician. This provision set forth at Section 718.104(d), requiring special consideration of the opinions of treating physicians, applies only to medical opinions developed after January 19, 2001. 20 C.F.R. §718.104(d). Therefore, this provision is inapplicable to the instant claim. Hence, claimant's contention is without merit. Moreover, as discussed above, the administrative law judge is not required to give greater weight to a treating physician's opinion. *Akers, supra*. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis is not established by medical opinion evidence. 20 C.F.R. §718.202(a)(4); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Thus, the administrative law judge properly found that the newly submitted evidence of record failed to establish the existence of pneumoconiosis, and therefore a material change in conditions. Further, because the administrative law judge found, considering all the evidence of record, that the existence of pneumoconiosis, an essential element of entitlement, was not established, we will not consider the administrative law judge's finding on total disability. *See* Decision and Order at 7; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge