BRB No. 05-0674 BLA

JAMES FOX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHANEY CREEK COAL CORPORATION	)	
	)	DATE ISSUED: 12/22/2005
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5799) of Administrative Law Judge Joseph E. Kane 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). Claimant's prior application for benefits, filed on January 3, 1986,

was finally denied on June 19, 1986 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(2000). Director's Exhibit 1. On March 15, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 2.

In a Decision and Order dated April 14, 2005, the administrative law judge credited the miner with seven years of coal mine employment,[1] as stipulated by the parties and supported by the record, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response to claimant's appeal.[2]

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).

---

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction 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*).

[2] The administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, his finding of seven years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 a finding of 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).

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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these two elements. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that the newly submitted x-ray evidence consisted of one positive reading of a July 18, 2001 x-ray by Dr. Hussain, a physician with no specialized qualifications for the reading of x-rays, and uniformly negative readings of x-rays dated March 21, 2001, August 13, 2001 and October 27, 2003. Director's Exhibits 9, 13, 14, 35, 36; Employer's Exhibits 2, 7; Decision and Order at 8. However, as the July 18, 2001 x-ray was also read as negative by Dr. Poulos, a dually qualified B-reader and Board-certified radiologist, the administrative law judge permissibly found that this x-ray is also negative, based on Dr. Poulos' superior qualifications. *Staton v. Norfolk & Western Railway 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 on recon*.); Decision and Order at 8. While the administrative law judge properly noted that the record additionally contained one positive reading of a March 28, 1986 x-ray, submitted in conjunction with the prior claim, the administrative law judge permissibly found that this x-ray was outweighed by the preponderance of the more recent x-ray readings by highly qualified readers. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Director's

Exhibit 1; Decision and Order at 8. Thus, contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the new x-ray readings of record, and permissibly found that the preponderance of negative readings by B-readers and dually qualified readers outweighs the positive x-ray evidence of record. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *McMath*, 12 BLR at 1-6; *see Woodward*, 991 F.2d at 314, 17 BLR at 2-77; Decision and Order at 8-9. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence. In addition, we reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3-4. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence.

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Baker. We disagree.

In considering the medical opinion evidence,[3] the administrative law judge properly noted that in his March 21, 2001 report, Dr. Baker diagnosed "borderline pneumoconiosis" with chest x-ray showing profusion 0/1, and chronic bronchitis by history, and stated that claimant's lung disease was due to coal dust exposure. Director's Exhibit 9. In addition, Dr. Baker stated that claimant had a Class I impairment, also caused by his coal dust exposure. Director's Exhibit 9; Decision and Order at 6, 9-10. Contrary to claimant's arguments, the administrative law judge did not reject Dr. Baker's opinion, but permissibly found its conclusions outweighed by the opinion of Dr. Rosenberg, that claimant does not have pneumoconiosis, which the administrative law judge found to be more persuasive. The administrative law judge specifically found that while Dr. Baker's opinion was based primarily on x-ray evidence and history of coal dust exposure, Dr. Rosenberg's opinion was better reasoned, better documented and better supported by the objective evidence of record because the physician explained how particular findings on physical examination and pulmonary testing supported his opinion that claimant does not have pneumoconiosis.[4] *Tennessee Consol. Coal Co. v. Crisp*, 866

[3] The relevant medical opinion evidence of record consists of the opinions of Drs. Baker, Hussain, and Evans, who diagnosed the existence of pneumoconiosis, and Drs. Rosenberg and Broudy, who found no evidence of pneumoconiosis or any coal dust related lung disease. Director's Exhibits 1, 9, 10, 32; Employer's Exhibits 2, 7, 9, 10.

[4] In concluding that claimant does not have pneumoconiosis or any disease or impairment of the lungs causally related to coal mine dust, Dr. Rosenberg explained that

F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Martin v. Ligon Preparation Co.*, F.3d , 2005 WL 492241 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 9; Employer's Exhibits 7, 9; Decision and Order at 9-10.

Additionally, we reject claimant's assertion that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis as "unsupported," and that, therefore, he is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[5] Claimant's Brief at 5-6. Contrary to claimant's arguments, the administrative law judge did not discredit Dr. Hussain's opinion. Rather, the administrative law judge permissibly found that Dr. Hussain's diagnosis of pneumoconiosis, which the physician stated was based on his x-ray reading and claimant's history of dust exposure, was "outweighed by the more thorough reports of Drs. Rosenberg and Broudy which discuss the results on physical examination and pulmonary testing, as well as the chest x-ray results of record."[6] *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; Director's Exhibit 10; Employer's Exhibits 2, 7, 9, 10; Decision and Order at 10. Thus, there is no merit to claimant's argument that the administrative law judge rejected Dr. Hussain's opinion as not credible.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or

---

the CT scan results confirmed the lack of micronodularity seen on x-ray, that the normal TLC results on pulmonary testing revealed no evidence of restriction, that the diffusing capacity results indicated that the alveolar capillary bed in the lungs was intact, that the FEV1/FVC ratio indicated that claimant did not have chronic obstructive pulmonary disease, and that his physical examination did not reveal the sort of abnormalities often associated with pneumoconiosis. Employer's Exhibits 7, 9.

[5] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

[6] The administrative law judge additionally acted within his discretion in finding the opinions of Dr. Baker and Evans similarly outweighed. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Director's Exhibits 1, 9, 32; Decision and Order at 10.

conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the evidence submitted since the prior denial of benefits does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

With respect to the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant generally asserts that the administrative law judge erred in failing to consider the requirements of claimant's usual coal mine employment in conjunction with his assessment of disability, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and without considering that his usual coal mine work involved daily exposure to heavy concentrations of dust. Claimant's Brief at 7. Claimant raises no specific allegations of error with respect to the administrative law judge's weighing of the individual medical opinions.

Contrary to claimant's arguments, a review of the administrative law judge's decision indicates that he was fully aware that claimant worked in low coal, thirty-two to thirty-six inches in height, and that his job duties involved setting jacks, shoveling dust, and hanging curtains. Decision and Order at 2. The administrative law judge permissibly accorded greatest weight to the opinions of Drs. Broudy and Rosenberg, that claimant has no respiratory impairment which would prevent him from performing these duties, because he found their opinions "much better documented and better reasoned," "more reliable," and ultimately, "more persuasive" than the opinions of Drs. Baker, Hussain and Evans. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; Director's Exhibits 1, 9, 10, 32; Employer's Exhibits 2, 7, 9, 10; Decision and Order at 11. Moreover, contrary to claimant's argument, contraindication against further coal dust exposure does not establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Therefore, as the administrative law judge permissibly concluded that the newly submitted opinions of the more reliable physicians of record opined that claimant does not have a respiratory impairment, and as the administrative law judge further properly weighed the medical opinion evidence together with the newly submitted pulmonary function and blood gas study results of record, all of which were non-qualifying, we affirm the administrative law judge's determination that the evidence submitted since the prior denial of benefits fails to establish the existence of a totally disabling respiratory or

pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), aff'd on recon 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR 1-111, 1-113.

Consequently, as we have affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is that he is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge