BRB No. 07-0285 BLA

H.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHANEY CREEK COAL CORPORATION	)	DATE ISSUED: 12/31/2007
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE 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 – Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting 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 – Denial of Claim (2004-BLA-6318) of Administrative Law Judge Daniel F. Solomon rendered 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 September 24, 2003.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition 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 the x-ray evidence submitted since the denial of his prior claim insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), and also erred in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, in a

[1]Claimant's first application for benefits, filed with the Social Security Administration on June 13, 1973, was denied on September 19, 1973. Director's Exhibit 1. Claimant filed an Election Card seeking Department of Labor (DOL) review on June 17, 1978. Director's Exhibit 1. The DOL denied the claim on June 20, 1979. *Id*. Claimant then filed an application for benefits with the DOL on July 7, 1988, which was denied by the district director on December 23, 1988, based on the finding that claimant failed to establish a material change in conditions because he established no element of entitlement under 20 C.F.R. Part 718. *Id*. The case was appealed directly to the Board, which remanded the case to the Office of Administrative Law Judges. *[H.T.] v. Chaney Creek Coal Corp*., BRB No. 89-0184 BLA (Sept. 18, 1990)(Order)(unpub.). The case was then assigned to Administrative Law Judge Thomas Schneider, who issued an Order to Show Cause, requesting that claimant explain why the case should not be dismissed for claimant's failure to attend the hearing. Director's Exhibit 1. By Order dated July 12, 1991, Judge Schneider dismissed this claim for claimant's failure to respond to the Order to Show Cause. *Id*.

limited response, urges that the Board to reject claimant's contention that the Director failed to provide a complete, pulmonary evaluation, arguing that there is no basis to remand for a supplemental medical report. Director's Letter Brief at 2.[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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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., Inc*., 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 last claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

---

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 1, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The newly submitted x-ray evidence consists of four interpretations of three x-rays taken on October 10, 2003, November 10, 2003 and December 19, 2003.[4] Director's Exhibits 11, 13. Dr. Simpao, who is a B reader, read the October 10, 2003 x-ray as positive for pneumoconiosis, including Category A complicated pneumoconiosis; whereas Dr. Halbert, who is both a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Director's Exhibits 8, 13. Dr. Dahhan, a B reader, interpreted the film dated November 10, 2003, as negative for pneumoconiosis. Director's Exhibit 10. Dr. Broudy, also a B reader, read the x-ray obtained on December 19, 2003, as negative. Director's Exhibit 11.

The administrative law judge acted within his discretion as fact-finder in determining that Dr. Halbert's negative reading of the October 10, 2003 film, was entitled to greater weight than Dr. Simpao's positive reading, based upon Dr. Halbert's superior radiological credentials. Decision and Order at 6; 20 C.F.R. §718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Therefore, contrary to claimant's assertions, the record indicates that the administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and may have selectively analyzed the readings, lack merit.[5] Claimant's Brief at 2-3; Decision and Order at 6. We therefore affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as supported by substantial evidence. Moreover, because claimant does not otherwise challenge the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4), we affirm his finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

[4] An additional reading by Dr. Barrett was obtained solely to assess the quality of the October 10, 2003 x-ray. Director's Exhibit 9.

[5] Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

Claimant also generally contends that the administrative law judge erred in finding the medical opinion evidence developed since the denial of his prior claim insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant argues that in addressing the issue of total disability, an administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a foreman and cutter operator. It can be reasonably concluded that claimant's coal mining duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge rationally found that claimant failed to "establish the necessary exertional capacity required to perform his 'usual' coal mine employment," and, therefore, reasonably found that the medical opinion evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 8; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1221 (1984).

We also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and a "considerable amount of time … has passed since the initial diagnosis…." Claimant's Brief at 5-6. An administrative law judge's findings on the issue of total disability must be based on the evidence of record, rather than general principles regarding the nature of pneumoconiosis. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm his finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 8; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR

1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

We must, however, address claimant's contention that the Director failed to fulfill his statutory obligation to provide a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Claimant argues that he is entitled to another complete pulmonary evaluation, since the administrative law judge concluded that Dr. Simpao's opinion was unreasoned and, therefore, did not credit Dr. Simpao's opinion concerning the issue of total disability. Claimant's Brief at 4. The Director, in a limited response, urges the Board to reject claimant's contention that the Director failed to provide a complete, pulmonary evaluation, arguing that there is no basis to remand for a supplemental medical report. The Director contends that "any flaw in the 413(b) examination relates at least in part to [claimant] and, in the absence of a definitive finding by the [administrative law judge] that Dr. Simpao's opinion is wholly unreasoned, there is no basis to remand for a supplemental medical report." Director's Letter Brief at 2. Consequently, the Director contends that he has fulfilled his statutory obligation to provide claimant with the opportunity to substantiate his claim through a complete, credible pulmonary evaluation.

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

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 8; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Contrary to claimant's contention, the administrative law judge did not find Dr. Simpao's opinion "un-reasoned", Claimant's Brief at 4, but rather, the administrative law judge accorded this opinion less weight at Section 718.202(a)(4), finding it well-documented, but not as well reasoned as the contrary medical opinions. Decision and Order at 7. Consequently, as the Director correctly argues, the administrative law judge did not find that Dr. Simpao's opinion on the issue of the existence of pneumoconiosis was incomplete or incredible. Therefore, we agree with the Director that because the Director is not required to provide claimant with a dispositive medical evaluation, but only one that is complete and credible, this part of Dr. Simpao's medical opinion satisfies the Director's Section 413(b) obligation. Director's Letter Brief at 2; *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir.

1984).

In addition, as the Director correctly contends, the administrative law judge did not find that Dr. Simpao's diagnosis of a moderate impairment was not complete or not credible on the issue of total disability, but rather, found that claimant failed to meet his burden of establishing the exertional requirements of his usual coal mine employment. Director's Letter Brief at 2. Consequently, the Director notes that "any flaw in the 413(b) examination" relates to claimant's actions and, therefore, "in the absence of a definitive finding by the ALJ that Dr. Simpao's opinion is wholly unreasoned, there is no basis to remand for a supplemental opinion." Director's Letter Brief at 2. We agree with the Director that remand under Section 413(b) is not warranted in this claim. *See Hodges*, 18 BLR at 1-88 n.3; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*),

Because we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), claimant has failed to demonstrate a change in one of the applicable conditions of entitlement since the denial of his prior claim, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order – Denial of Claim is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge