BRB No. 07-0301 BLA

M.C. Claimant-Petitioner v. IKERD BANDY COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/14/2007 DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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 (05-BLA-5043) of Administrative Law Judge Donald W. Mosser denying benefits 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 April 25, 2002.[1] After crediting claimant with thirty-five years of coal mine employment, the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final, 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 new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends 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 has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, as required by the Act.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

[1] Claimant initially filed a claim for benefits on May 6, 1994. Director's Exhibit 1. That claim was denied on April 12, 1996, because the evidence did not establish the existence of pneumoconiosis or total disability. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim. Claimant filed a second claim on April 25, 2002. Director's Exhibit 3.

[2] Because no party challenges 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), (a)(3), and (a)(4), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id.*

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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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)

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); *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 that he suffered from 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 either that he suffers from pneumoconiosis or that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of four interpretations of three x-rays taken on July 13, 2002, October 18, 2002, and April 6, 2006. Although Dr. Baker, a B reader, interpreted claimant's July 13, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 14, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease.[3] Employer's Exhibit 3. The administrative law judge acted within his discretion in crediting Dr. Wheeler's negative interpretation of claimant's July 13, 2002 x-ray, over Dr. Baker's positive interpretation, based upon Dr. Wheeler's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7.

[3] Dr. Barrett, a B reader and Board-certified radiologist, interpreted claimant's July 13, 2002 x-ray for quality purposes only. Director's Exhibit 14.

The remaining x-ray interpretations of record were negative for pneumoconiosis.[4] Therefore, the administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order at 7.

The administrative law judge based his finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) 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, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. 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. Claimant's Brief at 3. We, therefore, affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, claimant alleges no error in regard to the administrative law judge's consideration of the opinions of Drs. Jenkins, Baker, Broudy, and Dahhan.[5] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, the administrative law judge's finding that

[4] Dr. Broudy, a B reader, interpreted claimant's October 18, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 12. Dr. Dahhan, a B reader, interpreted claimant's April 6, 2006 x-ray as negative for pneumoconiosis. Employer's Exhibit 2.

[5] The administrative law judge found that Dr. Jenkins did not offer any reasoning in support of his opinion that claimant suffered from an "80% disability" due to coal workers' pneumoconiosis. Decision and Order at 10; Director's Exhibit 28. The administrative law judge also accorded less weight to Dr. Baker's opinion, that claimant did not retain the respiratory capacity to perform his coal mine employment, because the pulmonary function study that he relied upon was invalidated by Dr. Broudy. Decision and Order at 10; Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge credited the opinions of Drs. Broudy and Dahhan, that claimant retains the respiratory capacity to perform his coal mine employment, because the administrative law judge found that they were "in accord with the weight of the evidence." Decision and Order at 10; Director's Exhibit 12; Employer's Exhibits 1, 2.

the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309.

Claimant contends that because the administrative law judge discredited Dr. Baker's diagnosis of pneumoconiosis, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he fulfilled his obligation to provide a complete pulmonary evaluation; the administrative law judge simply found that Dr. Baker's diagnosis of pneumoconiosis was outweighed. Director's Brief 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), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations. Director's Exhibit 14; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Claimant does not allege that Dr. Baker's report was incomplete. The administrative law judge permissibly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker because the administrative law judge found that it was merely a restatement of Dr. Baker's x-ray interpretation.[6] *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 8; Director's Exhibit 14.

Dr. Baker also opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 14. The administrative law judge questioned Dr. Baker's

[6] The administrative law judge also found that Dr. Baker's positive interpretation of claimant's July 13, 2002 x-ray was outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 7; Director's Exhibits 14, 27. An administrative law judge may properly question a physician's diagnosis of pneumoconiosis when the x-ray upon which he relies is interpreted by a better qualified physician as negative for pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

assessment because the doctor relied upon a nonconforming, July 13, 2002 pulmonary function study. Decision and Order at 14. The administrative law judge noted that Dr. Broudy invalidated the results of claimant's July 13, 2002 pulmonary function study.[7] *See* Employer's Exhibit 1. Consequently, any deficiency in Dr. Baker's opinion was not the fault of the Director, but was the result of claimant's less-than-optimal effort on the pulmonary function study.

Under these circumstances, we agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

[7] Dr. Broudy invalidated the results of claimant's July 13, 2002 pulmonary function study because he found that claimant's "effort was variable and suboptimal making [the] study less reliable." Employer's Exhibit 1. Based upon Dr. Broudy's assessment, the administrative law judge found that claimant's July 13, 2002 pulmonary function study was invalid. Decision and Order at 10. Because claimant does not challenge the administrative law judge's finding that claimant's July 13, 2002 pulmonary function study is invalid, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

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