BRB No. 07-0365 BLA

E. J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 12/27/2007
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5288) of Administrative Law Judge Ralph A. Romano, with respect to 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). Director's Exhibit 3. The administrative law judge noted that the claim before him was a subsequent claim, filed on October 9, 2003.[1] Director's Exhibit 3. Based on the parties' stipulation, the administrative law judge credited claimant with forty-three years of coal mine employment. The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) or that claimant was totally disabled due to pneumoconiosis pursuant to §718.204(b)(2), (c). Thus, he 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 challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(b)(2)(iv).[2] Claimant further asserts that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has responded and urges the Board to reject claimant's allegation that remand to the district director for a complete pulmonary evaluation is required in this case.[3]

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[1] Claimant initially filed a claim for benefits on November 4, 1999, which was denied by Administrative Law Judge Daniel J. Roketenetz on October 2, 2002, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant also filed a claim on January 16, 2003, but on February 27, 2003, he notified the district director that he did not wish to pursue the claim. *Id.* Claimant took no further action with regard to the denial of his November 4, 1999 claim, until he filed another application for benefits on October 9, 2003. Director's Exhibit 3.

[2] In asserting that the administrative law judge erred by not finding that he was totally disabled, claimant cites 20 C.F.R. §718.204(c). Claimant's Brief at 6. We note, however, that under the revised regulations, Section 718.204(c) is the regulation pertaining to disability causation, and 20 C.F.R. §718.204(b)(2) is the regulation pertaining to total respiratory or pulmonary disability.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of forty-three years of coal mine employment, his determination that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and

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.[4] 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).

When 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). Because claimant's initial claim for benefits, filed on November 4, 1999, was denied for failure to establish any of the requisite elements of entitlement, claimant was required to prove, based on the newly submitted evidence, either that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment.

Pursuant to Section 718.202(a)(1), the administrative law judge considered seven readings of four newly submitted x-rays. The December 11, 2002 x-ray was read as positive by Dr. Baker, a B reader, and negative by Dr. Poulos, a Board-certified radiologist and B reader.[5] Director's Exhibit 12; Employer's Exhibit 13. The February 23, 2004 x-ray was read as positive by Dr. Simpao, who holds no radiological qualifications, and negative by Dr. Wiot, a Board-certified radiologist and B reader. Director's Exhibit 10; Employer's Exhibit 12. The March 12, 2004 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, a B reader. Employer's Exhibit 7. The

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his determination that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[5] A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(c)(ii).

August 11, 2004 x–ray was interpreted as positive by Dr. Alexander, a Board-certified radiologist and B reader, and as negative by Dr. Rosenberg, a B reader. Claimant's Exhibit 3; Employer's Exhibit 6. The administrative law judge determined that all of the films were negative except the last one, based upon the negative readings by physicians with superior radiological qualifications. Decision and Order at 6-7. Based upon his finding that the preponderance of films was negative for pneumoconiosis, the administrative law judge concluded that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

Claimant asserts that the administrative law judge erred in his consideration of the newly submitted x-ray evidence because he "selectively analyzed" the evidence and improperly relied upon the physician's qualifications and the numerical superiority of the negative x-ray interpretations. Claimant's Brief at 3. Claimant's allegations of error have no merit. Section 718.202(a)(1) specifically provides that "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because the administrative law judge reasonably considered the quantitative and qualitative nature of the conflicting x-ray readings, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the newly submitted x-ray evidence, as it is rational and supported by substantial evidence.

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in rejecting Dr. Baker's opinion, that claimant suffers from coal workers' pneumoconiosis. We disagree. Contrary to claimant's contention, the administrative law judge permissibly gave diminished weight to Dr. Baker's opinion, as it was based primarily on claimant's history of coal mine employment, and Dr. Baker's own positive reading of the December 11, 2002 x-ray, which was read as negative by a better qualified physician. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 10. Additionally, the administrative law judge rationally found that Dr. Baker did not diagnose legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), as he did not indicate whether claimant's chronic obstructive airway disease and chronic bronchitis were related to coal dust exposure. *Id*. Accordingly, we affirm his finding that Dr. Baker's opinion was insufficient to establish that claimant is suffering from pneumoconiosis pursuant to Section 718.202(a)(4). *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf*

Creek Collieries v. Director, OWCP [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). We also affirm, therefore, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), based on the newly submitted evidence.

Regarding the issue of total disability, claimant argues that the administrative law judge erred in rejecting Dr. Baker's opinion under Section 718.204(b)(2)(iv). Claimant specifically contends that the administrative law judge did not compare the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's diagnosis of a Class 3 respiratory impairment. Claimant's Brief at 8. This allegation of error is without merit. The administrative law judge stated that Dr. Baker opined that claimant has a "Class 3 Impairment" based on claimant's December 11, 2002 pulmonary function study (PFS), which produced FEV1 values that were between 40% and 59% of normal. Decision and Order at 14; Director's Exhibit 12. The administrative law judge permissibly found Dr. Baker's opinion "problematic," and entitled to no weight, because Dr. Baker questioned the validity of the December 11, 2002 PFS and relied on the results of two additional studies that the administrative law judge determined were not valid. *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149, 1-151 (1989)(*en banc*); Decision and Order at 14; Director's Exhibit at 12. In addition, the administrative law judge properly found that Dr. Baker's recommendation against further coal dust exposure was insufficient to establish total disability under Section 718.204(b)(2). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988); Decision and Order at 14; Director's Exhibit 12.

Because claimant has raised no other allegations of error regarding the administrative law judge's determination that the newly submitted medical opinion evidence was insufficient to establish total disability under Section 718.204(b)(2)(iv), we affirm this finding and his finding that the newly submitted evidence, as a whole, does not support a finding of total disability at Section 718.204(b)(2).[6] *Skrack v. Island Creek*

[6] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant also asserts that Dr. Baker's opinion is sufficient to "invoke a presumption of total disability." Claimant's Brief at 6. Claimant's reliance on *Meadows* is misplaced. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *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). We also reject claimant's assertion that, since

Coal Co., 6 BLR 1-710, 1-711 (1983). We also affirm, therefore, the administrative law judge's determination that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d). *White*, 23 BLR at 1-3.

Finally, claimant asserts that in light of the administrative law judge's decision to discredit Dr. Simpao's opinion on the issue of total disability, he did not receive the complete pulmonary evaluation to which he was entitled. The Director responds, conceding that Dr. Simpao did not address whether the moderate impairment that he diagnosed would preclude claimant from performing his previous coal mine employment. The Director further maintains, however, that despite this omission, remand to the district director is not required. The Director states in support of his position that:

> Claimant does not challenge the [administrative law judge's] crediting of the negative opinion of Dr. Rosenberg, nor his finding that the objective evidence does not support a finding of total disability. In particular, the [administrative law judge] credited Dr. Rosenberg's opinion because the ventilatory study he performed produced significantly higher results than the earlier qualifying studies, including the test performed by Dr. Simpao. Based on these findings, even had Dr. Simpao diagnosed total disability, the [administrative law judge] would still have given greater weight to Dr. Rosenberg's opinion.

Director's Brief at 2, citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

We are persuaded that, under the facts of this case, the Director is correct. 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,

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pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988).

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 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

In this case, Dr. Simpao examined claimant on February 23, 2004, at the request of the Department of Labor (DOL). Dr. Simpao recorded claimant's work, medical, and smoking histories and noted claimant's symptoms and complaints. Director's Exhibit 10. Dr. Simpao also obtained a chest x-ray, a qualifying PFS, and a blood gas study that he described as normal. *Id*. The physician diagnosed pneumoconiosis "1/1," and stated that the PFS revealed a mild degree of both restrictive and obstructive airway disease. *Id*. In response to the question on Form CM-988 regarding the degree of impairment, Dr. Simpao wrote that claimant had "moderate impairment," attributable to multiple years of coal dust exposure. *Id*.

The administrative law judge reviewed Dr. Simpao's report pursuant to Section 718.204(b)(2)(iv) and stated:

> Dr. Simpao opined that Claimant has a moderate impairment. Dr. Simpao did not explain the severity of the 'moderate impairment.' Additionally, the physician did not offer an opinion regarding whether Claimant would be able to perform his previous coal mine employment. Therefore, I find Dr. Simpao's opinion regarding total disability to be unreasoned, undocumented, and entitled to little weight.

Decision and Order at 14. The administrative law judge then credited, as well-reasoned and well-documented, the opinion in which Dr. Dahhan stated that claimant cannot perform his usual coal mine work. *Id*.; Employer's Exhibits 6-8. He rendered the same finding with respect to the opinion in which Dr. Rosenberg indicated that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. Decision and Order at 14; Employer's Exhibits 1, 5. In discussing how to resolve the conflict between the opinions of Drs. Dahhan and Rosenberg, the administrative law judge stated that:

> The PFT results produced two qualifying results out of seven tests. Dr. Simpao's February 23, 2004 test produced qualifying values as did Dr. Dahhan's pre-bronchodilator test dated March 12, 2004. Notably, the most recent PFT dated August 11, 2004, produced significantly higher values than the qualifying tests. Because pulmonary function tests are effort dependent, it is reasonable to conclude that [c]laimant put forth a greater effort in the August 11, 2004 test and produced values more indicative of his respiratory condition.

> Based on the foregoing, I find the objective medical evidence better supports Dr. Rosenberg's conclusion that [c]laimant is not totally disabled. Accordingly, I find Dr. Rosenberg's opinion outweighs Dr. Dahhan's contrasting opinion.

Decision and Order at 15. In light of the administrative law judge's decision to accord greatest weight to Dr. Rosenberg's opinion based upon the PFS that he obtained, the Director is correct in asserting that "even had Dr. Simpao diagnosed total disability, the [administrative law judge] would still have given greater weight to Dr. Rosenberg's opinion." Director's Brief at 2. Because remand for a complete evaluation on the issue of total disability would not alter the result in this case, we reject claimant's contention that remand for a new pulmonary evaluation is required. *Cf. Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge