BRB No. 09-0385 BLA

ROBERT LEE CURRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/22/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (07-BLA-5404) of Administrative Law Judge Larry S. Merck rendered on a subsequent claim[1] 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 is before the Board for the second

[1] Claimant filed four prior claims, all of which were finally denied. Director's Exhibits 1-4. His last claim, filed on January 16, 2001, was denied on April 23, 2001, because claimant failed to establish any element of entitlement. Director's Exhibit 4. Claimant took no further action on his 2001 claim. He filed his current claim on May 17, 2002. Director's Exhibit 6.

time. Initially, Administrative Law Judge Robert L. Hillyard found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Judge Hillyard therefore found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d), and he denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Hillyard's findings that the new medical evidence did not establish a change in an applicable condition of entitlement, but vacated the denial of benefits and remanded the case to the district director for further proceedings based on the concession by the Director, Office of Workers' Compensation Programs (the Director), that he did not fulfill his statutory duty to provide claimant with a complete pulmonary evaluation. *Curry v. Director, OWCP*, BRB No. 05-0985 BLA (June 26, 2006)(unpub.).

On remand, the district director obtained a supplemental medical report from Dr. Simpao, and referred the claim back to the Office of Administrative Law Judges, where it was assigned to Administrative Law Judge Larry S. Merck (the administrative law judge).

In his decision, the administrative law judge credited claimant with seven years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant did not 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 that the existence of pneumoconiosis was not established by the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and that total disability was not established by Dr. Simpao's medical report at 20 C.F.R. §718.204(b)(2)(iv).[3] Moreover, claimant contends that the

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. 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*).

[3] The administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-

Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The Director responds that he met his obligation to provide claimant with a complete pulmonary evaluation, and urges affirmance of the denial of benefits.

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).

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. 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 last claim was denied because claimant did not establish any element of entitlement. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing an element of entitlement. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to Section 718.202(a)(1), the administrative law judge considered two readings of one new x-ray. Dr. Simpao, who lacks radiological qualifications, interpreted the September 17, 2002 x-ray as positive for pneumoconiosis, while Dr. Barrett, a Board-certified radiologist and B reader, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 13; 25 at 121. Based upon Dr. Barrett's superior radiological credentials, the administrative law judge accorded greater weight to Dr. Barrett's reading and found that the September 17, 2002 x-ray was negative for pneumoconiosis.

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, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, we reject claimant's arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications,

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710, 1-711 (1983).

and that he "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Massa and Simpao. The administrative law judge found that because Dr. Massa did not address the issue of whether claimant is totally disabled, his opinion was not probative on the disability issue.[4] Decision and Order at 17; Director's Exhibits 16; 25 at 141. With respect to Dr. Simpao, the administrative law judge noted that initially, in a September 17, 2002 medical report, Dr. Simpao stated that claimant has a mild pulmonary impairment and is unable to perform his usual coal mine work. Director's Exhibit 13. The administrative law judge noted further that in a supplemental report dated September 7, 2006, Dr. Simpao opined that "[w]ith closer evaluation I feel that [claimant] is not totally disabled from this impairment." Director's Exhibit 25 at 1. Dr. Simpao stated that claimant should "abstain from working in a dusty environment," and noted that he "may experience difficulty" in performing some of the tasks required by his usual coal mine employment. *Id*. The administrative law judge found Dr. Simpao's conclusions to be inconsistent and inadequately reasoned, and he accorded Dr. Simpao's opinion "little weight." Decision and Order at 18.

Claimant argues that, in addressing the issue of total disability, the 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); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The specific argument claimant sets forth is that:

> The claimant's usual coal mine work included being a coal loader, mechanic, coal shooter, and coal driller. It can be reasonably concluded that such 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. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability.

[4] Claimant does not challenge the administrative law judge's finding regarding Dr. Massa's opinion, which is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

Zimmerman v. Director, OWCP, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, we agree with the Director that the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment to Dr. Simpao's assessment of a mild pulmonary impairment. Dr. Simpao understood the exertional requirements of claimant's job when he opined, in his supplemental report, that claimant's mild impairment is not totally disabling.[5] *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-303 (2003).

Further, we reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 6. An administrative law judge's findings cannot be based on assumptions; they must be based on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv), based on the new evidence. *See White*, 23 BLR at 1-6-7. Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement, and we affirm the denial of benefits pursuant to Section 725.309(d).

Lastly, claimant argues that because the administrative law judge declined to credit Dr. Simpao's diagnosis of legal pneumoconiosis[6] in his supplemental opinion on

[5] The Director, Office of Workers' Compensation Programs (the Director), states that he disagrees with the administrative law judge's finding that Dr. Simpao did not adequately explain the reasoning for his supplemental opinion that claimant is not totally disabled from a pulmonary standpoint, but he states that any error in the administrative law judge's discounting of Dr. Simpao's supplemental opinion is harmless, as the opinion, even if fully credited, cannot establish total respiratory disability. Director's Brief at 3 n.1.

[6] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). In his supplemental report, Dr. Simpao opined that claimant has a "chronic lung condition [that] arose from his coal dust exposure" in that he has a mild degree of obstructive airway disease due to both coal dust exposure and

the ground that "Dr. Simpao did not explain how his objective medical evidence, along with his medical examination, supported a finding of legal pneumoconiosis," the Director failed to provide claimant with a complete, credible pulmonary evaluation, as required under the Act. Claimant's Brief at 4; *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406. The Director responds, alleging that the administrative law judge erred in finding that Dr. Simpao's diagnosis of legal pneumoconiosis was insufficiently explained, and asserting that he met his statutory obligation to provide a complete 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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009). In *Greene*, the court held that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Id*.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and he addressed each element of entitlement. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibits 13, 25. Contrary to

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smoking. Director's Exhibit 25 at 1. As noted, *supra*, n.3, claimant has not challenged the administrative law judge's decision to discount Dr. Simpao's diagnoses of clinical pneumoconiosis and legal pneumoconiosis pursuant to Section 718.202(a)(4).

claimant's contention, the fact that the administrative law judge found Dr. Simpao's opinion to be unpersuasive, because Dr. Simpao did not fully explain the basis for his diagnosis of legal pneumoconiosis, does not establish that the Director failed to meet his statutory obligation. Because Dr. Simpao performed all of the necessary tests and his report addressed the requisite elements of entitlement, we agree with the Director that claimant received a complete pulmonary evaluation.[7] *See Greene*, 575 F.3d at 641-642, --- BLR at ---; *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, --- BLR ---, BRB No. 08-0491 BLA, slip op. at 19 (Aug. 28, 2009)(*en banc*). We therefore reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[7] Because we conclude that the Director provided claimant with a complete pulmonary evaluation under the standard of *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009), we need not address the Director's argument that the administrative law judge erred in according less weight to Dr. Simpao's diagnosis of legal pneumoconiosis on the ground that it was inadequately explained.