BRB No. 05-0367 BLA

ROGER AMOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	DATE ISSUED: 02/09/2006
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Benefits of Daniel J. Roketenetz, 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.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6155) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge credited claimant with eighteen years of coal mine employment. The administrative law judge found that the new evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge also found *assuming arguendo* that claimant had established the existence of pneumoconiosis, the new evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge determined that because claimant did not establish the existence of pneumoconiosis, claimant thereby failed to establish a change in the sole condition of entitlement on which the prior denial was based, pursuant to 20 C.F.R. §725.309(d)(2). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act and its implementing regulation at 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director responds, contending that he satisfied his obligation to provide claimant with a

[1] Claimant filed his first claim for benefits on October 10, 1991. Director's Exhibit 1. That claim was denied by Administrative Law Judge Ralph A. Romano on March 14, 1994 as the evidence did not establish either the existence of pneumoconiosis or total disability. *Id.* The Board affirmed Judge Romano's denial of benefits on July 28, 1995 because the evidence did not establish total disability. Director's Exhibit 2. Claimant filed a second claim on August 22, 1997, which was denied by the district director for failure to establish the existence of pneumoconiosis. *Id.* Claimant requested a hearing. By Decision and Order dated April 21, 1999, Administrative Law Judge Joseph E. Kane determined that claimant had established total disability but denied benefits because the evidence did not establish the existence of pneumoconiosis. *Id.* On April 28, 2000, the Board affirmed Judge's Kane's denial of benefits based on his finding that the evidence did not establish the existence of pneumoconiosis. *Amos v. Nally & Hamilton Enterprises*, BRB No. 99-0815 BLA (Apr. 28, 2000) (unpublished). Claimant filed the third and instant claim for benefits on September 12, 2001. Director's Exhibit 4. The district director denied benefits on April 7, 2003. Director's Exhibit 28. Pursuant to claimant's request, the administrative law judge thereafter conducted a formal hearing.

complete pulmonary evaluation, as required under the Act, by virtue of Dr. Hussain's assessment of claimant.

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).

Under Section 725.309(d), the instant subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement" has changed since the final denial of the prior claim. 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The prior denial was based solely on claimant's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 2. Claimant must, therefore, establish the existence of pneumoconiosis in order to have the instant subsequent claim considered on its merits. *See* 20 C.F.R. §725.309(d). The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and thus, claimant did not meet his burden at 20 C.F.R. §725.309(d).

Claimant contends that the administrative law judge erred in finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[2] Claimant argues that the administrative law judge erroneously "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," placed "substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

Claimant's contentions lack merit. There are seven readings of three new x-rays dated October 6, 2001, November 21, 2001, and January 16, 2002. Dr. Baker interpreted the October 6, 2001 x-ray as 0/1, which classification does not constitute evidence of pneumoconiosis under 20 C.F.R. §718.102(b). With regard to the November 21, 2001 x-ray, the administrative law judge rationally found its weight to be negative for pneumoconiosis because, while it was read as positive by Dr. Alexander, a dually qualified physician, it was read as negative by Dr. Wheeler, a dually qualified physician, and by Dr. Hussain. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc);* Director's Exhibits 11, 15;

[2] As claimant does not challenge the administrative law judge's findings at 20 C.F.R. §718.202(a)(2) and (a)(3), we affirm them. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant's Exhibit 2-2. The x-ray dated January 16, 2002, was read as positive by Dr. Alexander, a dually qualified physician, and as negative by both Dr. Wheeler, a dually qualified physician, and Dr. Dahhan, a B reader. Director's Exhibits 13, 14; Claimant's Exhibit 1. Based on these three readings, the administrative law judge rationally determined that the January 16, 2002 x-ray does not establish the existence of pneumoconiosis, and thus found that claimant had not established the existence of pneumoconiosis by a preponderance of the new x-ray evidence at 20 C.F.R. §718.202(a)(1). *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); Decision and Order at 8. Further, claimant provides no support for his contention that that the administrative law judge selectively analyzed the new x-ray evidence. *Pearl Glenn White v. White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Based on the foregoing, we hold that, contrary to claimant's assertions, the administrative law judge properly considered both the qualitative and quantitative nature of the new x-ray evidence. *Staton*, 65 F.3d at 55, 19 BLR at 2-271; *Woodward,* 991 F.2d at 314, 17 BLR at 2-77. We affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by the substantial evidence.

Claimant alleges error in the administrative law judge's finding that the new medical opinions are insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). There are four new medical opinions: By report dated October 6, 2001, Dr. Baker diagnosed "Chronic Obstructive Airway Disease with moderate obstructive ventilatory defect – based on pulmonary function testing;" "Mild resting arterial hypoxemia – based on arterial blood gas analysis;" and "Chronic Bronchitis – based on history." Director's Exhibit 12. Dr. Baker also found a "Class 3 impairment." *Id.* In the "Causation" section of his report, Dr. Baker checked a box to indicate that claimant's "disease" is not the result of exposure to coal dust, and explained, "Patient has x-ray changes suggestive of pneumoconiosis but only with a profusion of 0/1." *Id.* Dr. Baker, however, also checked a box to indicate that any pulmonary impairment *is* the result of exposure to coal dust. *Id.* He explained, "Patient has a long history of dust exposure as well as a 30-pack year history of smoking. He has a moderate obstructive airway disease. It is felt that his dust exposure may have contributed to some extent to his obstructive airway disease." *Id.*

By report dated November 21, 2001, Dr. Hussain diagnosed chronic obstructive pulmonary disease and pneumoconiosis, and listed "tobacco abuse" and "dust exposure" as the etiologies of these diagnoses. Director's Exhibit 11. Dr. Hussain opined that claimant has a moderate impairment that is sixty percent due to chronic obstructive pulmonary disease and forty percent due to pneumoconiosis. *Id.* He interpreted the x-ray dated November 21, 2001 as 0/1 p, indicating that it showed mild pneumoconiosis. *Id*. In a supplemental report, also dated November 21, 2001, Dr. Hussain indicated that

claimant has an occupational lung disease due to his coal mine employment, and explained that he based his diagnosis on the x-ray findings and claimant's history of exposure. *Id.* Dr. Hussain also indicated that claimant's moderate impairment is "mainly due to chronic obstructive pulmonary disease" and that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment due to severe hypoxemia and dyspnea. *Id.*

By report dated January 21, 2002, Dr. Dahhan diagnosed an obstructive ventilatory defect due to claimant's "lengthy smoking habit" and opined that there are insufficient objective findings to justify a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 13. Dr. Dahhan also opined that claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id.* Dr. Dahhan also diagnosed claimant with hypertension, low back pain, arthritis, peptic ulcer disease, hyperlipidemia, anxiety and post removal of a benign tumor of the left lung, which he indicated "are not caused by, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." *Id.*

By report dated August 28, 2003, Dr. Fino diagnosed a disabling respiratory impairment due to claimant's cigarette smoking, and opined that there is insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Fino stated that from a respiratory standpoint, claimant is disabled from returning to his last coal mining job or a job requiring similar effort. *Id.* He added, "Even if I were to assume that this man has coal workers' pneumoconiosis, it has not contributed to his disability." *Id.*

Considering these four new medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge stated that Dr. Baker indicated that none of his diagnoses were related to claimant's coal dust exposure; the administrative law judge thus determined that Dr. Baker did not render a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). Decision and Order at 11. Similarly, the administrative law judge found that Drs. Dahhan and Fino attributed claimant's ventilatory condition and impairment to cigarette smoking and thus did not render a diagnosis of legal pneumoconiosis. *Id.* Further, the administrative law judge accorded little weight to Dr. Hussain's opinion, that claimant has clinical and legal pneumoconiosis, as he found that it is not supported by the underlying x-ray reading and is not well reasoned. *Id.* at 10-11. Claimant asserts that "it can be concluded that the report and opinion of Dr. Baker is well reasoned" and thus the administrative law judge "should not have rejected it for the reasons he provided."

Claimant's Brief at 5. Claimant also summarily asserts that the administrative law judge "appears to have" substituted his opinion for that of a medical expert.[3] *Id.*

Claimant's contention that the administrative law judge erred in his weighing of Dr. Baker's opinion has merit. The administrative law judge correctly referred to the fact that Dr. Baker indicated that claimant's "disease" is not the result of exposure to coal dust. Decision and Order at 11; *see* Director's Exhibit 12. The administrative law judge, however, did not address Dr. Baker's indication that any pulmonary impairment *is* the result of claimant's exposure to coal dust, explaining "Patient has a long history of dust exposure as well as a 30-pack year history of smoking. He has a moderate obstructive airway disease. It is felt that his dust exposure may have contributed to some extent to his obstructive airway disease." *Id.* This opinion by Dr. Baker, if fully credited, could support a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). Because the administrative law judge did not address the totality of Dr. Baker's medical opinion at 20 C.F.R. §718.202(a)(4), we vacate the administrative law judge's finding and remand the case. On remand, the administrative law judge must analyze the entirety of Dr. Baker's findings and determine the sufficiency and credibility of the physician's opinion relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant contends that, given the administrative law judge's treatment of Dr. Hussain's opinion at 20 C.F.R. §718.202(a)(4), the Director failed to provide claimant with a credible pulmonary evaluation as required under the Act.[4] The administrative law judge accorded "little weight" to Dr. Hussain's opinion at 20 C.F.R. §718.202(a)(4) because he found it to be not well reasoned. *See* Decision and Order at 11. The Director argues that he has fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation based on Dr. Hussain's assessment of claimant.

In order to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by the Act and its implementing regulations, 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*), the Director must provide claimant

[3] We reject claimant's assertion that the administrative law judge substituted his opinion for that of a medical expert at 20 C.F.R. §718.202(a)(4) in the absence of any supporting evidence.

[4] On behalf of the Director, Office of Workers' Compensation Programs (the Director), Dr. Hussain examined claimant on November 21, 2001. *See* Director's Exhibit 11.

with a medical opinion that addresses all of the elements of entitlement. *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994). The Director's obligation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman*, 745 F.2d at 1162, 7 BLR at 2-25.

We find no merit in claimant's contention that the Director failed to provide claimant with a credible pulmonary evaluation as required under the Act. The administrative law judge permissibly accorded "little weight" to Dr. Hussain's opinion at 20 C.F.R. §718.202(a)(4) because he found it to be not well reasoned. *See* Decision and Order at 11. Specifically, the administrative law judge found that Dr. Hussain based his diagnosis of "mild pneumoconiosis" on an x-ray classified as 0/1, which classification does not constitute evidence of pneumoconiosis under 20 C.F.R. §718.102(b). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Decision and Order at 10-11. The administrative law judge further properly determined that Dr. Hussain's reliance upon "Claimant's reported histories of cigarette smoking and coal mine employment" was inadequate to support his opinion, which, the administrative law judge found, includes a diagnosis of legal pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11; *see* Director's Exhibit 11. The administrative law judge thereby did not discredit Dr. Hussain's opinion, but rather provided a rational basis for finding it to be deserving of little weight at 20 C.F.R. §718.202(a)(4). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, we agree with the Director's argument that he fulfilled his statutory duty to provide claimant with a credible pulmonary evaluation by virtue of Dr. Hussain's assessment of claimant, and we reject claimant's argument to the contrary. *See generally Newman*, 745 F.2d at 1162, 7 BLR at 2-25.

In sum, we affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Because the administrative law judge did not address the totality of Dr. Baker's diagnoses and their import at 20 C.F.R. §718.202(a)(4), we vacate the administrative law judge's finding thereunder and remand the case. Further, we reject claimant's assertion that the Director did not fulfill his statutory duty to provide claimant with a credible pulmonary evaluation by virtue of Dr. Hussain's assessment of claimant. On remand, the administrative law judge must determine whether the new medical opinions of record establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and thereby establish, at 20 C.F.R. §725.309(d)(2), a change in the sole applicable condition of entitlement. If so, then the administrative law judge must consider all the evidence of record pursuant to 20 C.F.R. Part 718 on the merits of the instant subsequent claim. *See* 20 C.F.R. §725.309(d)(2).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge