BRB No. 06-0613 BLA

RAYMOND K. CULBERTSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 02/27/2007
	)	
Employer-Respondent	)	
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Raymond K. Culbertson, Lebanon, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (05-BLA-5379) of Administrative Law Judge Stephen L. Purcell 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).[1] Claimant's prior application

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

for benefits, filed on December 6, 1996, was finally denied on May 27, 1998 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. On July 11, 2003, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim.[2] 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order – Denying Benefits issued on April 21, 2006, the administrative law judge credited claimant with twenty-three years of coal mine employment,[3] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the

[2] This is claimant's fourth claim for benefits. Claimant's original claim, filed on October 19, 1978, was denied as abandoned on October 4, 1979. Director's Exhibit 1. On July 28, 1986, claimant filed a second claim for benefits, which was denied on November 26, 1986 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant's third claim for benefits, filed on December 6, 1996, was denied by Administrative Law Judge Richard A. Morgan because claimant failed to establish a material change in condition, or any element of entitlement. Director's Exhibit 1. On April 5, 1999, June 8, 2000, and August 20, 2001, claimant filed requests for modification, which were denied on June 29, 1999, August 24, 2000, and October 11, 2001, respectively. Director's Exhibit 1. On November 6, 2001, claimant requested a formal hearing before an administrative law judge, but on July 3, 2002, claimant requested that he be permitted to withdraw "this entire claim for Federal Black Lung Benefits." Director's Exhibit 1 at 4. Consequently, by Order dated July 10, 2002, Administrative Law Judge Richard Stansell-Gamm granted claimant's Motion to withdraw his claim. Director's Exhibit 1. In the instant Decision and Order, Administrative Law Judge Stephen L. Purcell (the administrative law judge) properly found that, because Judge Morgan's denial of claimant's 1996 claim became final before claimant requested that the claim be withdrawn, Judge Stansell-Gamm's July 10, 2002 order approving withdrawal of claimant's December 6, 1996 claim was ineffective. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*); *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*).

[3] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

entire record, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits.[4] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (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). The administrative law judge determined that claimant's prior claim was denied because he failed to establish any of the conditions of entitlement. Consequently, claimant had to submit new evidence establishing one of the required elements. 20 C.F.R. §725.309(d)(2),(d)(3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously

[4] Employer contends that the administrative law judge erred in his application of 20 C.F.R. §725.414 to exclude certain evidence submitted by employer, but asserts that any errors are harmless in light of the administrative law judge's denial of benefits. Employer's Brief at 4, 7, 9.

adjudicated against him). The administrative law judge found that the new evidence developed with the subsequent claim established that claimant is totally disabled by a respiratory impairment from performing his usual coal mine work, thereby establishing a change in an applicable condition of entitlement.

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge initially correctly found that all twenty-four x-ray readings, submitted in claimant's three prior claims, were negative for the existence of pneumoconiosis. 20 C.F.R. §718.102; Decision and Order at 10; Director's Exhibit 1. In addition, none of the x-ray interpretations contained in claimant's hospitalization and treatment records supported a diagnosis of pneumoconiosis. Decision and Order at 11-13; Director's Exhibit 1.

The x-ray evidence submitted since the denial of the prior claims, and in support of claimant's current claim, consists of twenty-six readings of thirteen x-rays.[5] An August 26, 1997 x-ray was read twice as negative by Drs. Scott and Wheeler, who are Board-certified radiologists and B readers. Decision and Order at 20; Director's Exhibits 1, 56. An October 28, 1998 x-ray was read once as positive by Dr. Alexander, a Board-certified radiologist and B reader, once as negative by Dr. Cooper, a B reader, and twice as negative by Drs. Scott and Wheeler, who are Board-certified radiologists and B readers. Director's Exhibits 1, 37, 53, 56. The administrative law judge permissibly found this x-ray to be negative, based on the preponderance of the negative readings by highly qualified readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 20.

A March 26, 1999 x-ray was read twice as negative by Drs. Scott and Wheeler, both Board-certified radiologists and B readers. Decision and Order at 20; Director's Exhibit 1, 56. A May 28, 1999 x-ray was read once as positive by Dr. Ahmed, a Board-certified radiologist and B reader, once as negative by Dr. Gaziano, a B reader, and once as negative by Dr. Barrett, a Board-certified radiologist and B reader. Director's Exhibits 1, 49, 55, 58. The administrative law judge permissibly found this x-ray to be negative, based on the preponderance of the negative readings by highly qualified readers. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 20.

[5] The record contains an additional reading for quality only, by Dr. Barrett, of the December 9, 2003 x-ray. Director's Exhibit 13.

Four x-rays dated July 1, 1999, September 11, 2000, March 27, 2001 and July 24, 2001, were uniformly read as negative by Drs. Fino and Castle, both B readers, and Drs. Barrett and Scott, both Board-certified radiologists and B readers. Decision and Order at 15, 21; Director's Exhibits 1, 48, 53, 61, 63, 64, 66. A November 6, 2001 x-ray was read as positive by Dr. Ahmed, a Board-certified radiologist and B reader. Director's Exhibit 1. A March 19, 2003 x-ray was read once as positive by Dr. Cappiello, a Board-certified radiologist and B reader, and once as negative by Dr. Wheeler, who is also a Board-certified radiologist and B reader. Director's Exhibits 31, 36. The administrative law judge permissibly found this x-ray to be in equipoise, based on the readers' equal qualifications, and thus properly found this x-ray insufficient to support a finding of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 21.

A December 9, 2003 x-ray was read once as positive by Dr. Baker, a B reader, and once as negative by Dr. Scatarige, a Board-certified radiologist and B reader. Director's Exhibits 13, 36. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Scatarige's superior qualifications. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 21.

A May 13, 2004 x-ray was read once as positive by Dr. Miller, a Board-certified radiologist and B reader, and once as negative by Dr. Wheeler, who is also a Board-certified radiologist and B reader. The administrative law judge permissibly found this x-ray to be in equipoise, based on the readers' equal qualifications, and thus properly found this x-ray insufficient to support a finding of pneumoconiosis.[6] *See Ondecko*, 512 U.S. at 280-81; Decision and Order at 21.

An x-ray dated March 23, 2005 was read once as positive by Dr. Ahmed, a Board-certified radiologist and B reader, and once as negative by Dr. Wheeler, also a Board-certified radiologist and B reader. Claimant's Exhibit 2; Employer's Exhibit 29. The administrative law judge permissibly found this x-ray to be in equipoise, based on the readers' equal qualifications, and thus properly found this x-ray insufficient to support a finding of pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81; Decision and Order at 21.

[6] The administrative law judge further found Dr. Wheeler's negative reading to be more credible than Dr. Miller's positive reading, based on the April 14, 2005 rehabilitative statement submitted by employer, in which Dr. Wheeler explained the reasons for the differences between his reading and that of Dr. Miller. Employer's Exhibit 30.

Finally, the administrative law judge properly found that none of the x-ray interpretations contained in claimant's hospitalization and treatment records supported a diagnosis of pneumoconiosis. Decision and Order at 18-19; Director's Exhibit 1. The administrative law judge permissibly concluded that, therefore, both taken individually, and as a whole, the x-rays did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 21.

Because the administrative law judge examined the x-ray evidence in light of both the quantity of evidence and the relevant qualifications of the x-ray readers, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997), and explained why he found the x-ray evidence insufficient to establish the existence of pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998), we affirm the administrative law judge's finding that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(a)(1).[7]

The administrative law judge also found, correctly, that the record contains no biopsy or autopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 22.

In considering the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge first considered the medical opinions and progress notes submitted in claimant's three prior claims, dating between 1982 and 1997. Decision and Order at 22-23. The administrative law judge properly found that only Dr. Paranthaman, whose qualifications are not in the record, diagnosed chronic bronchitis due in part to coal dust exposure. Decision and Order at 22-23; Director's Exhibit 1. By contrast, Dr. Forehand, whose qualifications are also unknown, and Drs. Castle and Sargent, who are both Board-certified pulmonologists, opined that claimant does not have pneumoconiosis or any coal dust related disease. Decision and Order at 22-23; Director's Exhibit 1. The administrative law judge permissibly concluded that the opinions of Drs. Castle and Sargent, who are both highly qualified, and whose opinions are supported by the progress notes and hospital records from Drs. Cox, Burwell, Chambers, Tan, Griffith, and Ketron,

[7] We note that while the record contains conflicting positive and negative readings of two additional x-rays, which the administrative law judge did not specifically discuss, substantial evidence supports the administrative law judge's ultimate conclusion that the weight of the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 1, 32.

which also contained no diagnoses of coal workers' pneumoconiosis or coal dust related lung disease, outweighed Dr. Paranthaman's opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274. In addition, the administrative law judge properly found that the results of several computerized tomography scans, performed at Russell County Medical Center, did not contain any diagnoses of pneumoconiosis. Decision and Order at 13; Director's Exhibit 1.

Considering the medical opinions and progress notes submitted since the denial of the prior claims, and in support of claimant's current claim, the administrative law judge found that Drs. Baker, Henry, and Smiddy, rendered opinions supportive of a finding of the existence of pneumoconiosis. Decision and Order at 22-23; Director's Exhibits 1, 13, 31. By contrast, Drs. McSharry, Castle, and Hippensteel opined that claimant does not suffer from clinical coal workers' pneumoconiosis or any coal dust related lung disease. Decision and Order at 23.

The administrative law judge properly found that, in a report dated December 9, 2003, Dr. Baker diagnosed coal workers' pneumoconiosis, based on a positive x-ray reading and claimant's history of coal dust exposure. Decision and Order at 9, 23; Director's Exhibit 13. Dr. Baker also diagnosed chronic obstructive pulmonary disease (COPD) with a moderate obstructive defect, as shown on claimant's pulmonary function study; chronic bronchitis, based on history; and hypoxemia based on the arterial blood gas study results. Dr. Baker indicated that these diagnoses were due to a combination of cigarette smoking and coal dust exposure. Decision and Order at 9, 23; Director's Exhibit 13. The administrative law judge permissibly accorded little weight to Dr. Baker's diagnoses, as unreasoned, because Dr. Baker failed to point to any objective data or medical testing to support his diagnosis of coal workers' pneumoconiosis, beyond his own reading of a chest x-ray, that was re-read as negative by a more highly qualified reader, and did not substantiate any causal connection between claimant's COPD or chronic bronchitis, and claimant's coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985); Decision and Order at 23; Director's Exhibit 13.

The administrative law judge also found the June 21, 2000 and October 6, 2002 letters from Dr. Henry, claimant's treating physician, to be unreasoned because Dr. Henry provided insufficient rationale for his conclusions that: a 1997 pulmonary function study was not indicative of upper airway obstruction and was instead more consistent with pneumoconiosis; that claimant's breathing impairment resulted from "significant pneumoconiosis;" and that claimant's twenty-five year history of coal dust exposure plays a large part in his dyspnea. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997);

Grizzle v. Pickands Mather & Co./Chisolm Mines, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order at 23-4; Director's Exhibits 1, 31.

Finally, the administrative law judge permissibly accorded little weight to Dr. Smiddy's diagnoses of pneumoconiosis and chronic bronchitis, contained in various hospital and treatment records, because Dr. Smiddy provided no explanation for his conclusions. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood*, 105 F.3d at 949, 21 BLR at 2-31; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Decision and Order at 18-19, 24 n.14. In addition, the administrative law judge noted that the results of a computerized tomography scan, performed at Russell County Medical Center on June 20, 2001, did not include a diagnosis of coal workers' pneumoconiosis. Decision and Order at 18-19; Director's Exhibit 1.

By contrast, the administrative law judge permissibly found that the opinions of Drs. McSharry, Castle, and Hippensteel, were thorough, well-reasoned and well-documented, and more consistent with the objective evidence of record. Decision and Order at 24; Director's Exhibit 1; Employer's Exhibits 33, 34. As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is the job of the administrative law judge to evaluate the physicians' opinions, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127, and the Board will not substitute its inferences for those of the administrative law judge. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Finally, the administrative law judge considered all of the evidence pertinent to the existence of pneumoconiosis together, and permissibly concluded that claimant had not established the existence of pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 25. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). As claimant failed to establish the existence pneumoconiosis, a finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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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JUDITH S. BOGGS
Administrative Appeals Judge