BRB No. 07-0479 BLA

G.J.	)	
Claimant-Petitioner	)	
v.	)	
HARLAN BELL COAL INCORPORATED	)	
and	)	DATE ISSUED: 02/21/2008
OLD REPUBLIC 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 – Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

G.J., Hulen, Kentucky, *pro se*.

Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (05-BLA-6232) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). Claimant's prior application for benefits, filed on July 18, 1995, was finally denied on January 27, 2000, because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 2. On May 25, 2004, claimant filed his current application, his third, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order – Denying Benefits issued on January 31, 2007, the administrative law judge credited claimant with eleven years of coal mine employment[2] 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)(2). 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 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 and the Director, Office of Workers' Compensation Programs, have not filed briefs 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).

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[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge permissibly found that the more probative evidence was the more recent evidence developed in connection with the current claim, consisting of six readings of three new x-rays.[3] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 17-18. A June 10, 2004 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative by Dr. Wiot, both of whom are B readers and Board-certified radiologists. Decision and Order at 17; Director's Exhibit 36; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be inconclusive, based on the physicians' equal radiological qualifications. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); Decision and Order at 17. An August 27, 2004 x-ray was read as positive by Dr. Baker, a B reader, and as negative by Dr. Wiot, a B reader and Board-certified radiologist. Decision and Order at 17; Director's Exhibits 13, 27. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Wiot's superior radiological qualifications. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 17. Finally, a March 10, 2005 x-ray was read as positive by Dr. Ahmed, and as negative by Dr. Wiot, both of whom are B readers and Board-certified radiologists. Decision and Order at 17; Director's Exhibit 36; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be inconclusive, based on the physicians' equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 17.

Having considered that the record contains multiple conflicting readings by similarly qualified readers, and noting that all of the x-rays were either inconclusive or negative for pneumoconiosis, the administrative law judge permissibly concluded that the x-ray evidence did not support a finding of pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 18. Substantial evidence supports the administrative law judge's finding. Therefore, 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).[4]

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[3] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the August 27, 2004 x-ray. Director's Exhibit 14.

[4] The administrative law judge also found that the x-ray evidence submitted in support of claimant's prior claims, consisting of twenty-two readings of seven x-rays, did not support a finding of pneumoconiosis. Decision and Order at 17-18. Substantial

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 18.

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 treatment notes developed with the current claim. The administrative law judge found that Dr. Baker, who is a Board-certified pulmonary specialist, opined that claimant suffers from clinical pneumoconiosis, as well as legal pneumoconiosis, in the form of chronic bronchitis, a moderate restrictive defect, and severe hypoxemia, due to a combination of smoking and coal dust exposure. Decision and Order at 6-7; Director's Exhibits 13, 33. By contrast, Dr. Jarboe, who is also a Board-certified pulmonary specialist, opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease.[5] Decision and Order at 7-8; Employer's Exhibit 2.

The administrative law judge permissibly accorded little weight to Dr. Baker's diagnosis of clinical pneumoconiosis because the physician specifically stated that his

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evidence supports this finding. The administrative law judge properly found that the x-rays dated March 23, 1990, March 29, 1990, June 14, 1990, October 10, 1995, and February 1, 1996, were read uniformly negative for pneumoconiosis, and that a March 26, 1991 x-ray was found unreadable by the only physician who reviewed it. Decision and Order at 17-18; Director's Exhibit 1. Finally, the administrative law judge permissibly found that an August 15, 1995 x-ray, the only x-ray with conflicting readings, was negative for pneumoconiosis, based on the preponderance of the readings by the most highly qualified readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (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, 1-7 (1999)(*en banc*); Decision and Order at 18; Director's Exhibit 1.

[5] The administrative law judge further found that the record contains treatment notes from Drs. Joplin and Ahmad at the Appalachian Regional Healthcare Daniel Boone Clinic. Decision and Order at 8; Director's Exhibit 36. Dr. Joplin noted that claimant had a history of "black lung," and diagnosed claimant with chronic obstructive pulmonary disease [COPD], but did not relate the COPD to coal dust exposure. Dr. Ahmad noted that claimant reported that he was being treated for "black lung" by Dr. Baker. *Id.*

conclusion was based solely on claimant's positive x-ray and history of coal dust exposure. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at 19. Further, the administrative law judge permissibly accorded little weight to Dr. Baker's diagnosis of legal pneumoconiosis, because the physician based his diagnosis of chronic bronchitis solely on history and provided no objective data to support that conclusion, and because Dr. Baker failed to adequately explain why the miner's lung impairments that he diagnosed were due in part to coal dust exposure and were not wholly attributable to the miner's considerable smoking history. *See* 20 C.F.R. §718.202(a)(4); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 19; Director's Exhibits 13, 33.

By contrast, the administrative law judge found, within his discretion, that the opinion of Dr. Jarboe, that claimant does not have coal workers' pneumoconiosis or any coal dust-related lung disease, was thorough, reasoned, documented, and was consistent with the objective evidence of record, and thus was entitled to greater probative weight than the opinion of Dr. Baker. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 19, 20; Employer's Exhibit 2.

Turning to the medical opinions and progress notes submitted with the prior claim, the administrative law judge properly found that Drs. Morgan and Vaezy diagnosed claimant with pneumoconiosis, while Drs. Jarboe, Lockey, and Fino found no evidence of coal workers' pneumoconiosis or any coal dust-related lung disease. Decision and Order at 13-15; Director's Exhibit 1. The administrative law judge permissibly accorded little weight to Dr. Vaezy's opinion, that the miner had clinical pneumoconiosis, because the physician specifically stated that his diagnosis was based solely on claimant's positive x-ray and history of dust exposure. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Worhach*, 17 BLR at 1-110; Decision and Order at 20; Director's Exhibit 1. Finally, the administrative law judge permissibly found Dr. Morgan's opinion, that "perhaps" there was a causal relationship between claimant's asthma and chronic bronchitis and his history of coal dust exposure, to be too equivocal to support claimant's burden of proof. *See Island Creek Coal Co. v. Holdman,* 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000)*; Griffith v. Director, OWCP,* 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 20; Director's Exhibit 1.

Weighing the old and new medical opinion evidence together, the administrative law judge concluded that the probative, well-reasoned, and well-documented opinion of Dr. Jarboe, that claimant does not suffer from pneumoconiosis, outweighed the contrary medical opinions of record. Decision and Order at 20. It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine

credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), 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)(4).

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). Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge