BRB No. 07-0486 BLA

C.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAN DEL COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 02/29/2008
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6182) of Administrative Law Judge Alice M. Craft denying benefits on a subsequent 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] The administrative law judge credited claimant with eleven years of coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, claimant challenges the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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 applicable 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).

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[1] Claimant filed his first claim on May 2, 1988. Director's Exhibit 1. It was finally denied on January 29, 1996. *Id*. Claimant filed this claim on August 13, 2001. Director's Exhibit 3.

[2] The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 4. 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] Because the administrative law judge's length of coal mine employment finding and her findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(2), (3), and total disability at 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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 prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant initially contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts 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. Claimant's Brief at 3. Further, claimant asserts that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant's Brief at 3. We disagree. The administrative law judge properly found that the record consists of three new interpretations of x-rays dated October 17, 2001,[4] November 5, 2001, and September 10, 2003, and that all of the interpretations, including those by the most highly qualified readers, are negative for pneumoconiosis. Decision and Order at 10; Director's Exhibits 13, 14; Employer's Exhibit 1.

The administrative law judge permissibly concluded that, based on the absence of positive x-ray readings in the record, claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22

[4] Dr. Sargent also read the October 17, 2001 x-ray for quality only. Director's Exhibit 13.

BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 10. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge substituted her opinion for that of the physicians. Claimant's Brief at 4. We disagree. The administrative law judge considered the reports of Drs. Hussain, Broudy, and Dahhan. Decision and Order at 10. Dr. Hussain opined that claimant does not have an occupational lung disease related to his coal mine employment. Director's Exhibit 13. Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 14. Similarly, Dr. Dahhan opined that claimant does not have occupational pneumoconiosis. Employer's Exhibit 1. Contrary to claimant's argument, the administrative law judge accurately stated that "[n]o physician of record opines that the [c]laimant suffers from clinical or legal pneumoconiosis." Decision and Order at 10. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). 33 U.S.C. §921(b)(3); *see O'Keeffe*, 380 U.S. at 362.

Finally, claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with the physicians' assessments of claimant's impairment. Claimant's Brief at 5-6. As noted above, the record contains the reports of Drs. Hussain, Broudy, and Dahhan. Drs. Hussain, Broudy, and Dahhan opined that claimant retained the respiratory capacity to perform the work of a coal miner or to perform comparable work. Director's Exhibits 13, 14; Employer's Exhibit 1. The administrative law judge accurately stated that "[n]o physician of record opines that [claimant] is totally disabled." Decision and Order at 11-12. Contrary to claimant's assertion, because Drs. Hussain, Broudy, and Dahhan opined that claimant has the respiratory capacity to perform the work of a coal miner, the administrative law judge was not required to make a comparison of their opinions with the exertional requirements of claimant's usual coal mine work. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

We also reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled,

because pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). 33 U.S.C. §921(b)(3); *see O'Keeffe*, 380 U.S. at 362.

In view of the foregoing, we affirm the administrative law judge's finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

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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BETTY JEAN HALL
Administrative Appeals Judge