BRB No. 10-0319 BLA

LEONARD W. BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L.T.W. MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/09/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

John C. Blair (Blair Law Offices, PLLC), Logan, West Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (09-BLA-5385) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with twenty-five years of coal mine employment[2] and found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, she found that claimant did not establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and erred in her evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer/carrier (employer) responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to employer's appeal.[3]

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[1] This is claimant's third claim. Claimant's first application for benefits, filed on August 14, 1996, was denied by the district director on January 16, 1997, because the evidence did not establish that claimant had pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 30. Claimant's second claim, filed on August 14, 2000, was denied by Administrative Law Judge Edward Terhune Miller in a Decision and Order issued on May 8, 2003. Judge Miller credited claimant with approximately thirty-three years of coal mine employment, and found that the new evidence did not establish the existence of pneumoconiosis or total respiratory or pulmonary disability. Therefore, Judge Miller found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Claimant filed the instant claim on May 29, 2008. Director's Exhibit 4.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 5, 6; Hearing Transcript at 25. 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 (1989) (*en banc*).

[3] We affirm the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(4), and that total disability was not

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).

By Order dated May 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

Employer asserts that the Section 1556 amendments are inapplicable to this claim, because the administrative law judge found that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment.[4] Employer further objects to the retroactive application of these amendments. The Director asserts, correctly, that although the amendments apply to claimant's subsequent claim, based on its filing date, the Board need not address their impact on this claim if the Board affirms the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. The Director further asserts, however, that if the Board does not affirm the administrative law judge's total disability finding, the case must be remanded to the administrative law judge for consideration pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

As will be discussed below, we affirm the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory impairment. Therefore, we need not remand this case for the administrative law judge to consider this case in light of the recent amendments to the Act, nor need we address employer's challenge to the retroactive application of amended Section 411(c)(4).

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established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

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 prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 30. Consequently, claimant had to submit new evidence establishing one element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant initially asserts that in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge erred in discounting Dr. Rasmussen's positive reading of the June 12, 2008 x-ray, and in crediting Dr. Castle's negative interpretation of the May 6, 2009 x-ray. Claimant's Brief at 3. Claimant's assertions lack merit.

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge properly considered the six interpretations of the two x-rays developed in connection with the current claim.[5] 20 C.F.R. §725.309(d)(3); *White*, 23 BLR at 1-3; Decision and Order at 12-13. The administrative law judge permissibly found that the only positive reading of record, that of the June 12, 2008 x-ray by Dr. Rasmussen, a B reader, was outweighed by negative readings of the same x-ray by Drs. Wheeler, Meyer and Wiot, who are all B readers and Board-certified radiologists, and thus possess superior radiological qualifications to Dr. Rasmussen. *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 12-13; Director's Exhibits 11, 12; Employer's Exhibits 1, 12. The administrative law judge further properly found that the remaining x-ray of record, dated May 6, 2009, was read as negative for pneumoconiosis by both Dr. Wiot, and Dr. Castle, who is a B reader. Decision and Order at 12-13; Employer's Exhibits 6, 8. Thus, based on the preponderance of the negative interpretations of these x-rays by the most highly qualified readers, the administrative law judge permissibly found that the x-ray evidence did not

[5] The record contains an additional reading for quality only by Dr. Gaziano (Quality 1), of the June 12, 2008 x-ray. Director's Exhibit 11.

establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[6] *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 12-13.

As the administrative law judge properly considered both the quality and the quantity of the x-ray readings in evaluating the evidence pursuant to Section 718.202(a)(1), we affirm the administrative law judge's finding that the preponderance of the new x-ray evidence does not establish the existence of pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

Because claimant raises no additional arguments regarding the administrative law judge's evaluation of the evidence pursuant to Section 718.202(a), we affirm the administrative law judge's finding that the new evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

We next consider the administrative law judge's total disability finding. Claimant asserts that the administrative law judge erred in failing to find the medical opinion of Dr. Bellam, claimant's treating physician, together with claimant's testimony, sufficient to establish the existence of a totally disabling respiratory impairment.[7] We disagree.

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[6] Contrary to claimant's contention, the administrative law judge properly considered claimant's argument that, because Dr. Castle reviewed "a digital image of a copy of an analog x-ray," his interpretation of the May 6, 2008 x-ray is of little probative value. Claimant's Brief at 5; Decision and Order at 13 n.1. The administrative law judge rationally concluded, however, that even if he were to disregard Dr. Castle's reading, the preponderance of the readings by the most highly qualified physicians remained negative for the existence of pneumoconiosis. Decision and Order at 13, n.1. Therefore, the administrative law judge's consideration of Dr. Castle's x-ray reading, if error, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] The new evidence contains the medical opinions of four physicians. In a report dated June 12, 2008, Dr. Rasmussen examined claimant and diagnosed a minimal loss of lung function and opined that claimant retained the pulmonary capacity to perform his last coal mine employment. Director's Exhibit 11. Dr. Rasmussen reiterated his conclusions in his March 9, 2009 deposition testimony. Employer's Exhibit 3. In a letter dated January 16, 2003, Dr. Bellam, claimant's treating physician, described claimant as a "disabled coal miner." Director's Exhibit 12. He noted that claimant had a lengthy

In evaluating the evidence relevant to total disability, the administrative law judge accurately noted that Drs. Rasmussen and Crisalli opined that claimant retained the pulmonary capacity to perform his last coal mine employment, and that Dr. Castle did not offer a definitive opinion on the issue of respiratory disability. Decision and Order at 16. The administrative law judge found that Dr. Bellam's opinion, that claimant was disabled, was conclusory and not supported by any objective medical evidence, and thus was entitled to no weight. *Id.* Therefore, she determined that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

After consideration of the evidence, the arguments raised on appeal and the administrative law judge's findings, we hold that substantial evidence supports the administrative law judge's credibility determinations with regard to Dr. Bellam's opinion. As the administrative law judge found, Dr. Bellam's opinion does not identify any specific medical evidence or objective medical data to support his opinion that claimant is totally disabled from a respiratory impairment. Therefore, the administrative law judge rationally accorded this opinion no weight, as he found that it was not a well documented or reasoned medical opinion. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Since we affirm the administrative law judge's finding that Dr. Bellam's opinion was not reasoned and documented, there is no need to further analyze Dr. Bellam's opinion pursuant to Section 718.104(d).[8] *See* 20 C.F.R. §718.104(d)(5).

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history of coal mine employment and that claimant smoked cigarettes for "many years." Dr. Bellam stated, "We have to accept the fact that based upon medical evidence that [claimant] is totally disabled from a respiratory impairment." Director's Exhibit 12. Dr. Crisalli examined claimant and, in a report dated April 22, 2009, diagnosed a mild pulmonary impairment, and opined that claimant is "not in any way disabled on the basis of his pulmonary impairment and retains the pulmonary functional capacity to perform his previous job in the coal mines or a job requiring similar effort outside of the mines." Employer's Exhibits 4, 9. Dr. Castle examined claimant on May 6, 2009, and then reviewed claimant's medical records. Dr. Castle diagnosed a moderate airway obstruction without restriction. He stated that "it is not clear whether these findings represent a permanent degree of impairment or a transient phenomenon." Employer's Exhibit 6.

[8] The regulations state that a treating physician's opinion may be accorded controlling weight "[p]rovided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its

Further, we reject claimant's assertion that his testimony is sufficient to establish total disability.[9] In a living miner's case, lay testimony is generally insufficient to establish total respiratory disability, unless it is corroborated by at least a quantum of medical evidence. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Because we affirm the administrative law judge's finding that there is no credible medical evidence of total disability submitted in this subsequent claim, claimant's testimony is insufficient to carry his burden of establishing total disability pursuant to Section 718.204(b)(2). *See Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999). As claimant raises no further allegations of error regarding the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability at Section 718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309, and we affirm the administrative law judge's denial of benefits.

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reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[9] Claimant testified that, beginning in 1987, he had difficulty performing his coal mine employment, his breathing has progressively worsened, he is short of breath, he cannot move fast, and he sleeps on three or four pillows. Hearing Transcript at 20-22, 26.

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