BRB No. 03-0439 BLA

JAMES MONROE ESTEP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOHN CAIN TRUCKING	)	
	)	DATE ISSUED: 01/30/2004
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5278) of Administrative Law Judge Joseph E. Kane 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] The instant case involves a claim filed on February 27, 2001.[2] After crediting claimant with 1.32 years of coal mine employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1999 claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to

[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on December 3, 1993. Director's Exhibit 1. The district director denied the claim on May 17, 1994. *Id.* Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* After holding a hearing on January 25, 1996, Administrative Law Judge J. Michael O'Neill issued an Order dated April 9, 1996 wherein he remanded the case to the district director for a new determination regarding the identity of the responsible operator. *Id.* After identifying the putative responsible operators, the district director again denied benefits on July 30, 1996. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a second claim on March 25, 1999. Director's Exhibit 2. The district director denied the claim on June 30, 1999. *Id.* There is no indication that claimant took any further action in regard to his 1999 claim.

Claimant filed a third claim on February 27, 2001. Director's Exhibit 4.

20 C.F.R. §718.204(b)(2)(iv). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1999 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[4] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1999 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 2.

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5] In considering whether the newly submitted x-ray

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[3] Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

[5] The record contains five interpretations of three x-rays. Although Dr. Baker, a physician with no special radiological qualifications, interpreted claimant's March 28, 2001 x-ray as positive for pneumoconiosis, Dr. Wiot, a physician dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 1. Similarly, while Dr. Simpao, a physician with no special radiological qualifications, interpreted claimant's May 8, 2001 x-ray as positive for pneumoconiosis, Dr. Wiot interpreted the x-ray as

evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by the only physician that was dually qualified as a B reader and Board-certified radiologist, Dr. Wiot. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10-12. Because all of the newly submitted x-ray interpretations rendered by Dr. Wiot are negative for pneumoconiosis, the administrative law judge properly found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains three newly submitted medical opinions. While Drs. Baker and Simpao diagnosed pneumoconiosis, Director's Exhibits 15, 17, Dr. Dahhan opined that claimant did not suffer from the disease. Employer's Exhibit 2. After discrediting Dr. Baker's opinion because it was merely the doctor's restatement of an x-ray opinion, the administrative law judge found that the remaining contrary opinions of Drs. Simpao and Baker were equally probative regarding the existence of pneumoconiosis. Decision and Order at 20. Having found that the newly submitted medical opinion evidence was "equally probative," the administrative law judge properly found that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Claimant contends that the administrative law judge erred in his consideration of Dr. Baker's opinion. We disagree. The administrative law judge permissibly discredited Dr. Baker's diagnosis of coal workers' pneumoconiosis because he found that it was merely a restatement of an x-ray opinion.[6] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as claimant does not assert any additional error, we affirm the administrative law judge's

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negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 1. Finally, Dr. Dahhan, a B reader, interpreted claimant's September 6, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 2.

[6] Dr. Baker also diagnosed chronic bronchitis. However, because Dr. Baker failed to provide an etiology for this diagnosis, the administrative law judge properly found that this condition did not satisfy the definition of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); Decision and Order at 20-21; Director's Exhibit 17.

finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). After finding that Dr. Baker's opinion was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge found that the contrary opinions of Drs. Simpao and Dahhan[8] were equally probative as to whether claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23-24. The administrative law judge, therefore, found that claimant failed to establish, by a preponderance of the evidence, that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 24.

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[7] Dr. Baker opined that:

> Patient has a Class II impairment based on the FEV1 and vital capacity between 60% and 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.
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> ***
>
> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or any similar dusty occupation.

Director's Exhibit 17.

[8] Dr. Simpao opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 15. Dr. Simpao further opined that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.*

Dr. Dahhan opined that there were no objective findings to indicate total or permanent pulmonary disability based on the clinical and physiological parameters of claimant's respiratory system. Employer's Exhibit 2. Dr. Dahhan opined that from a respiratory standpoint, claimant retained the physiological capacity to continue his previous coal mining work. *Id.*

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Baker and Simpao insufficient to establish total disability. The administrative law judge permissibly found that Dr. Baker's diagnosis of a "Class II" impairment was insufficient to support a finding of total disability because the doctor failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 23; Director's Exhibit 17. Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 17. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion is also insufficient to support a finding of total disability.

While Dr. Simpao opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibit 15, Dr. Dahhan opined that claimant retained the respiratory capacity to perform his usual coal mine employment. Employer's Exhibit 2. The administrative law judge found that these two opinions were equally probative regarding the extent of claimant's respiratory impairment. Decision and Order at 24. Inasmuch as no party challenges this determination, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Having found that the newly submitted medical opinion evidence was "equally probative," the administrative law judge properly found that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9] *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R.

[9] Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. These factors are relevant in determining whether claimant can perform comparable and gainful employment, not whether he can perform his usual coal mine employment. *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-87 (1988).

Claimant also asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 7. Claimant has not identified any presumption of total disability that is applicable in this case.

§718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the prior claim. 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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PETER A. GABAUER, JR.
Administrative Appeals Judge