BRB No. 04-0418 BLA

ISAAC HOLLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/14/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order – Denying Benefits of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C. for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 (03-BLA-5531) of Administrative Law Judge Stuart A. Levin 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). Claimant filed a subsequent claim on February 12, 2001.[1] Director's Exhibit 3. The district director issued a Proposed Decision and Order denying the claim on November 20, 2002. Claimant requested a hearing, which was held on July 9, 2003. The administrative law judge found that the new evidence failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial, and therefore that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.[2]

Claimant appeals, challenging the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits.

The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, alleging that the administrative law judge erred in admitting evidence, including the medical report of Dr. Vuskovich and the deposition testimony of Dr. Barrett, which was proffered by employer in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director, however, also maintains that the error is harmless since the administrative law judge did not specifically discuss this evidence in his decision. Director's brief at 2. Employer filed a reply to the Director's brief, arguing the following: 1) that 20 C.F.R. §725.414 is an invalid regulation; 2) that employer's evidence was admissible even under the invalid provisions of 20 C.F.R. §725.414; and 3) that the Director has waived the right to raise for the first time on appeal the issue of whether the admitted evidence is in compliance with 20 C.F.R. §725.414.[4]

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[1] Claimant initially filed a claim for benefits on July 28, 1993, which was denied by the district director in a Proposed Decision and Order and Memorandum of Conference dated June 29, 1994. Director's Exhibit 1. The district director found that claimant failed to establish the existence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and total disability due to pneumoconiosis. *Id*.

[2] The administrative law judge issued an Order Correcting Sentence in Decision and Order dated April 9, 2004. This Order pertained to a clerical error and did not alter the denial of benefits.

[3] The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 9-11. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[4] Employer alternatively argues that any error committed by the administrative law judge with respect to 20 C.F.R. §725.414 was harmless error. Employer's brief at 4, n.1.

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).

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that, in a case involving the prior regulations, in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[5] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*.

In this case, claimant's prior claim was denied because he failed to establish that he had pneumoconiosis, that the disease arose out of coal mine employment, or that he was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. After consideration of the administrative law judge's Decision and Order, the issue on appeal, and the evidence of record, we affirm as supported by substantial the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We reject claimant's contention that the administrative law judge erred in finding that claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a pulmonary or respiratory impairment.

In weighing the new x-ray evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly noted that

[5] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

the record contained seven readings of four new x-rays, of which there were two positive and five negative readings for pneumoconiosis. Director's Exhibits 11, 12, 13, 15; Employer's Exhibits 1, 2, 3; Decision and Order at 4. Contrary to claimant's contention, the administrative law judge law judge did not selectively analyze the x-ray evidence as he fully discussed the positive readings for pneumoconiosis and his reasons for discounting them. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order at 4. The administrative properly found Dr. Hussain's positive reading of the July 25, 2001 x-ray was outweighed by a negative reading of that same x-ray by Dr. Scott, a more qualified Board-certified radiologist and B-reader. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Director's Exhibits 11, 12; Decision and Order at 4. Likewise, the administrative law judge properly found Dr. Baker's positive reading of the February 28, 2001 x-ray was outweighed by a negative reading of that same x-ray by Dr. Barrett, a more qualified Board-certified radiologist and B-reader. Director's Exhibit 13; Employer's Exhibit 2; Decision and Order at 4. Thus, because the administrative law judge correctly found that the weight of the new x-ray evidence, viewed in light of the readers' radiological qualifications, was negative for pneumoconiosis, s*ee Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

With respect to the new medical opinion evidence at 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred by not crediting the opinions of Drs. Baker, Hussain and Chaney that claimant has pneumoconiosis. We disagree. In weighing the conflicting medical opinions relevant to the existence of pneumoconiosis, the administrative law judge permissibly assigned less probative weight to the opinions of Drs. Baker and Hussain, as these physicians diagnosed pneumoconiosis based in part "on their own positive chest x-ray readings, which were outweighed by the contradictory readings by a physician with higher qualifications." Decision and Order at 5; s*ee Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Director's Exhibits 13, 15.

Similarly, the administrative law judge permissibly rejected Dr. Chaney's opinion that claimant has coal worker's pneumoconiosis, despite Dr. Chaney's status as a treating physician. First, the administrative law judge noted that Dr. Chaney only made a cursory notation on his last treatment entry of June 28, 2001 that claimant had positive x-ray evidence for pneumoconiosis.[6] Secondly, the administrative law judge properly found that Dr. Chaney did not include a diagnosis of pneumoconiosis over his prior two year treatment of claimant, and that Dr. Chaney did not set forth any underlying

[6] Dr. Chaney did not identify the date of the x-ray. Director's Exhibit 16.

documentation to support his conclusion.[7] Director's Exhibits 14, 16; Decision and Order at 7. Although an administrative law judge may not discredit an opinion solely because it is based on a positive reading, which is contrary to the weight of the other x-ray evidence of record, *see Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996), he may discredit the opinion if, as here, it is not supported by underlying documentation and is not reasoned. *See Worhach*, 17 BLR at 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In contrast, the administrative law judge properly credited that the opinions of Drs. Broudy and Dahhan, that claimant does not have pneumoconiosis, because he found their opinions to be more thorough and better supported by the results of claimant's chest x-rays, physical examination, and the objective evidence of record. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985)*; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Director's Exhibit 15; Employer's Exhibit 4; Decision and Order at 7. We therefore affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Claimant next challenges the administrative law judge's finding that he failed to establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Claimant specifically argues that the administrative law judge failed to consider the exertional requirements of his last coal mine employment in conjunction with the medical opinion evidence. Claimant's argument, however, is without merit. In weighing the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly weighed the five new medical opinions, noting that while Dr. Baker diagnosed a mild to moderate respiratory impairment, Dr. Baker failed to assess claimant's physical ability to do his usual coal mine employment or comparable work. *See Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983) (physician's diagnosis of mild respiratory impairment does not establish to what extent, if any, the impairment is disabling); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge also properly noted that Dr. Chaney failed to include an assessment of claimant's pulmonary capacity in his treatment notes. Director's Exhibits 14, 16; Decision and Order at 10. Conversely, the administrative law judge correctly noted that Drs. Hussain, Broudy and Dahhan

[7] The administrative law judge was not required to accord greater weight to Dr. Chaney's opinion based on his status as a treating physician. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge was only required to explain the weigh accorded to Dr. Chaney's opinion, which he has done in this case. *Id.*

specifically opined that claimant retained the respiratory capacity to perform his usual coal mine work. Director's Exhibits 11, 15; Employer's Exhibit 4; Decision and Order at 10. Based on the reasoned medical opinions of Drs. Hussain, Broudy and Dahhan, that claimant is not totally disabled by a pulmonary or respiratory impairment, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the new evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's determination, pursuant to 20 C.F.R. §725.309 and *Ross*, that claimant failed to meet his burden to establish a change in an applicable condition of entitlement since the prior denial of benefits. We therefore affirm the administrative law judge's denial of benefits.[8]

[8] We reject employer's contention that 20 C.F.R. §725.414 is an invalid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1- , BRB Nos. 03-0615 BLA and 03-0615 BLA-A at 6-8 (Jun. 28, 2004). We furthermore reject employer's assertion that the Director's failure to attend the hearing and thereby object to the admission of any of the evidence before the administrative law judge constitutes a waiver of the issue of compliance with the evidentiary limitations of 20 C.F.R. §725.414. The regulation makes plain that the limitations are mandatory, and as such, they are not subject to waiver: "Medical evidence in excess of the limitations contained in 20 C.F.R. §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added).

However, as noted by the Director, in this case any error committed by the administrative law judge in admitting evidence in excess of the evidentiary limitations is, at best, harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In his analysis of claimant's entitlement to benefits, the administrative law judge did not discuss Dr. Barrett's deposition. The administrative law judge noted that the opinions of Drs. Broudy and Dahhan that claimant did not have pneumoconiosis were supported by Dr. Vuskovich, but the administrative law judge did not specifically assign Dr. Vuskovich's opinion any determinative weight. Decision and Order at 7.

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