

BRB No. 05-0699 BLA

HERMAN YANCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	
	)	DATE ISSUED: 01/19/2006
Employer-Respondent	)	
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (04-BLA-5859) of Administrative Law Judge Stephen L. Purcell rendered 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). The administrative law judge found that employer was the responsible operator and that the parties stipulated to nineteen years of

coal mine employment.<sup>1</sup> Decision and Order at 2-3; Hearing Transcript at 6, 16-19. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. After determining that the instant claim is a subsequent claim,<sup>2</sup> the administrative law judge found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 2-3, 6-9. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement that was previously adjudicated against him, and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 9.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond on the merits of the appeal but asserting that claimant was provided with a complete pulmonary evaluation.<sup>3</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 6.

<sup>2</sup> Claimant's initial claim for benefits, filed on November 19, 1998, was finally denied on February 24, 1999 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed this claim on February 10, 2003. Director's Exhibit 3.

<sup>3</sup> The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of two new x-rays in light of the readers' radiological qualifications. Decision and Order at 7. One reading was positive for pneumoconiosis, a "2/2" reading of the March 12, 2003 x-ray by Dr. Baker, who is a B-reader. Director's Exhibit 13. Taking into account that the March 12, 2003 x-ray was read as negative for pneumoconiosis by Dr. Wiot, a B-reader and board-certified radiologist, the administrative law judge found that the March 12, 2003 x-ray was negative for pneumoconiosis. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 7. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding that Dr. Baker's opinion does not support a finding of

pneumoconiosis. Claimant's Brief at 4-5. Contrary to claimant's contention, the administrative law judge was within his discretion to find that Dr. Baker's diagnosis of pneumoconiosis was countered by the contrary medical opinions of Drs. Dahhan and Repsher, which, in the administrative law judge's view, were "better reasoned and documented" opinions explaining why pneumoconiosis was not present. Decision and Order at 8; see *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). The administrative law judge therefore concluded that they merited "greater probative weight" in determining whether the existence of pneumoconiosis was established. Decision and Order at 8. Claimant's assertion that Dr. Baker's opinion was well reasoned merely requests that the Board reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that since Dr. Baker opined that claimant retains the respiratory capacity to perform his usual coal mine employment, and Drs. Dahhan and Repsher opined that claimant has no respiratory impairment, the medical opinion evidence did not establish that claimant is totally disabled. Decision and Order at 9. Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 6-7, citing *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). The only specific argument claimant sets forth, however, is that:

The claimant's usual coal mine work included being a belt head operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 7. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal mine dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor*, 12 BLR at 1-88.

Further, we also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv). *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Baker's March 12, 2003 medical report provided by the Department of Labor, "the Director has failed to provide claimant with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5-6. The Director responds that he is required to provide the claimant with a complete and credible examination, not a dispositive one. Director's Brief at 2. The Director states that claimant was provided the medical examination required by the Act and regulations, and that "Dr. Baker's diagnosis of pneumoconiosis was simply outweighed by the contrary opinion of Dr. Dahhan." *Id.*

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 188 n.3 (1994); *see also Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 13. The administrative law judge did not find nor does claimant allege that Dr. Baker's report was incomplete. The administrative law judge chose to give less weight to Dr. Baker's diagnosis of pneumoconiosis because he did not find it as well reasoned and documented as the contrary opinions by Drs. Dahhan and Repsher, but he did not find that it lacked credibility. Decision and Order at 8; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Moreover, on the issue of total disability, the administrative law judge credited Dr. Baker's opinion that claimant can perform his usual coal mine work. Decision and Order at 9. Because Dr. Baker's opinion was merely found outweighed on

the issue of the existence of pneumoconiosis, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-88 n.3.

Therefore, we affirm the administrative law judge's finding that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled. Consequently, we affirm the administrative law judge's finding that claimant did not establish that one of the applicable conditions of entitlement changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). *See White*, 23 BLR at 1-7.

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