

BRB No. 06-0378 BLA

RONALD E. BOWEN)
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 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 01/25/2007
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Sarah M. Hurley and Michael J. Rutledge (Howard M. Radzely, Solicitor of
Labor; Allen H. Feldman, 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 (2005-BLA-5002) of Administrative
Law Judge Linda S. Chapman 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). The administrative law judge credited
claimant with eight years of qualifying coal mine employment, determined that
claimant's original claim, filed on March 5, 1974, was no longer viable, and adjudicated
this subsequent claim, filed on May 9, 2002, pursuant to the provisions at 20 C.F.R. Part
718. The administrative law judge determined that claimant had previously established
the existence of pneumoconiosis, and found that new evidence submitted in support of
this subsequent claim established total respiratory disability, an element of entitlement
previously adjudicated against claimant; thus claimant had demonstrated a change in an

applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Weighing all of the evidence of record, the administrative law judge found that claimant failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), or that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the original 1974 claim is no longer viable, and in allowing the Director, Office of Workers' Compensation Programs (the Director), to submit two x-ray interpretations in rebuttal of claimant's affirmative x-ray evidence involving a single film. Claimant also challenges the administrative law judge's weighing of Dr. Baker's opinion on the issues of disease etiology at Section 718.203(c) and disability causation at Section 718.204(c). The Director responds, urging the Board to reject claimant's arguments and affirm the denial of benefits.

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).

Claimant initially contends that the administrative law judge erred in finding that claimant's original claim, filed on March 5, 1974, was not viable. Specifically, claimant argues that the district director had completed evidentiary development and adjudication without having resolved all contested issues in the claim at the time he issued his denial of the claim pursuant to 20 C.F.R. §725.410 on December 8, 1976. As claimant requested a hearing on December 16, 1976, and the district director never referred the claim to the Office of Administrative Law Judges for hearing as required by the plain language of the regulations at 20 C.F.R. §§725.410 and 725.421, claimant asserts that a remand is appropriate for adjudication of his original claim under the regulations at 20 C.F.R. Parts 410 and 727. We disagree.

The record reflects that, following claimant's request for a hearing on December 16, 1976, the district director identified and notified a potentially liable operator of the claim, and a medical report of physical examination and testing conducted on June 10, 1980 was subsequently submitted into the record. Director's Exhibit 1. After reviewing the evidence of record under the Black Lung Benefits Reform Act of 1977, the district director again denied benefits on September 2, 1980. *Id.* As claimant failed to submit additional evidence or request a hearing within the prescribed period thereafter, we affirm the administrative law judge's finding that the 1974 claim was finally denied on

September 2, 1980, and therefore was no longer viable.¹ Decision and Order at 4; *see* 20 C.F.R. §§725.401, 725.410, 725.450; *see generally* *Jordan v. Director, OWCP*, 892 F.2d 1455, 13 BLR 2-184 (6th Cir. 1989).

Claimant next contends that the administrative law judge erred in allowing the Director to exceed the evidentiary limitations at Section 725.414 by submitting two rebuttal readings of an x-ray film obtained on August 6, 2003. Claimant's arguments are without merit. The Director accurately notes that claimant submitted two interpretations of that single film as his affirmative case evidence, and thus, consistent with applicable Board precedent, the administrative law judge properly held that the Director was entitled to submit two interpretations of that film in rebuttal. Decision and Order at 4-5; *see Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006). Consequently, we affirm the administrative law judge's evidentiary findings pursuant to Section 725.414.

Turning to the merits, claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion, that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c) and was a contributing cause of claimant's disability at Section 718.204(c), for the reasons provided. We disagree.

The administrative law judge determined that Dr. Baker initially based his conclusions on inaccurate employment and smoking histories, as his August 6, 2003 report indicated that claimant worked fourteen years in coal mine employment and had never smoked, when, in fact, claimant acknowledged a smoking history at his hearing, and was credited with eight years of coal mine employment. Decision and Order at 8; Director's Exhibit 16; *see generally* *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). After receiving additional information from claimant's counsel, Dr. Baker again diagnosed clinical pneumoconiosis and an obstructive ventilatory defect in a letter dated November 4, 2003, and stated that "[w]ith eight years [of coal dust] exposure, I feel the

¹ The Director, Office of Workers' Compensation Programs, correctly maintains that, assuming *arguendo* that the 1974 claim was still pending at the time claimant filed his second claim in 1991, the 1991 claim would have merged with the prior claim. *See generally* *Chadwick v. Island Creek Coal Co.*, 7 BLR 1-883 (1985). As the record reflects that claimant was granted a hearing in 1993, but did not raise the issue of the viability of his original claim or take any action after the Board affirmed the denial of benefits on June 16, 1995 until the 2002 filing of the present claim, further consideration of the issue is precluded. *See* 20 C.F.R. 725.309(c)(2000); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

most likely cause of his obstructive defect is that of cigarette smoking, though it has probably been contributed to by some undefinable extent by his coal dust exposure as well.” Director’s Exhibit 16. After noting that Dr. Baker did not specify the information he received regarding claimant’s smoking history, the administrative law judge reasonably concluded that Dr. Baker’s opinion about the probable contribution of claimant’s coal dust exposure to his obstructive defect was equivocal and thus unreliable. Decision and Order at 8; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Although Dr. Baker affirmatively attributed claimant’s x-ray evidence of pneumoconiosis to coal dust exposure, the administrative law judge acted within her discretion in finding that the opinion was unpersuasive, as Dr. Baker did not address what impact claimant’s significant exposure to cement and sand dust from 1968 to 1989 at a concrete pipe manufacturing plant had on claimant’s pulmonary condition, despite the fact that Dr. Arnett, claimant’s treating physician, characterized claimant’s lengthy history of working with concrete as “important.” Decision and Order at 8, 10; Director’s Exhibit 1; *see generally Graziani v. Director, OWCP*, 9 BLR 1-193 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); *Long*, 7 BLR 1-254; *Windom v. Director, OWCP*, 7 BLR 1-52 (1984); *Collura v. Director, OWPC*, 6 BLR 1-100 (1983). As substantial evidence supports the administrative law judge’s findings, and the remaining medical opinions of record did not attribute claimant’s pneumoconiosis or disability to coal dust exposure, we affirm the administrative law judge’s finding that the weight of the evidence was insufficient to establish disease etiology at Section 718.203(c) or disability causation at Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge