BRB No. 07-0355 BLA

R.J. Claimant-Petitioner v. RACHEAL MINING COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/24/2008 DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2005-BLA-05157) of Administrative Law Judge Janice K. Bullard rendered on a subsequent claim, filed on February 11, 2002, 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 his subsequent claim

on February 11, 2002.[1] The administrative law judge determined that the newly submitted evidence was insufficient to establish that claimant suffered from pneumoconiosis or that he was totally disabled due to pneumoconiosis. The administrative law judge thus found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in determining that the x-ray and medical opinion evidence was in equipoise as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant also contends the administrative law judge failed to adequately address the issue of disability causation pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[2]

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,

---

[1] Claimant filed a claim for benefits on March 9, 1998, which was denied by the district director on September 24, 1998. The district director determined that while the medical evidence showed that claimant was totally disabled by a respiratory or pulmonary impairment, it was insufficient to establish that claimant suffered from pneumoconiosis arising out of coal mine employment, or that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant took no action with regard to the denial of his claim until he filed a subsequent claim on February 11, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits on June 10, 2003. Director's Exhibit 28. Employer requested a hearing and the matter was forwarded to the Office of Administrative Law Judges (OALJ). By Order dated June 16, 2004, Administrative Law Judge Rudolf L. Jansen remanded the claim in order for the district director to satisfy his obligation to provide claimant with a complete pulmonary evaluation. Director's Exhibit 35. Upon completion of evidentiary development, the case was returned to the OALJ and a hearing was held on May 10, 2006. Director's Exhibit 37. The administrative law judge issued her Decision and Order on December 14, 2006.

[2] The administrative law judge found that there was no biopsy evidence in the record to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that claimant was ineligible for any of the presumptions available to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). We affirm the administrative law judge's findings pursuant to Section 718.202(a)(2), (3) as they are unchallenged by the parties in this appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[3] 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, 363 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 197 (6th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994); *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." *Id*. As noted by the administrative law judge, because claimant's prior claim was denied for failure to establish the existence of pneumoconiosis or disability causation, claimant was required to submit new evidence to establish either of these conditions of entitlement in order to proceed to the merits of his claim.[4] Decision and Order at 12.

In addressing whether claimant had demonstrated a change in an applicable condition of entitlement, the administrative law judge first considered whether claimant was able to establish the existence of pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of eight

[3] Because claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 7.

[4] The administrative law judge indicated that if the newly submitted evidence was sufficient to establish either the existence of pneumoconiosis, or disability causation, then claimant could demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, because the administrative law judge determined that the newly submitted evidence failed to establish the existence of legal or clinical pneumoconiosis, the issue of disability causation becomes moot, as claimant would be unable to show that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

interpretations of three chest x-rays dated June 28, 2001, July 2, 2002 and July 20, 2002.[5] The administrative law judge determined that the June 28, 2001 x-ray was in equipoise as to the presence or absence of pneumoconiosis because that x-ray had one positive reading by Dr. Alexander, a Board-certified radiologist and B reader, and one negative reading by Dr. Wiot, a Board-certified radiologist and B reader. Decision and Order at 15. She determined that the July 2, 2002 x-ray was negative for pneumoconiosis because there were two negative readings of that film by Dr. Wiot, a dually qualified physician, and Dr. Jarboe, a B reader, in comparison to one positive reading by Dr. Alexander, a dually qualified physician.[6] *Id*. Additionally, the administrative law judge determined that the July 20, 2002 x-ray was positive for pneumoconiosis because there were two positive readings of that x-ray by Dr. Alexander and Dr. Baker, a B reader, in comparison to Dr. Wiot's sole negative reading. *Id*. The administrative law judge then stated:

> The record therefore contains one negative X-ray, one positive X-ray, and one X-ray that I have found to be in equipoise. Although the most recent X-ray of record was read as positive, I decline to accord it more weight because all of the X-rays were conducted close in time. Considering all of the X-ray evidence together, I find that it is in equipoise, and does not establish the presence of pneumoconiosis.

Decision and Order at 15.

On appeal, claimant contends that the administrative law judge erred in failing to weigh an additional "positive" reading of the June 28, 2001 x-ray contained in claimant's medical records, which would "settle the tie" and establish that the June 28, 2001 x-ray was positive for pneumoconiosis. Claimant's Brief at 7. Counting the additional reading, claimant asserts the June 28, 2001 film must be considered positive for pneumoconiosis, and therefore, that he has established the existence of pneumoconiosis by a preponderance of the x-rays. Claimant also maintains that, overall, there are five positive readings of the three newly submitted x-rays, in comparison to only four negative readings, which prove that he has pneumoconiosis pursuant to Section 718.202(a)(1). We disagree.

---

[5] Dr. Barrett, a dually-qualified physician, also interpreted the July 20, 2002 film for quality purposes only. Director's Exhibit 15.

[6] Although the administrative law judge prepared a chart summarizing the correct dates of the x-ray evidence of record, she mistakenly referenced the July 2, 2002 x-ray as being dated June 2, 2002 in her discussion at Section 718.202(a)(1). Decision and Order at 15; Director's Exhibits 14, 15, 27, 35; Claimant's Exhibits 1, 5, 7; Employer's Exhibits 1, 4.

Pursuant to 20 C.F.R. §718.102(b), "[a] Chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971)." 20 C.F.R. §718.102(b). Furthermore, Section 718.102(e) states that "[e]xcept as provided in this paragraph, no chest x-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this Section and Appendix A." 20 C.F.R. §718.102(e).

Contrary to claimant's contention, Dr. Datu interpreted the June 28, 2001 x-ray as showing "mild chronic fibroemphysematous changes without other active lung disease process." Director's Exhibit 25. Because Dr. Datu did not classify the June 28, 2001 x-ay as either positive or negative for pneumoconiosis in accordance with the ILO requirements specified at Section 718.102, the administrative law judge properly did not weigh Dr. Datu's interpretation along with the ILO readings at Section 718.202(a)(1).

As the administrative law judge properly performed both a qualitative and quantitative analysis of the conflicting x-rays, taking into consideration the qualifications of the interpreting physicians' opinions, we affirm her determination that the x-ray evidence stands in equipoise as to the existence of pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Moreover, because the administrative law judge permissibly determined that the x-ray evidence was in equipoise, we affirm her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994).

Under Section 718.202(a)(4), claimant may establish the existence of pneumoconiosis "if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that [he] suffers or suffered from pneumoconiosis" as defined at 20 C.F.R. §718.201. 20 C.F.R. §718.202(a)(4). The administrative law judge correctly noted that the record contains four newly submitted medical opinions from Drs. Potter and Baker, who diagnosed that claimant has pneumoconiosis, and Drs. Jarboe and Rosenberg, who opined that claimant does not suffer from pneumoconiosis.[7] Because the

[7] In a report dated February 7, 2003, claimant's treating physician, Dr. Potter, diagnosed claimant with "[coal worker's pneumoconiosis] caused by coal dust exposure" and chronic obstructive pulmonary disease (COPD) aggravated by coal dust exposure. Claimant's Exhibit 2. Dr. Baker performed the Department of Labor examination on July 29, 2002 and opined that claimant suffered from coal workers' pneumoconiosis by x-ray, and COPD and chronic bronchitis due to the combined effects of coal dust exposure and cigarette smoking. Director's Exhibit 11. Dr. Jarboe examined claimant on July 2, 2002 and opined that the evidence did not support a diagnosis of coal workers'

administrative law judge determined that each physician provided a reasoned and documented opinion, she concluded that the medical opinion evidence was in equipoise as to the presence of absence of both clinical and legal pneumoconiosis. Decision and Order at 16-17. Therefore, she concluded that claimant failed to satisfy his burden of proving the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 17.

Claimant asserts on appeal that the administrative law judge erred in not addressing "faults" in the opinions of Drs. Jarboe and Rosenberg that demonstrate their "hostility" to the Act. Claimant's Brief at 9. We disagree. Contrary to claimant's assertion, the administrative law judge permissibly credited, as reasoned and documented, Dr. Jarboe's opinion that claimant does not have pneumoconiosis. Decision and Order at 17. Although Dr. Jarboe stated in his report dated July 3, 2002 that it was rare for coal dust exposure to result in *severe* obstructive respiratory impairment, this statement must be considered in context with his overall discussion of the objective evidence. Employer's Exhibit 1. Contrary to claimant's assertion, Dr. Jarboe specifically opined that coal dust exposure could result in obstructive respiratory impairment. Director's Exhibit 35 at 106. However, he explained in this case why he attributed claimant's severe airflow obstruction to smoking, noting that claimant's respiratory condition was responsive to bronchodilators, and therefore was not compatible with the fixed and irreversible effects of coal dust exposure. Because Dr. Jarboe did not foreclose all possibility that pneumoconiosis or coal dust exposure can cause an obstructive lung disease, his opinion is not hostile to the Act, and the administrative law judge did not err in crediting Dr. Jarboe's opinion as reasoned under Section 718.202(a)(4). *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72 (6th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988).

Similarly, Dr. Rosenberg's opinion is not hostile to the Act simply because the doctor stated that claimant's "severely" reduced FEV1 is "a physiologic pattern [that] is not what is expected to occur in relationship to coal dust exposure." Claimant's Brief at 13, citing Employer's Exhibit 2. Dr. Rosenberg specifically acknowledged that coal dust exposure could cause an obstructive respiratory condition, but he listed several objective factors present in this case, in combination with claimant's severely reduced FEV1 value, that led him to conclude that claimant did not suffer from COPD due to coal dust exposure, but rather from COPD caused by smoking. Employer's Exhibit 2. Because the

---

pneumoconiosis or any coal-dust related pulmonary or respiratory lung disease. Director's Exhibit 35. Dr. Rosenberg also opined, based on his review of medical evidence in the record, that claimant did not have clinical or legal pneumoconiosis as a result of his coal dust exposure. Employer's Exhibit 5. Dr. Rosenberg specifically attributed claimant's COPD to smoking. *Id*.

administrative law judge reasonably determined that Dr. Rosenberg's opinion was reasoned and documented as to the existence of pneumoconiosis, she was entitled to assign Dr. Rosenberg's opinion probative weight at Section 718.202(a)(4).[8] Decision and Order at 17.

Claimant also contends that the administrative law judge failed to adequately address whether employer met its burden to demonstrate the "medical acceptability" of an August 8, 2002 CT scan reading by Dr. Wiot, which evidence was referenced by Dr. Rosenberg in support of his opinion that claimant does not have pneumoconiosis.[9] Claimant notes that the administrative law judge simply accepted Dr. Rosenberg's statements that the CT scan was reliable without explaining the rationale behind her finding. We disagree.

As noted by the administrative law judge, a CT scan of claimant's chest was taken on August 8, 2002 during the course of his treatment with Dr. Potter. The CT scan was

---

[8] Claimant offers a contradictory argument that Dr. Rosenberg "did not address the issue of legal pneumoconiosis," which we also reject. Because Dr. Rosenberg specifically opined that claimant's chronic obstructive respiratory impairment was due to smoking and not coal dust exposure, his opinion was relevant to the inquiry of whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as recognized by the administrative law judge. Furthermore, we reject claimant's assertion that "Dr. Rosenberg's entire report must fail as he took on the job of the [a]dministrative [l]aw [j]udge by weighing the old evidence against the new and making his determination based on this evidence." Claimant's Brief at 10. Contrary to claimant's assertion, the evidence developed in conjunction with his initial claim is automatically included as part of the record without regard to the evidentiary limitations at 20 C.F.R. §725.414. *See* 20 C.F.R. §725.309(d) ("[a]ny evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the prior adjudication of the prior claim"). Consequently, Dr. Rosenberg's review of the record, including the prior claim evidence, does not render his opinion inadmissible, nor does it demonstrate error on the part of the administrative law judge in crediting his opinion.

[9] CT scans are considered as "other medical evidence" under the provisions of 20 C.F.R. §718.107. Under Section 718.107(b), the party submitting the test or procedure bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits. Thus, when a party seeks to admit a CT scan, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has established, as required by Section 718.107(b), that the CT scan is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b).

originally interpreted by Dr. Pampati as showing atelectatic changes in the right mid-lung near the right heart border. Director's Exhibit 26. Dr. Potter indicated in his April 11, 2006 report that he relied on the CT scan, in part, to support his diagnosis that claimant suffered from a chronic lung disease caused by coal dust exposure. Claimant's Exhibit 3. The August CT scan, along with claimant's treatment records, was admitted into the record pursuant to 20 C.F.R. §725.414.[10] Employer had the August 8, 2002 CT scan read by Dr. Wiot, who interpreted it as negative for pneumoconiosis. Dr. Wiot's negative reading was properly admitted into the record by the administrative law judge.[11] Employer's Exhibit 3. In preparing his consultative opinion, Dr. Rosenberg concluded that the x-ray evidence was negative for pneumoconiosis. He further noted that the August 8, 2002 CT scan was negative for pneumoconiosis, and opined that since "a CAT scan, in comparison to a chest X-ray is much more accurate for diagnosing coal workers' pneumoconiosis (CWP)," it was his opinion that claimant did not have roentgenographic evidence of CWP." Employer's Exhibit 2.

Although claimant challenges the administrative law judge's reliance on Dr. Rosenberg's opinion as to the medical acceptability of the CT scan evidence, asserting that she failed to specifically explain why she considered his opinion to be credible on this issue, claimant has failed to show how he was prejudiced by this potential error. Both Dr. Potter and Dr. Rosenberg based their conflicting opinions as to the existence of pneumoconiosis, in part, on their review of the CT scan evidence. Moreover, Dr. Rosenberg's opinion, that a CT scan is an accurate tool for diagnosing the presence of absence of pneumoconiosis, is not contradicted by any evidence in this record. Thus, we consider any error committed by the administrative law judge in failing to fully discuss Section 718.107(b) to be harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We therefore reject claimant's contentions with respect to Dr. Rosenberg, and affirm the administrative law judge's determination that Dr. Rosenberg provided a

[10] The regulations provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). The original CT scan interpretation by Dr. Pampati was properly admitted into the record as a part of claimant's medical treatment records. *Id*.

[11] In *Webber v. Peabody Coal Co.*, 24 BLR 1-1 (2007) (*en banc*) *aff'g on recon.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring) the Board adopted the position of the Director, Office of Workers' Compensation Programs, that "Section 718.107 is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of only one reading of each separate test or procedure undergone by claimant." *Webber*, 24 BLR at 1-11, 23 BLR at 1-135.

reasoned opinion that claimant does not have pneumoconiosis pursuant to Section 718.202(a)(4). S*ee Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because the administrative law judge rationally determined that the medical opinion evidence was in equipoise, we affirm her finding that claimant failed to satisfy his burden of proving the existence of pneumoconiosis under Section 718.202(a)(4). Decision and Order at 17; *see Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190, 1-192 (1989).

Since the administrative law judge permissibly found the newly submitted evidence of record to be insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), claimant is unable to demonstrate a change in an applicable condition of entitlement. Consequently, we affirm the administrative law judge's denial of benefits pursuant to Section 725.309.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge