BRB No. 07-0393 BLA

B.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/30/2008
	)	
SHAMROCK COAL COMPANY	)	
	)	
and	)	
	)	
JAMES RIVER COAL	)	
	)	
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Gregory F. Jacob, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5146) of Administrative Law Judge Daniel F. Solomon rendered 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). Claimant filed his first claim on July 23, 1997, and it was denied on March 2, 2000, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). *[B.C.] v. Shamrock Coal Co., Inc.*, BRB No. 99-0568 BLA (Mar. 2, 2000)(unpub.); Director's Exhibit 1 at 26, 198; February 1, 2006 Transcript at 8. Claimant filed this subsequent claim on September 3, 2003. Director's Exhibit 3. The administrative law judge credited claimant with more than ten years of coal mine employment, as stipulated by employer.[1] Decision and Order at 11. The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv).[2] Moreover, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The Director responds that the Board should reject claimant's argument that he is entitled to a new pulmonary evaluation because remand for a complete pulmonary evaluation is unnecessary. Employer responds in support of the administrative law judge's 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,

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4; Decision and Order at 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 12.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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. *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); *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 the existence of pneumoconiosis and total disability. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or total disability to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant first argues that the administrative law judge erred in finding that pneumoconiosis was not established at Section 718.202(a)(1), because there is a positive x-ray of record, and because the administrative law judge is not required to defer to the numerical superiority of the x-ray interpretations by physicians with superior qualifications. Moreover, claimant argues that the administrative law judge "selectively analyzed" the x-ray evidence. There are four classified readings of three x-rays dated October 6, 2003, February 26, 2004, and May 31, 2005.[3] Dr. Simpao, with no known radiological qualifications, interpreted the October 6, 2003 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis.[4] Director's Exhibits 13, 16. Dr. Dahhan, a B reader, interpreted the February 26, 2004 x-ray as negative for pneumoconiosis, and Dr.

[3] The record also contains two readings of x-rays dated December 28 and 29, 2005, but these x-rays cannot establish the existence of pneumoconiosis as they are unclassified. 20 C.F.R. §718.202(a)(1); Decision and Order at 5; Claimant's Exhibit 2.

[4] Dr. Barrett, a Board-certified radiologist and B reader, interpreted the October 6, 2003 x-ray for its film quality only. Director's Exhibit 14.

Broudy, a B reader, interpreted the May 31, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 3.

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to Dr. Wiot's negative reading of the October 6, 2003 x-ray, based upon Dr. Wiot's superior radiological qualifications. Decision and Order at 10. Weighing all of the interpretations together, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by chest x-ray pursuant to Section 718.202(a)(1). The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *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, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; Decision and Order at 10; Director's Exhibits 13, 16; Employer's Exhibits 1, 3. Consequently, we reject claimant's arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that he "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. As claimant raises no other arguments relevant to this issue, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(1).

Claimant also argues 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 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a drill operator and blaster. 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, 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 5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the newly submitted medical opinion evidence of record with

respect to total disability, 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) based on the new evidence. *See White*, 23 BLR at 1-6-7. Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d).

Claimant lastly argues that the Director failed to provide him with a complete, credible pulmonary evaluation, as required under the Act, because the administrative law judge concluded that Dr. Simpao's report should "be discredited (Decision, page 11) and that, as said physician failed to offer any diagnosis regarding the issue of total disability, was also unreasoned and undocumented (Decision, page 12)." Claimant's Brief at 4. The Director responds that a remand to the district director for a complete pulmonary evaluation is unnecessary. The Director states that, although Dr. Simpao's opinion diagnosing a moderate impairment is "incomplete" as to the issue of total disability, even if Dr. Simpao had fully explained that claimant's moderate impairment was totally disabling and the administrative law judge credited Dr. Simpao's opinion, claimant could not establish pneumoconiosis, because the administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Broudy and Dahhan. Director's Brief at 2. Consequently, the Director asserts that claimant cannot establish entitlement because he cannot establish the existence of pneumoconiosis, regardless of whether he can establish total disability through Dr. Simpao's opinion.

We agree with the Director, whose duty it is to ensure the proper administration of the Act, *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994), that a remand of this case to the district director for another pulmonary evaluation is unnecessary, because, as the Director asserts, even if Dr. Simpao's opinion were credited at total disability, claimant still could not establish entitlement because the administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was outweighed by the

contrary opinions of Drs. Broudy and Dahhan, whom he found better qualified,[5] and there is no other evidence in the record which would establish pneumoconiosis. Director's Exhibit 1. Thus, we agree with the Director that a remand for a complete pulmonary evaluation is unnecessary in this case, and we reject claimant's argument that he is entitled to a new pulmonary evaluation.

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[5] Claimant does not challenge the weight given to the physicians' opinions based on their qualifications.