BRB No. 08-0443 BLA

J.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED: 01/30/2009
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 of Ralph A. Romano, 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), Harlan, Kentucky, for employer/carrier.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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 (06-BLA-5027) of Administrative Law Judge Ralph A. Romano (the administrative law judge) denying benefits on a subsequent claim[1] 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 twelve years of coal mine employment based on the parties' stipulation,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203 or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, urging the Board to reject claimant's assertion that the case should be remanded to the district director for the Director to provide claimant with a complete and credible pulmonary evaluation.[3]

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[1] Claimant filed his first claim on January 3, 1995. Director's Exhibit 1. It was finally denied on September 10, 2003. *Id*. Claimant filed this claim on September 24, 2004. Director's Exhibit 3.

[2] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4. Accordingly, 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 (1989)(*en banc*).

[3] Because the administrative law judge's length of coal mine employment finding and his findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4), that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, or total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). 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 at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant initially contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of the four interpretations of two x-rays dated January 10, 2005[4] and January 11, 2005. All of the x-ray readings were negative for pneumoconiosis. Director's Exhibits 11-13, 16, 19; Employer's Exhibits 1, 5, 6. Consequently, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.[5] *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). Because it is supported by substantial evidence, we affirm the administrative law judge's

[4] Dr. Barrett, a B reader and a Board-certified radiologist, read the January 10, 2005 x-ray for quality only. Director's Exhibit 12.

[5] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 7. Thus, we reject claimant's suggestion.

finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new reports of Drs. Simpao, Broudy, and Rosenberg. Dr. Simpao opined that claimant has a mild impairment that may affect his ability to perform regular coal mining duties. Director's Exhibit 11. Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Director's Exhibit 16; Employer's Exhibits 1, 2. Lastly, Dr. Rosenberg opined that from a pulmonary perspective claimant was not disabled from performing his previous coal mining job or other similarly arduous types of labor. Employer's Exhibit 3. The administrative law judge found that the opinions of Drs. Broudy and Rosenberg outweighed Dr. Simpao's contrary opinion, because they were better reasoned. Decision and order at 13.

Claimant argues that the exertional requirements of his usual coal mine employment must be compared with a physician's assessment of his respiratory impairment and that it would be error for the administrative law judge to find that he could perform his usual coal mine employment without considering the physical requirements of such work. Because the administrative law judge rationally determined that Dr. Simpao failed to adequately explain how the underlying objective evidence supported his opinion, *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985), the administrative law judge was not required to make a comparison of Dr. Simpao's opinion with the exertional requirements of claimant's usual coal mine employment.[6] *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of his usual coal mine employment with a physician's disability assessment.

Further, because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), we reject claimant's assertion that he is totally disabled because his usual coal mine employment involved

[6] Further, because Drs. Broudy and Rosenberg opined that claimant does not have a disabling respiratory impairment, Director's Exhibit 16; Employer's Exhibits 1-3, the administrative law judge was not required to make a comparison of their opinions with the exertional requirements of claimant's usual coal mine employment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

exposure to heavy concentrations of dust on a daily basis and his respiratory condition would preclude him from being exposed to a dusty environment.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no new credible medical evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, in view of the foregoing, we affirm the administrative law judge's finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Finally, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Specifically, claimant argues that "the [administrative law judge] discredited Dr. Simpao's report because said physician failed to adequately explain the basis for his conclusions (Decision, page 10)." Claimant's Brief at 4. The Director responds that that there is no violation of the Director's duty to provide claimant with a credible examination. Director's Letter Brief at 2.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed the elements of pneumoconiosis and total disability on the Department of Labor examination form.[7] Director's Exhibit 11; 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 718.104, 725.406. On the dispositive issues of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Simpao, Broudy, and Rosenberg. Director's Exhibits 11, 16; Employer's Exhibits 1-3. Pursuant to Section 718.202(a)(4), the administrative law judge properly found that the opinions of Drs. Broudy and Rosenberg that claimant does not have coal workers' pneumoconiosis or any other chronic lung disease related to coal dust exposure outweighed Dr. Simpao's contrary opinion, because they were better reasoned.[8] *Clark v.*

[7] Dr. Simpao diagnosed coal workers' pneumoconiosis and opined that claimant has a mild impairment that may affect his ability to perform regular coal mining duties. Director's Exhibit 11.

[8] In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge stated, "I find Drs. Broudy and Rosenberg's reasoning and explanation in support of their conclusions more complete and thorough than that of Dr.

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*). Similarly, pursuant to Section 718.204(b)(2)(iv), the administrative law judge properly found that the opinions of Drs. Broudy and Rosenberg that claimant does not have a disabling respiratory impairment outweighed Dr. Simpao's opinion, because they were better reasoned.[9] *Id*. We, therefore, agree with the Director that the administrative law judge found that Dr. Simpao's opinion regarding the issues of pneumoconiosis and total disability were outweighed by more persuasive evidence, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to claimant. *Cf. Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

Simpao." Decision and Order at 10. The administrative law judge also stated that "[t]hose two physicians [Drs. Broudy and Rosenberg] better explained how the evidence they developed and reviewed supported their conclusions." *Id*. at 10. By contrast, the administrative law judge stated that "Dr. Simpao's opinion does not explain why [c]laimant is not exhibiting a reduced vital capacity, although in his opinion, [claimant] has pneumoconiosis." *Id*. at 9-10. Further, the administrative law judge stated that "Dr. Simpao finds pneumoconiosis without fully explaining what his opinion is based on." *Id*. at 10.

[9] In considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated, "I find that Drs. Rosenberg and Broudy's opinions are well-documented and reasoned as they are clearly and logically based on clinical findings, such as physical examinations, pulmonary function tests, and arterial blood gas studies." Decision and Order at 13. The administrative law judge also stated that "Dr. Simpao's opinion is not as well-reasoned because the doctor relies on non-qualifying pulmonary function studies and arterial blood gas studies and concluded from them that [c]laimant is totally disabled." *Id*.

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