BRB No. 08-0466 BLA

| | | |
|---|---|---|
| K.A. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MOUNTAIN CLAY, INCORPORATED | ) | DATE ISSUED: 01/29/2009 |
| | ) | |
| 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 Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-06016) of Chief Administrative Law Judge John M. Vittone 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). This case involves a subsequent claim filed on October 3, 2005.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with twenty-one years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to 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 the new x-ray evidence and medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (4), and also erred in finding the new medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief unless requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's

[1] Claimant's prior claim for benefits, filed on October 2, 2001, was denied by the district director on March 18, 2003, who found that the evidence of record failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. In addition, the district director denied claimant's request for modification in a Proposed Decision and Order issued on September 12, 2003, finding that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Director's Exhibit 1. Claimant took no further action until filing the current claim on October 3, 2005. Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order must be affirmed if it is rational, supported by substantial evidence, 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 (1965).

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

If a miner files an application 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 of these elements of entitlement to proceed with his claim. 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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three new x-rays dated October 21, 2005, December 9, 2005 and December 20, 2006. Dr. Westerfield, a B reader, and Dr. Wheeler, a B reader and Board-certified radiologist, read the October 21, 2005 x-ray as negative for pneumoconiosis.[4] Director's Exhibits 15, 19. Dr. Broudy and Dr. Dahhan, both of whom are B readers, read the December 9, 2005 and December 20, 2006 x-rays, respectively, as negative for pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 1. Finding that none of the x-rays was read as positive for pneumoconiosis, the administrative law judge found that

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

[4] Dr. Barrett, a B reader and Board-certified radiologist, read the October 21, 2005 x-ray for quality purposes only. Director's Exhibit 16.

the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 6. Since the new x-ray evidence did not include any positive interpretations, we affirm the administrative law judge's finding that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we reject claimant's argument 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 2-3.

Claimant also argues that the administrative law judge erred in finding that the new medical opinions did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In challenging the administrative law judge's findings, claimant merely sets forth the general standards by which an administrative law judge should weigh the relevant medical evidence, such as the principle that an administrative law judge may not discredit a medical opinion merely because it is based on a positive x-ray reading which is contrary to the administrative law judge's findings; or, that the administrative law judge may not substitute his own interpretation of the medical data for that of the physician. Claimant's Brief at 4. In addition, claimant contends that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data relied on by the physician. Claimant's Brief at 4. Claimant has not set forth a meritorious argument.

Initially, the administrative law judge, within a proper exercise of his discretion, found the opinion of Dr. Norris, diagnosing chronic shortness of breath secondary to black lung, insufficient to establish the existence of pneumoconiosis. The administrative law judge reasonably found that this opinion is not well-reasoned or documented because Dr. Norris, claimant's treating physician, did not provide any underlying documentation or rationale for her opinion, nor does the record contain any office notes documenting any ongoing treatment or examinations and objective testing administered during the treatment history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003) (opinions of treating physicians should be given the deference they deserve based upon their power to persuade); Decision and Order at 6; Director's Exhibit 14. However, the administrative law judge reasonably found that the opinions of Drs. Simpao, Broudy and Dahhan, finding no evidence of pneumoconiosis, were well-reasoned and documented because the physicians provided the underlying documentation and rationale that supported their conclusions. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985);

Decision and Order at 7; Director's Exhibits 15, 17, 20, 22; Employer's Exhibit 1. Moreover, the administrative law judge correctly determined that the opinions of these doctors are insufficient to establish pneumoconiosis, because they found no evidence of pneumoconiosis and found that claimant did not suffer from a respiratory or pulmonary impairment due to claimant's coal dust exposure. 20 C.F.R. §718.201; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 7; Director's Exhibits 15, 17, 20, 22; Employer's Exhibit 1. As the administrative law judge correctly found that the record contains no credible, affirmative evidence of pneumoconiosis, claimant's contention that the administrative law judge erred in substituting his interpretation of the medical evidence for that of a physician lacks merit. Consequently, since claimant does not otherwise allege any specific errors in the administrative law judge's weighing of the new evidence in this case, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Norris, Simpao, Broudy and Dahhan, finding that the preponderance of this evidence is insufficient to establish a totally disabling respiratory impairment. The administrative law judge found that Dr. Norris's opinion was insufficient to establish total disability, as the opinion does not specifically address the issue of disability and Dr. Norris did not provide any underlying documentation or rationale to support her statement that claimant suffers from chronic shortness of breath; has a component of chronic obstructive pulmonary disease (COPD); and uses an inhaler. Decision and Order at 7. The administrative law judge then found that the remaining new medical opinions are insufficient to establish total disability because none of the physicians, Drs. Simpao, Broudy or Dahhan, concluded that claimant suffers from a respiratory or pulmonary impairment, but rather, they support a finding that claimant is capable, from a respiratory standpoint, of performing his usual coal mine employment. Decision and Order at 8. Consequently, the administrative law judge found the newly submitted medical opinions insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

In challenging the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv), claimant generally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability. Without referring to any specific medical opinion that was considered by the administrative law judge, claimant contends that an administrative law judge must consider the physical requirements of a claimant's usual coal mine employment in determining whether claimant is totally disabled. Claimant's Brief at 5-6; citing *Cornett v. Benham Coal, Inc.*,

227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's argument is without merit.

Contrary to claimant's suggestion, medical opinions such as those of Drs. Simpao, Broudy and Dahhan, which diagnose no impairment, need not be discussed in terms of claimant's former job duties.[5] *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge rationally found that Dr. Norris's opinion is insufficient to support a finding of total disability as she did not specifically address the issue of disability, or provide any underlying documentation or rationale for her conclusion that claimant has chronic shortness of breath and a component of COPD.[6] *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 7; Director's Exhibit 14. Consequently, the administrative law judge rationally found that none of the new medical opinions of record supports a finding of total disability, because they do not diagnose a pulmonary impairment or disability that would prevent claimant from performing his usual coal mine employment. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order at 8; Director's Exhibits 15, 17, 20, 22; Employer's Exhibit 1. We, therefore, affirm his finding that, based on a preponderance of the newly submitted medical opinion evidence, claimant has not established total disability pursuant to Section 718.204(b)(2)(iv).

We also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and "a considerable amount of time has passed since the initial diagnosis…." Claimant's Brief at 6. An administrative law judge's findings on the issue of total disability must be based on the evidence of record, rather than general principles regarding the nature of pneumoconiosis. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2), we affirm his

[5] Dr. Simpao opined that claimant has no pulmonary impairment and that he is not totally disabled from his pulmonary status. Director's Exhibits 15, 20. Dr. Broudy opined that there is no evidence of a significant pulmonary or respiratory impairment, and that claimant retains the respiratory capacity to perform the work of an underground coal miner. Director's Exhibits 17, 22. Dr. Dahhan concluded that he finds no evidence of a pulmonary impairment and/or disability caused by, related to, or aggravated by claimant's coal dust exposure. Employer's Exhibit 1.

[6] Dr. Norris stated that claimant suffers from chronic shortness of breath and that he has a component of chronic obstructive pulmonary disease that requires use of an inhaler. Director's Exhibit 14.

finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 8; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

Because we affirm the administrative law judge's determination that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), claimant has failed to demonstrate that one of the applicable conditions of entitlement has changed since the denial of his prior claim, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

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