BRB No. 04-0772 BLA

DONALD E. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 07/07/2005
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5297) of Administrative Law Judge Alice M. Craft 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). The administrative law judge credited claimant with at least twenty-four years of coal mine employment and noted that this case involves a subsequent claim. The administrative law judge considered the newly submitted evidence and determined that it was not sufficient to establish that one of the applicable conditions of entitlement has changed since the denial of the previous claim.[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide claimant with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, asserting that he has satisfied his statutory duty to provide claimant with a complete pulmonary evaluation.[2]

Since this case involves a subsequent claim pursuant to 20 C.F.R. §725.309, it is necessary to consider the basis for the denial of the prior claim. In a Decision and Order Denying Benefits, issued on February 25, 1998 in the miner's second claim,

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[1] Claimant filed an application for benefits on February 10, 1987, which was denied by the district director on July 21, 1987, on the grounds that the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment, or total disability due to pneumoconiosis. Director's Exhibit 1. More than one year later, on March 6, 1996, claimant filed a new application for benefits. The case was considered by Administrative Law Judge Thomas F. Phalen, Jr., who issued his Decision and Order Denying Benefits on February 25, 1998. Judge Phalen found that claimant did not establish a material change in conditions, and therefore, he denied benefits. Director's Exhibit 1. Claimant filed the current application for benefits on February 12, 2001. Director's Exhibit 3.

[2] No party has challenged the administrative law judge's finding of at least twenty-four years of coal mine employment, nor her statement that the results of all of the newly submitted pulmonary function studies and blood gas studies are non-qualifying pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Because these finding have not been challenged on appeal, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Administrative Law Judge Thomas F. Phalen, Jr., found that the newly submitted evidence did not establish the existence of pneumoconiosis or total disability. Consequently, Judge Phalen determined that claimant had not established a material change in conditions. 20 C.F.R. §725.309 (2000). In the instant claim, the administrative law judge considered the evidence submitted since the prior denial and found it insufficient to establish the existence of pneumoconiosis or total disability. The administrative law judge therefore determined that claimant has not established one of the applicable conditions of entitlement pursuant to Section 725.309. Accordingly, the administrative law judge denied 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that the administrative law judge improperly relied on the qualifications of the physicians interpreting the x-rays as negative and the numerical superiority of the negative x-ray interpretations. The administrative law judge considered each of the newly submitted x-rays independently, evaluating both the quantity and the quality of the interpretations, to determine whether each x-ray supports a finding of pneumoconiosis.[3] Director's Exhibits 8, 9, 29, 32; Employer's Exhibits 4, 5. The administrative law judge found that each x-ray was negative for pneumoconiosis, and therefore found the newly submitted x-ray evidence, as a whole, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 12. Since the administrative law judge has rationally considered both the quality

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[3] The newly submitted evidence includes eight interpretations of four x-rays. Dr. Baker, who is not a B-reader, read the March 10, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 9, while Dr. Wiot, a B-reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis, Director's Exhibit 32. The March 21, 2001 x-ray was read by Dr. Hussain, who is not a B-reader or a Board-certified radiologist, as positive for pneumoconiosis, Director's Exhibit 8, and was read by Dr. Wiot (dually qualified) as negative for pneumoconiosis, Director's Exhibit 32. Dr. Sargent read the March 21, 2001 film for quality only. Director's Exhibit 8. Dr. Fino, a B-reader, and Dr. Wiot (dually qualified), both read the May 4, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 29; Employer's Exhibit 4. The June 18, 2003 x-ray was read by Dr. Rosenberg, a B-reader, as negative for pneumoconiosis. Employer's Exhibit 5.

and the quantity of the evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Railroad 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).

Turning to the administrative law judge's evaluation of the newly submitted medical opinion evidence, claimant contends that the administrative law judge erred in rejecting Dr. Baker's opinion. The administrative law judge reviewed the medical opinions of Drs. Baker and Hussain, Director's Exhibits 8, 9, who diagnosed pneumoconiosis, and the opinions of Drs. Fino and Rosenberg, Director's Exhibit 35; Employer's Exhibits 4, 5, 8, who opined that claimant does not have pneumoconiosis. The administrative law judge found all of these opinions to be documented and reasoned. The administrative law judge found that both Dr. Fino and Dr. Rosenberg have excellent credentials in the field of pulmonary disease, and the administrative law judge found that the reasoning provided by these physicians supports their conclusions more thoroughly than the reasoning of Drs. Baker and Hussain. The administrative law judge also found the opinions of Drs. Fino and Rosenberg[5] to be "in better accord both with the evidence

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[4] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for this contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence without engaging in a selective analysis. Decision and Order at 12. We therefore reject claimant's suggestion.

[5] Dr. Fino examined claimant and considered his symptoms, his personal and employment history, a CT scan and a negative x-ray interpretation, as well as the non-qualifying results of claimant's pulmonary function study and blood gas study. Dr. Fino opined that there is insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis, and stated that claimant does not suffer from an occupationally acquired pulmonary condition. Employer's Exhibit 4; Director's Exhibit 35. Dr. Rosenberg examined claimant and reviewed his medical records. Dr. Rosenberg considered claimant's personal and work histories, his symptoms and an EKG, as well as the negative x-ray reading and the non-qualifying results of claimant's pulmonary function study and blood gas study. Dr. Rosenberg opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibits 5, 8. Dr. Baker examined claimant and considered his symptoms, his personal and employment history, and a positive x-ray interpretation, as well as the non-qualifying results of claimant's pulmonary function study and blood gas study. Dr. Baker diagnosed coal workers' pneumoconiosis. Director's Exhibit 9. Dr. Hussain examined claimant and considered his symptoms, his

underlying their opinions and the overall weight of the medical evidence of record." Decision and Order at 13. The administrative law judge therefore accorded greater weight to the opinions of Drs. Fino and Rosenberg.

We affirm the administrative law judge's finding that the opinions of Drs. Fino and Rosenberg are entitled to greater weight, as she rationally found that these opinions are better supported by the objective evidence of record, *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985), and by their underlying documentation, *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge, within a proper exercise of her discretion as the trier-of-fact, rationally determined that the opinions of Drs. Fino and Rosenberg are better reasoned than the contrary opinions of Drs. Baker and Hussain. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant also contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Virginia. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Dr. Baker opined that because a person who develops pneumoconiosis should limit their further exposure to the offending agent, in this case, coal dust, it would imply that claimant is 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 9. Because a physician's recommendation against further coal dust exposure is insufficient to establish a totally

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personal and employment history, and a positive x-ray interpretation, as well as the non-qualifying results of claimant's pulmonary function study and blood gas study. Dr. Hussain diagnosed an occupational lung disease caused by dust exposure. Director's Exhibit 8.

disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability. Decision and Order at 14. Dr. Baker also opined that:

> Patient has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on the FEV1 and vital capacity being greater than 80% of predicted.

Director's Exhibit 9. Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Further, inasmuch as we hold that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

In weighing the medical opinion evidence regarding total disability, the administrative law judge accorded greater weight to the opinions of Dr. Fino, that claimant has no respiratory impairment, Employer's Exhibit 4, and Dr. Rosenberg, that claimant has no restriction from a functional perspective, Employer's Exhibit 5, as she found these opinions consistent with the results of the objective testing. We hold that the administrative law judge permissibly accorded these opinions greater weight because they are better supported by the objective medical evidence of record. *See Wetzel*, 8 BLR 1-139; *Pastva*, 7 BLR 1-829. We therefore affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as this finding is supported by substantial evidence.

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with her assessment that the claimant was not totally disabled." Claimant's Brief at 9. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further.

Claimant also asserts that the Director has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant alleges that the administrative law judge found that Dr. Hussain's opinion does not provide sufficient reasoning in support of his conclusions and that his opinion is "inconsistent" with the testing. The Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner, pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform his pulmonary examination. Dr. Hussain diagnosed an occupational lung disease caused by dust exposure in claimant's coal mine employment and opined that claimant suffers from a moderate impairment. Director's Exhibit 8. Dr. Hussain also opined that claimant did not have the respiratory capacity to perform comparable work in a dust free environment. Director's Exhibit 8.

The administrative law judge found that all of the medical opinions of record were documented and reasoned. Decision and Order at 13. In determining whether the newly submitted medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge gave greater weight to the opinions of Drs. Fino and Rosenberg, Director's Exhibit 35; Employer's Exhibits 4, 5, 8, who opined that claimant does not have pneumoconiosis, than she gave to Dr. Hussain's diagnosis of pneumoconiosis, Director's Exhibit 8. Decision and Order at 13; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Lucostic*, 8 BLR 1-46; *Kuchwara*, 7 BLR 1-167. In evaluating the newly submitted medical opinion evidence regarding total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge accorded greater weight to the opinions of Drs. Fino and Rosenberg, who found no impairment, Director's Exhibit 35; Employer's Exhibits 4, 5, 8, over the opinion of Dr. Hussain, Director's Exhibit 8, who opined that claimant is unable to perform the work of a coal miner. Decision and Order at 14; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90, n.1 (1986); *Wetzel*, 8 BLR 1-139; *Pastva*, 7 BLR 1-829. Because the administrative law judge did not find that Dr. Hussain's opinion lacks credibility, but instead found it outweighed by the other newly submitted medical opinions, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.

Because claimant raises no other assertions on appeal, we affirm the administrative law judge's finding that the newly submitted evidence does not establish a change in one of the applicable conditions of entitlement pursuant to Section 725.309. We, therefore, affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge