BRB No. 04-0805 BLA

MARSHALL PEACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 07/28/2005
Employer-Respondent	)	
	)	
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Barry H. Joyner (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5348) of Administrative Law Judge Mollie W. Neal 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). The administrative law judge found, and the

parties stipulated to, nineteen years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 7. In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an element of entitlement previously adjudicated against claimant. The administrative law judge, therefore, determined that claimant failed to establish a change in one of the applicable conditions of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203 and 718.204(b), (c). Claimant also contends that the Director failed to provide him with a complete, credible, pulmonary evaluation pursuant to 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that he satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation pursuant to 20 C.F.R. §725.406.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from 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. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] Claimant filed his first claim for benefits on September 1, 1995. Employer's Exhibit 1. That claim was denied by Administrative Law Judge Daniel J. Roketenetz on February 24, 1998, because claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. The Benefits Review Board (the Board) affirmed Judge Roketenetz's denial of benefits on April 27, 1999, based on claimant's failure to establish the existence of pneumoconiosis. Employer's Exhibit 1. Claimant filed this subsequent claim on May 29, 2001, and benefits were awarded by the district director in a Proposed Decision and Order dated October 30, 2002. Director's Exhibits 2, 28. Employer requested a formal hearing on November 22, 2002, and the case was transferred to the Office of the Administrative Law Judges on January 9, 2003. Director's Exhibits 29, 33. A hearing was held on September 10, 2003.

As discussed, *supra*, the instant claim, filed May 29, 2001, Director's Exhibit 2, constitutes a subsequent claim under the revised regulation at 20 C.F.R. §725.309(d). As such, this claim must be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since Administrative Law Judge Daniel J. Roketenetz's February 24, 1998, denial of benefits became final. 20 C.F.R. §725.309(d). While Judge Roketenetz denied benefits based on claimant's failure to establish the existence of pneumoconiosis and total respiratory or pulmonary disability, *see* Director's Exhibit 1, the Board affirmed his denial of benefits based on claimant's failure to establish the existence of pneumoconiosis. *Peace v. Andalex Resources, Inc.*, BRB No. 98-0789 BLA (Apr. 27, 1999)(unpublished). Thus, claimant can meet his burden at 20 C.F.R. §725.309(d) by showing the existence of pneumoconiosis.

Claimant first contends that the administrative law judge erred in her weighing of the newly submitted x-ray evidence.[2] There are five newly submitted readings of four x-rays dated July 11, 2001, August 24, 2001, April 10, 2002 and March 20, 2003. The x-rays dated July 11, 2001 and August 24, 2001, were read as positive by Dr. Baker and Dr. Hussain, respectively, physicians with no special radiological qualifications. Director's Exhibits 10, 21. The administrative law judge considered the August 24, 2001 x-ray to be negative as it was reread as negative by Dr. Poulus, a physician dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 27. The April 10, 2002 x-ray was read as negative by Dr. Broudy, a B reader. Director's Exhibit 27. The March 20, 2003 x-ray was read as negative by Dr. Westerfield, a B reader. Employer's Exhibit 1. Claimant argues that the administrative law judge, in finding that the x-ray evidence did not establish the existence of pneumoconiosis, erroneously "relied almost solely on the qualifications of the physicians" and "placed substantial weight on the numerical superiority of x-ray interpretations." Claimant's Brief at 3.

Claimant's contentions lack merit. Considering the newly submitted x-ray evidence, the administrative law judge properly accorded greater weight to the negative readings by better qualified physicians than to the positive readings of physicians who hold no special radiological qualifications. Decision and Order at 9; 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co.,* 22 BLR 1-1 (1999) (*en banc)*; *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). Further, claimant's contention that the administrative law judge selectively analyzed the newly submitted x-ray evidence is refuted by the record. *See* discussion, *supra*. Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray evidence failed to

[2] Claimant specifies no error in the administrative law judge's findings at 20 C.F.R. §718.202(a)(2) and (a)(3). We thus affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(2) and (a)(3). *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

establish the existence of pneumoconiosis at Section 718.202(a)(1). *See White v. New White Coal Co.,* 23 BLR 1-1 (2004).

Claimant next contends that the administrative law judge erred in weighing the newly submitted medical opinions. The newly submitted medical opinions are as follows: By report dated July 11, 2001, Dr. Baker diagnosed pneumoconiosis due to coal dust exposure based on the x-ray dated July 11, 2001 and claimant's history of coal dust exposure. Director's Exhibit 21. By report dated August 24, 2001, Dr. Hussain diagnosed pneumoconiosis based on x-ray dated August 24, 2001 and claimant's history of coal dust exposure. Director's Exhibit 10; Employer's Exhibit 4. By report dated April 10, 2002, Dr. Broudy found no evidence of pneumoconiosis and diagnosed chronic airways disease due to smoking. Director's Exhibit 24. By report dated March 20, 2003, Dr. Westerfield found no occupational lung disease and diagnosed a pulmonary impairment due to chronic obstructive pulmonary disease caused by smoking. Employer's Exhibits 1, 2; Claimant's Exhibit 2.

Claimant specifically argues that Dr. Baker's opinion is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's contention lacks merit. The administrative law judge accorded less weight to the opinion of Dr. Baker as the physician based his diagnosis of pneumoconiosis on a positive x-ray and claimant's history of coal dust exposure, without providing any other rationale for his diagnosis. Specifically, the administrative law judge found that Dr. Baker failed to explain "how the miner's slightly diminished breath sounds were consistent with his diagnosis." Decision and Order at 10. Thus, contrary to claimant's contention, the administrative law judge rationally accorded less weight to the opinion of Dr. Baker. *See Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Risher v. Director, OWCP,* 15 BLR 2-186 (8th Cir. 1991) (a fact finder "may disregard a medical opinion that does not adequately explain the basis for its conclusion"); *White*, 23 BLR at 1-1; *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.,* 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.,* 8 BLR 1-405 (1985); *King v. Consolidation Coal Co.,* 8 BLR 1-262 (1985); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (explaining that in making credibility determination, the administrative law judge "must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based") (footnote omitted). Moreover, the administrative law judge rationally accorded greater weight to the opinions of Drs. Broudy and Westerfield as he found them to be better reasoned,

documented, and supported by the objective evidence of record.[3] Decision and Order at 10; *Rowe*, 710 F.2d at 251, 5 BLR at 2-99; *Clark,* 12 BLR at 1-149; *Fields,* 10 BLR at 1-19. Accordingly, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Lastly, claimant contends that, as the administrative law judge accorded less weight to Dr. Hussain's opinion, the Director thereby failed to provide claimant with a credible pulmonary evaluation.[4] Claimant's contention lacks merit. In order to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP,* 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP,* 14 BLR 1-98 (1990) (*en banc*), the Director must provide claimant with a medical opinion that addresses all of the elements of entitlement. *Cline v. Director, OWCP,* 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Hodges v. Bethenergy Mines, Inc.,* 18 BLR 1-84 (1994). The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman*, 745 F.2d at 1162, 7 BLR at 2-25. In the instant case, claimant was examined by Dr. Hussain at the Director's request. Dr. Hussain's opinion addresses all of the elements of entitlement. *See* Director's Exhibit 10; Employer's Exhibit 4. The administrative law judge found that Dr. Hussain's opinion was not fully explained, and also noted that the positive x-ray interpretation upon which Dr. Hussain relied, was reread as negative by a dually qualified physician. Decision and Order at 9, 10; *see Winters v. Director, OWCP,* 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge determined that Dr. Hussain's opinion was outweighed by the opinions of Drs. Westerfield and Broudy, employer's medical experts, as they were better reasoned, documented and supported by the medical evidence. Decision and Order at 10; *Rowe*, 710 F.2d at 251, 5 BLR at 2-99; *Clark,* 12 BLR at 1-149; *Fields,* 10 BLR at 1-19. Thus, rather than giving no weight to Dr. Hussain's opinion, the administrative law judge gave it less weight. Accordingly, we hold that Dr. Hussain's opinion constitutes a complete and credible pulmonary evaluation, and meets the Director's obligation under the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.202(a), 718.203, 718.204(c); *see Newman*, 745 F.2d at 1166, 7 BLR at 2-31.

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[3] The administrative law judge found that Dr. Westerfield considered all the x-ray evidence and explained that claimant's "presenting symptoms were consistent with lung disease caused by smoking," Decision and Order at 10, and that Dr. Broudy reviewed Dr. Hussain's report in making his determination.

[4] Claimant does not allege any error in the administrative law judge's weighing of Dr. Hussain's report at 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we hold that the administrative law judge properly found that the newly submitted evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Further, the Board's decision in *Peace v. Andalex Resources, Inc.*, BRB No. 98-0789 BLA (Apr. 27, 1999)(unpublished), demonstrates that the old evidence is insufficient to establish the existence of pneumoconiosis.[5] The totality of the evidence of record is, therefore, insufficient to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718.[6] Therefore, an award of benefits on the merits of this case is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). We thus affirm the administrative law judge's denial of benefits in the instant claim based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

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[5] With regard to the previously submitted evidence, only four of the thirty x-ray readings are positive for pneumoconiosis, with only two of the positive readings being rendered by physicians who are B readers. Director's Exhibits 21-24. Judge Roketenetz rationally found that the previously submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) based on the preponderance of negative readings by physicians with superior radiological qualifications, including six physicians who are dually qualified as B readers and Board-certified radiologists. *Peace v. Andalex Resources, Inc.*, BRB No. 98-0789 BLA (Apr. 27, 1999)(unpublished), slip op. at 3; *Staton v. Norfolk & Western Railway 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). Further, there is no biopsy evidence of record and the presumptions referred to in 20 C.F.R. §718.202(a)(3) are inapplicable in this case. 20 C.F.R. §718.202(a)(2), (a)(3). With regard to the previously submitted medical opinions, substantial evidence in the record supports Judge Roketenetz's finding that the opinions by Drs. Anderson, Myers, Baker and Vaezy were essentially restatements of the physicians' x-ray readings and thus, were insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Peace,* slip op. at 4; *Worhach v. Director, OWCP,* 17 BLR 1-105, 1-110 (1993).

[6] Any error in the administrative law judge's failure to address the issue of whether the newly submitted evidence establishes total disability, and thus a change in an applicable condition of entitlement at 20 C.F.R. §725.309 is harmless. Even if claimant were to establish total disability at 20 C.F.R. §718.204(b), he could not establish total disability due to pneumoconiosis, an essential element of entitlement, given his failure to establish the existence of the disease. *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith,* 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Therefore, a remand of the case for the administrative law judge to consider the issue of total disability would be futile. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge