BRB No. 05-0155 BLA

R.J. BEGLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 07/07/2005
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-6093) of Administrative Law Judge Daniel J. Roketenetz 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). Based on the date of filing, February 6, 2001, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c), and that claimant failed, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established. Claimant also argues, in light of the administrative law judge's failure to credit the opinion of Dr. Hussain on the issue of pneumoconiosis, who provided an evaluation of claimant on behalf of the Director, Office of Workers' Compensation Programs (the Director), that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required under the Act. 30 U.S.C. §923(b). Thus, claimant contends that he either be awarded benefits or that the case be remanded to provide him a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Employer contends that the evidence failed to establish the existence of pneumoconiosis and total respiratory disability, and that claimant was provided a complete, credible pulmonary evaluation. The Director responds, urging affirmance of the administrative law judge's denial of benefits as the evidence of record does not establish a totally disabling respiratory impairment. The Director also argues that claimant was provided a complete, credible pulmonary evaluation on the issue of pneumoconiosis as required. Specifically, the Director contends that claimant misconstrues the Director's obligation under the Act; arguing that he is only required to

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[1] Claimant filed an earlier application for benefits on July 23, 1987. That claim was denied by the district director on December 16, 1987 because claimant failed to establish any of the required elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 24, 1994, which was denied by Administrative Law Judge J. Michael O'Neill in a Decision and Order issued on July 29, 1996, as claimant's newly submitted evidence did not establish any necessary element of entitlement, thereby precluding a finding of a material change in condition pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibit 1. On appeal, the Board affirmed the denial of benefits. *Begley v. Whitaker Coal Corp.*, BRB No. 96-1454 BLA (Jan. 23, 1997) (unpub.).

provide claimant with a complete, credible pulmonary evaluation, not a dispositive one, and that the administrative law judge's decision finding other opinions of record more persuasive on the existence of pneumoconiosis than Dr. Hussain's does not mean that he has failed to fulfill his statutory obligation of providing claimant with a complete, credible evaluation.

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 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 prove 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. §§718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge "need not defer to a doctor with superior qualifications" and "need not accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further suggests that the administrative law judge "may" have improperly "selectively analyzed" the x-ray evidence of record. Claimant's Brief at 3. We find no merit in these assertions, however, and hold that the administrative law judge rationally credited the greater number of negative readings from those physicians with specialized qualifications in the field of radiology. Decision and Order at 6-8; Employer's Exhibits 3, 5; Director's Exhibits 9, 10, 25; 20 C.F.R. §718.202(a)(1); *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. 1995); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).[2] This determination is supported by the record since

[2] Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

all of the negative interpretations were submitted by physicians who were either Board-certified radiologists, or B-readers, while the single positive reading was interpreted by a physician with no specialized radiological qualifications.[3] Employer's Exhibits 3, 5; Director's Exhibits 9, 10, 25. Further, claimant points to no evidence which supports his suggestion that the administrative law judge selectively analyzed the x-ray evidence of record. *See Cox v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge's failure to credit Dr. Hussain's opinion, diagnosing the existence of pneumoconiosis, means that the Director has failed to satisfy his obligation to provide claimant with a complete, credible pulmonary evaluation. Section 413(b) of the Act requires the director to provide claimant with a complete, credible, pulmonary evaluation which addresses each required element of entitlement, thereby affording claimant the opportunity to substantiate his claim. 30 U.S.C. §923(b). Dr. Hussain's opinion addresses the requisite elements of entitlement, including the existence of pneumoconiosis. The administrative law judge, however, found Dr. Hussain's opinion, diagnosing the existence of pneumoconiosis, to be less reliable than the opinions of Drs. Rosenberg and Dahhan, who found no pneumoconiosis, because his diagnosis of clinical pneumoconiosis was based solely on x-ray and history of coal dust exposure and his diagnosis of chronic obstructive pulmonary disease (copd) was conclusory, unreasoned, and unclear as to the etiology of the copd while the opinions of Drs. Rosenberg and Dahhan that claimant did not have pneumoconiosis were better supported by their underlying documentation. This was rational. Director's Exhibit 9; Employer's Exhibits 3, 5, 6; Decision and Order at 9-12; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-8 (1993); *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Accordingly, because Dr. Hussain did address the existence of pneumoconiosis but the administrative law judge properly found his opinion as to the existence of pneumoconiosis less reliable than the opinions of Drs. Rosenberg and Dahhan, we agree with the Director that claimant fulfilled his statutory

[3] A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C).

obligation of providing claimant with a complete, credible pulmonary evaluation. *See Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1994). We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis has not been established at Section 718.202(a)(4).

Likewise, we reject claimant's contention that the evidence establishes total disability pursuant to Section 718.204(b). Considering the opinions of Drs. Hussain, Rosenberg, and Dahhan along with the non-qualifying pulmonary function and blood gas studies, the administrative law judge properly found that the evidence failed to establish total disability. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-6 (2004); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). Likewise, contrary to claimant's argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant to determining the miner's ability to perform comparable and gainful work, not to establishing whether claimant is totally disabled from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(2)(iv); *White*, 23 BLR at 1-6-7; *Fields*, 10 BLR 1-19. Nor, contrary to claimant's assertion, can total disability be presumed on the basis of a diagnosis of simple pneumoconiosis. *See* Claimant's Brief at 4-6; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *White*, 23 BLR 1-7 n.8. Accordingly substantial evidence supports the administrative law judge's finding that the medical opinion evidence failed to establish total respiratory disability. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish the presence of a totally disabling respiratory impairment, as well as his finding that claimant failed to establish a change in an applicable element of entitlement pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[4]

[4] The administrative law judge's findings that the newly submitted evidence of record failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues decision to affirm the administrative law judge's decision denying benefits. I would hold that claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director, Office of Workers' Compensation Programs, (the Director) to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[5] In order to provide claimant with a complete 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 a medical opinion that addresses all of the elements of entitlement credibly. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, the administrative law judge found that Dr. Hussain's opinion, the opinion provided claimant by the Director, regarding the existence of pneumoconiosis, was "neither well-reasoned nor well-documented," Decision and Order at 11. This opinion

[5] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

cannot, therefore, constitute evidence of a credible pulmonary evaluation. *Newman*, 745 F.2d at 1166, 7 BLR 2-31; *Hodges*, 18 BLR at 1-88, n.3; *Pettry*, 14 BLR 1-100. Accordingly, this case must be remanded to the district director to provide claimant with a complete, credible pulmonary evaluation.

Further, regarding the issue of total disability, as claimant contends, the administrative law judge did not compare the exertional requirements of claimant's usual coal mine employment with the physicians' assessment of respiratory impairment. Dr. Hussain diagnosed a moderate pulmonary impairment; he also stated that claimant retained the pulmonary capacity to perform his prior coal mine work. The administrative law judge listed claimant's jobs during his coal mine employment as: running a tram motor; joy loader; shooting coal; running a bolt machine; scoops, shuttle car and helping with the "miner" and cutting machines, at the face of the mine. Decision and Order at 3; Hearing Transcript at 13-14. Claimant testified that his work involved manual type work, heavy lifting, carrying, pushing, pulling and tugging. Hearing Transcript at 15. Although the administrative law judge noted the types of jobs claimant performed, the administrative law judge never acknowledged or discussed the exertional requirements of those jobs, *i.e.*, whether they required mild, moderate or heavy exertion. Thus, the administrative law judge never determined whether Dr. Hussain's finding of a "moderate" pulmonary impairment precluded claimant from performing the exertional duties of his usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (even a "mild" respiratory impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of the miner's usual coal mine employment). Further, Dr. Hussain's finding that claimant retained the respiratory capacity to do his prior coal mine work is insufficient to preclude a finding of total disability since Dr. Hussain did not discuss the exertional requirements of claimant's usual coal mine employment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124 (administrative law judge must consider whether doctors have any knowledge of the exertional requirements of claimant's work before crediting their opinions that he can do that work). In light of the holding in *Cornett*, therefore, I would vacate the administrative law judge's finding that claimant failed to establish total disability. On remand, the administrative law judge must compare the "exertional" requirements of claimant's usual coal mine employment with Dr. Hussain's finding of a "moderate" pulmonary impairment.

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BETTY JEAN HALL
Administrative Appeals Judge