BRB No. 05-0299 BLA

B. G. LOVINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	
	)	DATE ISSUED: 07/29/2005
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson), Hazard, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5516) of Administrative Law Judge Joseph E. Kane 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).[1] The administrative law judge credited claimant with twenty-four years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 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 his analysis of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant argues further that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly denied benefits and that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.[3]

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

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[1] Claimant's initial application for benefits, filed on August 28, 1991, was finally denied on January 28, 1992 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed his current application for benefits on March 15, 2001. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 15. 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, 1-202 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has twenty-four years of coal mine employment, and did not establish the existence of pneumoconiosis or that he is totally disabled, pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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); *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)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted accurately that none of the four readings of two new x-rays was positive for the existence of pneumoconiosis. Director's Exhibits 11, 28. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered two new medical reports. Dr. Baker, who examined claimant on behalf of DOL, obtained "normal" pulmonary function and blood gas studies and diagnosed claimant with "[n]o [i]mpairment" or "minimal" impairment. Director's Exhibit 11 at 4, 5. Similarly, Dr. Dahhan, who examined claimant for employer, obtained pulmonary function and blood gas study results interpreted as "normal," and reported "no objective findings to indicate any pulmonary impairment and/or disability based on the normal . . . parameters of [claimant's] respiratory system." Director's Exhibit 13 at 2. Since both physicians concluded that claimant had no impairment, the administrative law judge found that their

reports did "not establish any pulmonary impairment or disability." Decision and Order - Denying Benefits at 10.

We reject claimant's allegations of error in the administrative law judge's finding that claimant did not establish total disability. First, because the administrative law judge found that neither Dr. Baker nor Dr. Dahhan diagnosed any respiratory or pulmonary impairment, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a heavy equipment operator with their no-impairment opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Second, contrary to claimant's contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White*, 23 BLR at 1-7. Third, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Baker's August 15, 2001 opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one," and states that he met his statutory obligation in this case. Director's Brief at 2-3.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a),

718.104, 725.406(a). The administrative law judge did not find nor does claimant allege that Dr. Baker's report was incomplete. Nor did the administrative law judge find that Dr. Baker's report lacked credibility. On the issue of the existence of pneumoconiosis, the administrative law judge merely found Dr. Baker's "somewhat equivocal" diagnosis of pneumoconiosis "outweighed by that of Dr. Dahhan" because Dr. Dahhan's opinion finding no pneumoconiosis was better-reasoned. Decision and Order at 9; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). On the issue of total disability, the administrative law judge accepted and relied on Dr. Baker's opinion that claimant has no or minimal impairment. Because Dr. Baker's report was complete and the administrative law judge did not find that it lacked credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because claimant failed to establish either the existence of pneumoconiosis or total disability, the elements of entitlement that were previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3.

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