BRB No. 05-0813 BLA

DONALD R. SCARBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPENCER BRANCH COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/10/2006
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery Law Offices), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5943) of Administrative Law Judge Thomas F. Phalen, Jr. on a subsequent claim[1] 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). Initially, the administrative law judge credited claimant with twenty-six years of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge concluded that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1), and in failing to credit the medical opinion of claimant's treating physician, Dr. Sundaram, who opined that claimant suffers from totally disabling coal workers' pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.[2]

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[1] Claimant filed his first application for benefits on April 17, 1985. The district director denied this claim on July 7, 1987 and, since claimant took no further action on this claim, it was administratively closed. Director's Exhibit 1. Claimant filed a second application on June 20, 1989; by Decision and Order dated June 15, 1993, Administrative Law Judge Michael O'Neill denied benefits and the Board affirmed the denial on appeal. *Scarberry v. Spencer Branch Coal Co.*, BRB No. 93-2038 BLA (Jun. 20, 1994) (unpub.); Director's Exhibit 1. Subsequently, on March 20, 1995, claimant filed a third application for benefits, which was construed as a petition for modification pursuant to 20 C.F.R. §725.310. The district director denied modification, therefore, claimant requested a formal hearing. Administrative Law Judge O'Neill reviewed claimant's petition for modification and found that claimant established total respiratory disability but failed to establish the existence of pneumoconiosis or that the disease was totally disabling; accordingly, he denied benefits. The Board affirmed this denial on appeal. *Scarberry v. Spencer Branch Coal Co.*, BRB No. 97-1644 BLA (Jun. 24, 1998) (unpub.); Director's Exhibit 1. Claimant took no further action on his petition for modification, but instead, filed another claim for benefits on October 9, 2001, which is the subject of the case *sub judice*. Director's Exhibit 3.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(2)-(3) because these

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Noting that pneumoconiosis is a progressive disease, claimant argues that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by failing to accord greater weight to the most recent x-ray of record, dated February 3, 2004, which was read consistently positive by two B-readers, Drs. Vuskovich and Narra. Claimant further contends that the administrative law judge's finding that the x-ray evidence was in equipoise was flawed since a significant amount of time, *i.e.*, two years, separated the most recent x-ray read positive from the November 2, 2001 x-ray read negative by Dr. Wicker.

In reviewing the x-ray evidence, the administrative law judge found that there were four x-ray interpretations of three x-rays; Dr. Wicker, a B-reader, interpreted the November 2, 2001 x-ray as negative,[3] Dr. Dahhan, a B-reader, interpreted the June 28, 2003 x-ray as negative, and Drs. Vuskovich and Narra, B-readers, both interpreted the most recent x-ray, dated February 3, 2004, as positive. Director's Exhibit 13; Employer's Exhibit 1; Claimant's Exhibits 1, 2. Accordingly, as two B-readers interpreted two different x-rays as negative and two other B-readers each interpreted another x-ray as positive, the administrative law judge found that the x-ray evidence was in equipoise and could not, therefore, carry claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

While, as claimant contends, over two years separate the November 2, 2001 x-ray film, which was interpreted as negative, and the February 3, 2004 x-ray film, which was interpreted as positive, another x-ray, dated June 28, 2003, was taken approximately seven months prior to the February 3, 2004 x-ray and was interpreted as negative. Moreover, all of the x-ray interpretations, both positive and negative, were rendered by equally-qualified physicians, *i.e.*, B-readers. Accordingly, we affirm the administrative

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determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 12.

[3] Dr. Sargent interpreted the x-ray film dated November 2, 2001 for film quality only and rated it as a "3." Director's Exhibit 13.

law judge's determination that the x-ray evidence in this case was in equipoise and could not, therefore, satisfy claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *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 Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 12. Accordingly, the administrative law judge's determination was rational and supported by substantial evidence and we, therefore, affirm his resultant finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Next, claimant asserts that the administrative law judge erred by failing to accord proper weight to the opinion of Dr. Sundaram, claimant's treating physician, who opined that claimant was totally disabled and that coal workers' pneumoconiosis was the primary contributing factor to claimant's disability.[4]

While noting that Dr. Sundaram treated claimant for six years, obtained a family, patient, and cigarette smoking history, and administered a physical examination, chest x-ray interpretation, pulmonary function study, and arterial blood gas study, the administrative law judge nonetheless permissibly found Dr. Sundaram's diagnosis of coal workers' pneumoconiosis entitled to no weight because the physician failed to provide any basis for his diagnosis other than twenty-three years of coal dust exposure. Specifically, the administrative law judge found that while Dr. Sundaram stated that the etiology of claimant's coal workers' pneumoconiosis was twenty-three years of underground coal mine employment, the physician did not take any employment history from claimant and while he recorded claimant's smoking history as one to two packs daily, stopping in 1991, he failed to state the actual length of claimant's smoking history.[5] This was rational. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37

[4] When challenging the administrative law judge's treatment of Dr. Sundaram's opinion, claimant fails to specify under which section he believes the administrative law judge erred—either Section 718.202(a)(4) or Section 718.204(c). Therefore, we will address both sections.

[5] Claimant testified at the formal hearing that he probably had a thirty-eight year cigarette smoking history. Hearing Transcript at 19.

(1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); Decision and Order at 14; Claimant's Exhibit 3. Contrary to claimant's contention, the administrative law judge was not compelled to accord determinative weight to Dr. Sundaram's opinion merely because he treated claimant, but instead, the administrative law judge rationally discounted Dr. Sundaram's opinion because it was unexplained and contained an incomplete chronicle of claimant's cigarette smoking history. *See* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003), *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) ("in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade."); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Claimant also argues that the administrative law judge erred in discrediting the well-reasoned and documented opinion of Dr. Sundaram on the basis that it was inconsistent because Dr. Sundaram merely acknowledged that both coal workers' pneumoconiosis and cigarette smoking caused claimant's pulmonary impairment and this conclusion should not nullify his entire opinion, *i.e.*, that pneumoconiosis was a primary contributing factor to claimant's totally disabling pulmonary impairment.

In assessing the probative value of the newly submitted medical opinions pursuant to Section 718.204(c), the administrative law judge correctly determined that Dr. Sundaram rendered a contradictory opinion with respect to the issue of disability causation. The administrative law judge found that in the initial portion of the November 8, 2002 report, Dr. Sundaram stated that coal workers' pneumoconiosis contributed "100%" to claimant's impairment, but in the latter section of the report on an accompanying form, Dr. Sundaram listed claimant's cigarette smoking history as another etiology and stated "[d]ifficult to separate impairment from coal dust [versus] smoking." Claimant's Exhibit 3. Consequently, the administrative law judge, within a rational exercise of his discretion, found that Dr. Sundaram's disability causation opinion was entitled to diminished weight because it contained an integral inconsistency concerning the cause of disability. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) (administrative law judge properly discredited physician's opinion as unreasoned as doctor failed to explain changes in his conclusions contained in his initial report and those revealed during subsequent deposition); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); Decision and Order at 16. Hence, we reject claimant's argument that the administrative law judge erred in finding Dr. Sundaram's opinion inconsistent and, as such, inadequately reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (crediting of physician's report as reasoned is credibility determination within purview of administrative law judge as trier-of-fact); *Trumbo*, 17

BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge rationally found that the contrary opinions of Drs. Wicker and Dahhan were more persuasive and, therefore, entitled to dispositive weight because both physicians based their opinions, that claimant did not have totally disabling coal workers' pneumoconiosis, on claimant's social and employment histories and on supportive, objective, diagnostic tests, including normal physical examinations, negative chest x-ray interpretations, and non-qualifying pulmonary function and arterial blood gas studies. Decision and Order at 14-16; Director's Exhibit 13; Employer's Exhibit 1. Consequently, the administrative law judge permissibly concluded that Drs. Wicker and Dahhan rendered well documented and well-reasoned opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46 (1985); Decision and Order at 15. Because claimant has not otherwise challenged the administrative law judge's discrediting of the opinion of Dr. Sundaram, we affirm the administrative law judge's findings that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Based on the foregoing, we affirm the administrative law judge's determination that because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204(c), claimant also failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final pursuant to Section 725.309, therefore, entitlement to benefits is precluded. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge