BRB No. 05-0842 BLA

ANGELO BOLINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CRIBB COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 07/18/2006
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (04-BLA-5218) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) denying benefits 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).[1] This case involves a subsequent claim filed on October 3, 2002.[2] After crediting claimant with twelve years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on December 14, 1994. Director's Exhibit 1. In a Decision and Order dated October 17, 1997, Administrative Law Judge Richard E. Huddleston, after crediting claimant with sixteen and one-half years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Huddleston also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Huddleston denied benefits. *Id.* By Decision and Order dated October 27, 1998, the Board affirmed Judge Huddleston's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Bolinger v. Cribb Coal Co.*, BRB No. 98-0209 BLA (Oct. 27, 1998) (unpublished). The Board, therefore, affirmed Judge Huddleston's denial of benefits. *Id.* In light of its affirmance of Judge Huddleston's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), the Board declined to address claimant's contentions regarding Judge Huddleston's finding pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a second claim on October 3, 2002. Director's Exhibit 3.

insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1994 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[3] has changed since the date upon which the order denying the prior claim became final. *Id.*

Administrative Law Judge Richard E. Huddleston denied benefits on claimant's 1994 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 1. In affirming Judge Huddleston's denial of benefits, the Board affirmed his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Bolinger v. Cribb Coal Co.*, BRB No. 98-0209 BLA (Oct. 27, 1998) (unpublished). Thus, in order to establish that an applicable condition of entitlement has changed, the newly submitted evidence must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[4]

[3]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d). The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2).

[4]As previously noted, Judge Huddleston also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 1. *Id.* However, in light of its affirmance of the Judge Huddleston's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5] The newly submitted x-ray evidence consists of three interpretations of two x-rays taken on December 9, 2002 and January 2, 2003.[6] Although Dr. Simpao, a reader without any special radiological qualifications, interpreted claimant's January 2, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 8, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Employer's Exhibit 1. The administrative law judge acted within his discretion in crediting Dr. Wheeler's negative interpretation of claimant's January 2, 2003 x-ray over Dr. Simpao's positive interpretation of this film based upon Dr. Wheeler's superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7. The only other newly submitted x-ray interpretation of record was read as negative for pneumoconiosis.[7] Because it is based upon substantial

---

(4) (2000), the Board declined to address claimant's contentions regarding Judge Huddleston's finding pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Bolinger v. Cribb Coal Co.*, BRB No. 98-0209 BLA (Oct. 27, 1998) (unpublished). Consequently, the denial of claimant's previous 1994 claim was not based upon a finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). We, therefore, need not address claimant's contention that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Even if the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), it would not assist claimant in establishing that an applicable condition of entitlement has changed since the date upon which the order denying his 1994 claim became final. *See* 20 C.F.R. §725.309(d)(2). Consequently, the administrative law judge's consideration of whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) was unnecessary.

[5]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]In addition, Dr. Barrett interpreted a January 16, 2003 x-ray for quality purposes only. *See* Director's Exhibit 8.

[7]Dr. Dahhan, a B reader, interpreted claimant's December 9, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 9.

evidence,[8] the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), claimant has failed to establish that the applicable condition of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

Claimant also contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see 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*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Claimant's argument is rejected. In this case, claimant selected Dr. Simpao to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 8. Dr. Simpao examined claimant on January 2, 2003. In a report dated January 2, 2003, Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/1.[9] *Id.* Dr. Simpao's diagnosis of clinical pneumoconiosis, based upon a positive x-ray, was neither unreasoned nor undocumented. Although Dr. Simpao's pulmonary evaluation was complete, documented, and inherently credible, the administrative law

[8]In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *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). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

[9]On its face, Dr. Simpao's opinion is complete. Dr. Simpao conducted a physical examination, recorded claimant's symptoms as well as his employment, medical and social histories, obtained an x-ray, EKG, pulmonary function and arterial blood gas studies, and addressed all of the elements of entitlement. *See* Director's Exhibit 8.

judge properly questioned the positive x-ray interpretation upon which the doctor relied because a better qualified physician interpreted the x-ray as negative for pneumoconiosis. Under these circumstances, we agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges*, *supra*; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge