BRB No. 06-0833 BLA

JERRY WAGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHANEY CREEK COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS	)	DATE ISSUED: 07/27/2007
	)	
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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5393) of Administrative Law Judge Adele Higgins Odegard on a subsequent claim[1] filed pursuant

[1] Claimant filed a claim for benefits on January 9, 1989, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. on April 9, 1991 on the basis that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Director's Exhibit 1. Claimant did not further pursue this

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 initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twelve years. 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 arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) based on newly submitted evidence. The administrative law judge, therefore, found that claimant failed to affirmatively 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 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the newly submitted x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability established by newly submitted medical opinion evidence under Section 718.204(b)(2)(iv). Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.[2]

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).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the newly submitted negative x-ray interpretations, and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a

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claim. Claimant filed a second claim for benefits on January 29, 2002, which is the subject of this appeal. Director's Exhibit 4.

[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)-(a)(3), 718.204(b)(2)(i)-(iii) since these 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 5-6, 11-14.

physician with superior qualifications or to accept, as conclusive, the numerical superiority of x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, properly considered the radiological expertise of the physicians who interpreted the newly submitted x-ray films and found that the positive interpretation of the x-ray film dated July 16, 2002 rendered by Dr. Baker, who was a B-reader, was outweighed by the negative interpretation of the same x-ray rendered by Dr. Poulos, who was both a Board-certified radiologist and B-reader.[3] 20 C.F.R. §718.202(a)(1); *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 7; Director's Exhibits 13, 23. In addition, the administrative law judge found that the probative value of the negative interpretation of the July 16, 2002 x-ray film by Dr. Poulos was further bolstered by the negative interpretations of Drs. Broudy and Dahhan, who were B-readers, of x-ray films taken on July 5, 2002 and April 16, 2003. Decision and Order at 8; Director's Exhibits 15, 28. Hence, the administrative law judge's consideration of the new x-ray evidence constitutes a qualitative and quantitative analysis of the x-ray evidence, and we affirm her weighing of the conflicting readings and her resultant finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See 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. 1994).

In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the new x-ray evidence as claimant has not provided any support for that assertion, nor does a review of the new evidence, and the administrative law judge's Decision and Order, reveal that she engaged in a selective analysis of the new x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmed.

Next, claimant contends that the administrative law judge erred in finding that Dr. Baker's reasoned and documented opinion did not establish the existence of pneumoconiosis. Claimant contends that the administrative law judge erred in rejecting Dr. Baker's opinion because it was based on his positive x-ray interpretation and an

[3] Dr. Barrett read the July 16, 2002 film for quality only. Director's Exhibit 14.

administrative law judge may not discredit the opinion of a physician, which is based on a positive x-ray interpretation, merely because the interpretation is contrary to the weight of the other x-ray interpretations or because the record contains subsequent, negative x-ray interpretations. Moreover, claimant contends that because the interpretation of medical data is for medical experts and Dr. Baker's finding of pneumoconiosis was based on a thorough physical examination, claimant's medical and work histories, a chest x-ray, and pulmonary function and arterial blood gas studies, it was error for the administrative law judge to interpret medical tests and substitute her own conclusions for those of the physician.

In assessing the credibility of the new medical opinion evidence, pursuant to Section 718.202(a)(4), the administrative law judge found that the new medical opinions of Drs. Baker, Dahhan, and Broudy, equally-qualified physicians, were adequately documented as all three opinions were based on physical examinations of claimant, similar diagnostic studies and pulmonary tests, and claimant's twelve-year coal mine employment history. The administrative law judge determined that Dr. Baker's opinion was entitled to diminished weight because Dr. Baker relied almost exclusively on his positive x-ray interpretation and claimant's coal mine employment. This was rational. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 (1984) ("…the fact that a doctor's x-ray interpretation has been called into question by a negative rereading of that same x-ray … may be considered by an administrative law judge in assessing the probative value of that physician's report."); Decision and Order at 11; Director's Exhibits 13, 39.

Similarly, the administrative law judge discounted that portion of Dr. Baker's opinion attributing claimant's chronic bronchitis to coal dust exposure because the physician qualified his diagnosis by opining that coal dust exposure "could not be ruled out" and by averring that claimant's smoking history was "the more important cause" of claimant's pulmonary condition. Consequently, the administrative law judge rationally concluded that Dr. Baker's failure to definitively find a relationship between claimant's coal dust exposure and his chronic bronchitis rendered his opinion hypothetical, and therefore, insufficient to affirmatively establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §§718.201(b), 718.202(a)(4); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000) (administrative law judge may discredit expert opinion that contains equivocations about the etiology of disease); *Graziani v. Director, OWCP*, 9 BLR 1-193, 1-194 (1986); Decision and Order at 11. Accordingly, we affirm the administrative law judge's finding

that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Claimant argues that in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by failing to consider the well reasoned and documented opinion of Dr. Baker and by finding that claimant failed to carry his burden of establishing total respiratory disability by a preponderance of the new evidence.

Relevant to Section 718.204(b)(2)(iv), the newly submitted medical opinion evidence consists of the opinions of Drs. Baker, Broudy, and Dahhan, all of whom opined that there is no evidence of a pulmonary or respiratory impairment and that claimant had the respiratory capacity to return to his usual coal mine work. Director's Exhibits 13, 15, 28, 39. Because none of the physicians opined that claimant suffered from a totally disabling respiratory or pulmonary impairment, the administrative law judge properly determined that the newly submitted medical opinion evidence failed to demonstrate that claimant was totally disabled pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 13. Because the administrative law judge's analysis of the new evidence is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b), based on the newly submitted evidence of record, we affirm the administrative law judge's finding 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 pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order Denying 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge