BRB No. 06-0952 BLA

J.K. Claimant-Petitioner v. UNICORN MINING, INCORPORATED and AMERICAN INTERNATIONAL SOUTH COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/26/2007 DECISION and ORDER

Appeal of the Decision and Order of William C. Colwell, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Helen H. Cox (Jonathan L. Snare, Acting 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-5896) of Administrative Law Judge William C. Colwell denying benefits 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). The administrative law judge credited claimant with thirty-two years of coal mine employment based on employer's concession and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found that the newly submitted evidence did not 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 did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that the newly submitted evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the newly submitted medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant filed his initial claim on October 12, 1999. Director's Exhibit 1. This claim was denied by a Department of Labor claims examiner on January 28, 2000. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on October 22, 2002. Director's Exhibit 3.

[2] Because the administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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). 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 the existence of pneumoconiosis and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. We disagree. The administrative law judge considered the three interpretations of an x-ray dated January 31, 2003 by Drs. Simpao, Wiot, and Spitz.[3] Of the three x-ray interpretations, one reading is positive for pneumoconiosis, Director's Exhibit 9, and two readings are negative for pneumoconiosis, Director's Exhibit 11; Employer's Exhibit 1. Dr. Simpao, who is not a B reader or a Board-certified radiologist, read the January 31, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 9. In contrast, Drs. Wiot and Spitz, B readers and Board-certified radiologists, read the January 31, 2003 x-ray as negative for

[3] The administrative law judge also noted that Dr. Armstrong read the January 31, 2003 x-ray. Decision and Order at 9. However, the administrative law judge indicated that he did not consider Dr. Armstrong's reading, because Dr. Armstrong did not read the x-ray for the purpose of determining the existence of pneumoconiosis. *Id*. Dr. Barrett, a B reader and Board-certified radiologist, read the January 31, 2003 x-ray for quality only. Director's Exhibit 10.

pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 1. After considering the quantitative and qualitative nature of the conflicting x-rays, the administrative law judge found that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *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). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. We therefore reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[4]

Claimant next contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Simpao's assessment of a "mild" impairment. Claimant's Brief at 5 (citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) and *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984)). The Director contends that "[a]lthough [Dr. Simpao] did not state whether this mild respiratory impairment would preclude [claimant] from doing his former coal mine duties, the [administrative law judge] permissibly inferred from the doctor's report and the normal objective test results that Dr. Simpao did not diagnose claimant as having a totally disabling respiratory impairment." Director's Letter Brief at 2. Upon review, we conclude that claimant's contention has merit.

[4] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence. Decision and Order at 9-10. Thus, we reject claimant's suggestion.

In a report dated January 31, 2003, Dr. Simpao diagnosed claimant with a mild impairment. Director's Exhibit 9. The administrative law judge found that Dr. Simpao's opinion, that claimant has a mild impairment, was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), because Dr. Simpao "did not specifically state whether [c]laimant could return to his prior coal mine employment from a pulmonary standpoint." Decision and Order at 12. The administrative law judge concluded, "[t]herefore his report is insufficient to establish total disability . . . ." *Id*. The administrative law judge also stated, "[a]lthough the [c]laimant has testified regarding his physical limitations, I cannot base a finding of disability solely on his testimony." *Id*.

In *Cornett*, the Sixth Circuit court held that even a mild impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of those duties. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Further, the Board has held that an administrative law judge must compare the exertional requirements of claimant's usual coal mine work with a physician's assessment of claimant's impairment in determining whether the evidence establishes a totally disabling pulmonary or respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). In this case, the administrative law judge noted that claimant's last coal mine work was as a repairman and electrician. Decision and Order at 3; Hearing Transcript at 13-17. The record also contains a Description of Coal Mine Work form, which describes the physical activity of claimant's usual coal mine work as a repairman and electrician. Director's Exhibits 1, 5. Further, Dr. Simpao diagnosed a "mild" impairment. *Budash*, 9 BLR at 1-51. Here, however, the administrative law judge did not assess the credibility of Dr. Simpao's impairment rating, or compare it with claimant's job duties. He merely stated, incorrectly, that because Dr. Simpao "did not specifically state whether" the mild impairment was disabling, the opinion was "insufficient to establish total disability . . . ." Decision and Order at 12. Because the administrative law judge erred in discounting Dr. Simpao's disability opinion on the ground that Dr. Simpao's diagnosis of a mild impairment was *per se* insufficient to establish total disability, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of Dr. Simpao's opinion. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

In view of our decision to vacate the administrative law judge's finding that the newly submitted evidence did not establish total disability at 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding that the newly submitted evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder, if reached.

In light of the foregoing, we vacate the administrative law judge's finding that the newly submitted evidence did not establish a change in an applicable condition of

entitlement at 20 C.F.R. §725.309, and remand the case for further consideration. If, on remand, the administrative law judge finds that the newly submitted evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309, he must then consider all of the relevant evidence of record to determine whether claimant is entitled to benefits pursuant to 20 C.F.R. Part 718.

Finally, claimant 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. Specifically, claimant argues that "the [administrative law judge] concluded that Dr. Simpao's report was based merely upon an erroneous x-ray interpretation, and that his opinion was outweighed by the better qualified physicians of record." Claimant's Brief at 4. The Director, however, contends that the statutory obligation to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. The Director argues that "[he] is only required to provide claimant with a complete and credible examination, not a dispositive one," and he points out that the administrative law judge did not completely discredit Dr. Simpao's opinion." Director's Letter Brief at 2.

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; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Simpao 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 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge reasonably found that Dr. Simpao's diagnosis of "CWP 1/1" was based largely on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of that x-ray by physicians with superior radiological credentials, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), and was not otherwise explained by Dr. Simpao.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for Dr. Simpao's diagnosis to be outweighed. *Cornett*, 227 F.3d at 576, 22 BLR at 2-120. Because the administrative law judge merely found Dr. Simpao's opinion outweighed on

[5] The administrative law judge stated that "Dr. Simpao gives no compelling rationale for his diagnosis of pneumoconiosis, relying solely upon his positive chest x-ray and years of coal mine employment." Decision and Order at 11.

the issue of the existence of pneumoconiosis, 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.

Regarding the issue of total disability, Dr. Simpao opined that claimant has a mild impairment. Director's Exhibit 9. Because Dr. Simpao rendered an opinion regarding the severity of claimant's respiratory impairment, *Budash*, 9 BLR at 1-51, it satisfies the Director's obligation to provide claimant with a complete, credible pulmonary evaluation. *Hodges*, 18 BLR at 1-93. Therefore, we reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Hodges*, 18 BLR at 1-89-90.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge