BRB No. 07-0837 BLA

C. W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	
and	)	
	)	
THE PITTSTON COMPANY	)	DATE ISSUED: 07/14/2008
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (Williams Lawrence Roberts, PSC), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird & Baird), Pikeville, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5213) of Administrative Law Judge Alice M. Craft 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] based on the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering the subsequent claim, the administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 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 finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to this appeal.

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 claim for benefits, filed on September 7, 1988, had a lengthy procedural history. Director's Exhibit 1. Ultimately, the claim was denied by an administrative law judge on April 24, 2001, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Director's Exhibit 1 at 269. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*C.W.*] *v. Eastern Coal Corp.*, BRB No. 01-0641 BLA (March 29, 2002)(unpub.); Director's Exhibit 1 at 1-177. Claimant filed his current claim on July 17, 2003. Director's Exhibit 3.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 6-8. Accordingly, the Board will apply the law 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] Because claimant does not challenge the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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. 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). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1 at 269. Consequently, claimant had to submit new evidence establishing either of these elements to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered nine readings of eight new x-rays along with the readers' radiological qualifications. The administrative law judge accurately noted that one x-ray was read as positive for pneumoconiosis. Specifically, the administrative law judge considered that Dr. Baker, who is a B reader, read the February 3, 2005 x-ray as positive for pneumoconiosis. The administrative law judge further considered that Dr. Rosenberg, who is also a B reader, read the same x-ray as negative for pneumoconiosis. In view of these conflicting readings by equally qualified doctors, the administrative law judge found the readings of the February 3, 2005 x-ray to be "in equipoise and, therefore, neither positive nor negative" for pneumoconiosis. Decision and Order at 17. Because all of the remaining x-ray readings were either negative or silent as to the existence of pneumoconiosis, the administrative law judge found that claimant did not establish the existence of pneumoconiosis. The administrative law judge based this finding on a proper qualitative analysis of the x-ray evidence, and substantial evidence supports her finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. We reject claimant's argument that the administrative law judge "should have given more weight to Dr. Baker's" reading. Claimant's Brief at 3. The Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in her analysis of the four new medical opinions when she determined that the existence of pneumoconiosis was not established. The administrative law judge

declined to credit the opinions of Drs. Hussain and Mettu that claimant has legal pneumoconiosis,[4] and she found that the contrary opinion of Dr. Rosenberg merited greater weight because it was better explained and supported.[5] Claimant contends that the administrative law judge should have accorded greater weight to Dr. Hussain's opinion because Dr. Hussain is claimant's treating physician and his opinion is supported by treatment records and objective testing. Claimant's Brief at 1-3. Claimant's contention lacks merit.

There is no requirement to accord the opinion of a treating physician greater weight. The administrative law judge must assess the credibility of the opinion in light of its reasoning and documentation, and in light of the other evidence of record. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge did so in this case, and determined that Dr. Hussain's opinion was not sufficiently reasoned or explained to carry claimant's burden to establish the existence of pneumoconiosis:

> Dr. Hussain is a [p]ulmonologist and has been treating the [c]laimant since 2002. Treatment records indicate that the [c]laimant was hospitalized once in 2003, once in 2004, and three times in 2005, for severe breathing problems. Each time, after medical treatment, the [c]laimant was released with his symptoms improved. Dr. Hussain consistently diagnosed COPD and black lung, and in response to the [c]laimant's counsel's questionnaires, characterized the [c]laimant's chronic lung disease as legal pneumoconiosis, and attributed it to exposure to coal dust. I find that Dr. Hussain's opinion is documented and reasoned, as it was based on his treatment . . . over a three-year period . . . . However, I cannot give it controlling weight, as I cannot determine the basis for his diagnosis of COPD in the absence of evidence of obstruction on pulmonary function testing, or any explanation from Dr. Hussain as to why he made the diagnosis, even after he reviewed the [contrary] opinions of Drs. Broudy and Rosenberg.

Decision and Order at 18. After weighing the remaining opinions, the administrative law judge reiterated that Dr. Hussain's opinion, when viewed in context of the record, was inadequately explained:

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[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] The administrative law judge discounted Dr. Broudy's opinion that claimant does not have pneumoconiosis because she found Dr. Broudy's reasoning to be incomplete.

> Although Dr. Hussain was in the best position to evaluate the [c]laimant's condition as his treating physician, he offered no explanation of his rationale for concluding that the [c]laimant's problems are due to coal dust. Moreover, when confronted with the contrary opinions of Drs. Rosenberg and Broudy, Dr. Hussain did not offer any explanation as to why his opinion remained unchanged . . . . [or] why their opinions were mistaken. Confidence in his opinion is also undermined by his diagnosis of obstructive disease, when no obstruction is apparent on pulmonary function testing . . . .

Decision and Order at 19. The administrative law judge permissibly found that Dr. Hussain did not adequately explain his opinion, and substantial evidence supports the administrative law judge's credibility determination. *See* 20 C.F.R. §718.104(d)(5); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Claimant's Exhibits 3, 7, 8, 10. Further, the administrative law judge acted within her discretion when she found that Dr. Rosenberg's opinion that claimant does not have pneumoconiosis was better explained and better supported by the objective evidence of record. *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); Employer's Exhibits 7, 9, 10. We therefore reject claimant's allegation of error, and we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).[6]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Hussain, the only physician to state that claimant is totally disabled, did not adequately "explain his rationale for his opinion" because he submitted "conclusory statements" in which he did not address the nonqualifying[7] pulmonary function and blood gas studies of record, or the observations by Drs. Broudy and Rosenberg that, following hospitalizations, claimant's "functional capacity always returned to normal values."

[6] The administrative law judge also determined that readings by Drs. Broudy and Rosenberg of two CT scans dated February 3 and May 11, 2005 were negative for pneumoconiosis. Decision and Order at 7, 17. In so finding, the administrative law judge considered Dr. Baker's report stating that he had reviewed claimant's February 3, 2005 CT scan, and that the scan was of suboptimal quality and no particular reading could be made. Claimant's Exhibit 9. Therefore, claimant's assertion that Dr. Baker supported his diagnosis of pneumoconiosis with a CT scan reading lacks merit. Claimant's Brief at 3.

[7] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Decision and Order at 20. Claimant reiterates his contention that Dr. Hussain's opinion should have received greater weight because he is the claimant's treating physician. Claimant's Brief at 1-3. We disagree. The administrative law judge permissibly found that Dr. Hussain failed to explain his opinion. *See* 20 C.F.R. §718.104(d)(5); *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. As claimant does not otherwise challenge the administrative law judge's finding that total disability was not established by the new medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), we affirm it.

Based on the foregoing, we affirm the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability at 20 C.F.R. §§718.202(a), 718.204(b)(2). Therefore, we affirm the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge