BRB No. 07-0934 BLA

E.S.	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING POCAHONTAS LAND COMPANY	)	
	)	
	)	DATE ISSUED: 07/29/2008
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan & Vorgelin, L.C.), Wheeling, West Virginia, for claimant.

Erik A. Schramm (Hanlon, Duff, Estadt & McCormick Co., LPA), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (03-BLA-5599) of Administrative Law Judge Thomas M. Burke on a subsequent claim[1] filed pursuant to the

[1] Claimant filed his initial claim for benefits on January 9, 1984. Director's Exhibit 1. It was finally denied on June 15, 1984, because claimant did not establish any element of entitlement. *Id*. Claimant filed his second claim on February 27, 1986, which was finally denied on February 17, 1998, because claimant did not establish the presence of a totally disabling respiratory or pulmonary impairment. *Id*. Claimant filed his current claim on February 26, 2001. Director's Exhibit 2.

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-five years of coal mine employment[2] based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). On the merits of the claim, the administrative law judge noted that employer conceded the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. Decision and Order at 13; Hearing Transcript at 6. The administrative law judge further found that the medical opinion evidence established that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] Decision and Order at 13. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in 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 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,

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Ohio. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

[3] In considering all of the record evidence on the merits of the claim, the administrative law judge accorded less weight to the evidence associated with claimant's 1984 and 1986 claims, in view of its age. Decision and Order at 13. On appeal, no party challenges this aspect of the administrative law judge's decision.

718.204. If a miner files an application 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). Claimant's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered two new medical opinions. Dr. Altmeyer determined that claimant's diffusing capacity was 59% of predicted, based on the October 14, 2003 diffusion capacity test, and stated that this was a mild to moderate impairment caused by claimant's coal workers' pneumoconiosis. Dr. Altmeyer opined that claimant "could perform his job in the coal mine as the superintendent of maintenance that required walking and carrying 12 pounds, from a pulmonary/respiratory standpoint." Employer's Exhibits 1, 3. Based on the same October 14, 2003 diffusing capacity test, Dr. Cohen concluded that claimant's diffusing capacity was 47% of predicted.[4] He further opined that this was a severe impairment that was "clearly disabling for [claimant] who had to perform the duties as superintendent of maintenance where he had to walk long distances each day carrying at least 12 pounds." Claimant's Exhibit 1. Considering this evidence, the administrative law judge found Dr. Cohen's opinion to be more persuasive, explaining that Dr. Cohen's credentials were superior to those of Dr. Altmeyer, and that his diagnosis of a severe diffusion impairment was corroborated by Dr. Sanchez's treatment records and by claimant's hearing testimony.[5] Decision and Order at 9-11.

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[4] Although Drs. Altmeyer and Cohen evaluated the same October 14, 2003 diffusing capacity test results, they assessed claimant's degree of impairment using different "predicted diffusing capacity" values. Claimant's Exhibit 1; Employer's Exhibit 3.

[5] The administrative law judge stated, in relevant part:

> Dr. Cohen's finding that the pulmonary condition is severe enough to be disabling is consistent with the symptoms [c]laimant testified to at [the] hearing. Claimant testified that he . . . is on oxygen most of the time. He . . . can not walk fifty feet without stopping unless he has oxygen. Claimant also testified that he can not now do his last coal mine job as superintendent of maintenance. The superintendent job required him to walk about "a mile

Employer initially asserts that the administrative law judge erred in failing to consider all relevant evidence. Specifically, employer asserts that the findings of the Social Security Administration and the State of Ohio Industrial Commission, that claimant was totally disabled due to a back injury, are relevant to whether claimant's breathing impairment is totally disabling. Employer's Brief at 15.

We disagree. The pertinent regulation provides that any independent disability unrelated to the miner's pulmonary or respiratory disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see also Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 134-35, 17 BLR 2-146, 2-151-53 (6th Cir. 1993).

Employer additionally challenges the administrative law judge's determination to credit Dr. Cohen's opinion over Dr. Altmeyer's contrary opinion. Specifically, employer alleges that Dr. Cohen's opinion is not reasoned, because Dr. Cohen did not examine claimant, did not consider the fact that claimant was totally disabled due to a back injury, and interpreted claimant's diffusing capacity test using a "different standard" than the standard used by Dr. Altmeyer. Employer's Brief at 5-14. Employer further asserts that the administrative law judge erred in finding Dr. Cohen's opinion to be better supported by claimant's testimony and by Dr. Sanchez's treatment records, because claimant's testimony was "untrue," and because Dr. Sanchez was unaware of claimant's smoking history. Employer's Brief at 7-8, 12.

We disagree. Contrary to employer's assertion, the fact that Dr. Cohen did not examine claimant or discuss his back injury, did not require the administrative law judge

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> or so," but some of his duties were delegated to other employees because of his breathing problems . . . .
>
> Although Dr. Sanchez does not offer an opinion on whether [c]laimant can perform his last coal mine job, he clearly diagnoses, and was treating [c]laimant for, a severe diffusion impairment . . . which limit[ed] [c]laimant's activities.
>
> . . .
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> Further, the qualifications of Dr. Cohen . . . are superior to those of Dr. Altmeyer . . . . [Dr. Altmeyer's] curriculum vitae shows less expertise in black lung disease than that of Dr. Cohen.

Decision and Order at 9-11 (citations omitted). Substantial evidence supports these findings.

to discount his opinion as to whether claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(a); *McAngues*, 996 F.2d at 143-35, 17 BLR at 2-151-53; *Cochran v. Consolidation Coal Co*., 16 BLR 1-101, 1-104 (1992). A reasoned opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge found Dr. Cohen's opinion to be based on a review of claimant's medical records, work history, and a diffusion capacity test indicating claimant's diffusing capacity was 47% of predicted.[6] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Substantial evidence supports these findings.

Moreover, employer does not challenge the administrative law judge's finding that Dr. Cohen's qualifications are superior to those of Dr. Altmeyer. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we conclude that the administrative law judge acted within his discretion in finding Dr. Cohen's opinion to be more persuasive than Dr. Altmeyer's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Thus, we need not address the remainder of employer's arguments. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983). We therefore affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment, based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Noting that the pulmonary function and arterial blood gas study evidence was non-qualifying[7] and, therefore, did not establish total disability, the administrative law judge

[6] Although employer asserts that Dr. Cohen's opinion is unreasoned because it is based on a "different standard" for assessing diffusing capacity tests, employer does not assert that the standard used by Dr. Cohen is invalid, improper, or less reliable in this specific instance than that of Dr. Altmeyer. Moreover, the record reflects that Dr. Altmeyer conceded that a number of different standards are used for interpreting diffusing capacity tests, no particular one of which is "generally recommended." Employer's Exhibit 3. Because employer has failed to brief with specificity the significance of its assertion on this point, we decline to address it further. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[7] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices

further determined that "a weighing of all the evidence of record shows a total pulmonary disability," because Dr. Cohen considered the results of those tests in forming his medical opinion. 20 C.F.R. §718.204(b)(2); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 12. Substantial evidence supports this finding, which is therefore affirmed. We therefore affirm the administrative law judge's attendant finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge noted accurately that both Drs. Altmeyer and Cohen diagnosed a diffusing capacity impairment caused by exposure to coal dust, and that the physicians' opinions differed only as to the severity of the impairment. Because the administrative law judge found Dr. Cohen's diagnosis of a severe, totally disabling diffusing capacity impairment to be more persuasive, and because there was no conflict in opinions that this impairment was due to pneumoconiosis, the administrative law judge determined that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer does not challenge this finding. It is therefore affirmed. *See Skrack*, 6 BLR at 1-711; *see also* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits 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