BRB No. 08-0854 BLA

P.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/21/2009
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-5006) of Administrative Law Judge Janice K. Bullard 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-seven years of coal mine employment pursuant to the parties' stipulation.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not 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 existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1),(4), and that total disability was not established at 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 brief.

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

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[1] Claimant's first claim, filed on October 22, 2001, was denied by an administrative law judge on August 17, 2004, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 64, 475. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*P.N.*] *v. Perry County Coal Co.*, BRB No. 04-0945 BLA (Aug. 12, 2005)(unpub.). Claimant filed the instant claim on August 18, 2006. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis and total disability based on the new evidence pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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). Claimant's prior claim was denied because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence[4] establishing either the existence of pneumoconiosis or total disability. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of two new x-rays and considered the readers' radiological qualifications. Dr. Rasmussen, a B reader, interpreted the December 7, 2006 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis.[5] Director's Exhibit 11; Employer's Exhibit 2. Dr. Wiot, and Dr. Jarboe, who is a B reader, both interpreted the March 22, 2007 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 3.

Based on the dual qualifications of Dr. Wiot, the administrative law judge accorded additional weight to his negative reading of the December 7, 2006 x-ray, and found this x-ray to be negative for pneumoconiosis. Since the remaining x-ray of March 22, 2007 was read as only negative for pneumoconiosis, the administrative law judge found that claimant did not establish the existence of pneumoconiosis. The administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-

[4] The administrative law judge noted correctly that evidence from claimant's finally denied claim could not support a change in an applicable condition of entitlement in this claim. *See* 20 C.F.R. §725.309(d)(2),(3); Decision and Order at 8, nn.5, 6. The administrative law judge nevertheless discussed evidence from the prior claim that claimant had resubmitted in this claim. Because that evidence could not assist claimant in carrying his burden to establish a change in an applicable condition of entitlement, we will not address claimant's arguments concerning the weight accorded to readings of the January 15 and June 9, 2002 x-rays, to Dr. Baker's June 15, 2002 medical report, and to Dr. Chaney's January 30, 2003 medical report. *See* 20 C.F.R. §725.309(d)(2),(3).

[5] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the December 7, 2006 x-ray for its film quality only. Director's Exhibit 12.

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. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, that she deferred to the numerical superiority of the negative readings, and that she "may have 'selectively analyzed'" the x-ray evidence, lack merit. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered two new medical opinions. Dr. Rasmussen, who is Board-certified in Internal Medicine, diagnosed claimant with coal workers' pneumoconiosis based on a positive x-ray reading and claimant's twenty-seven years of coal mine employment. Director's Exhibit 11 at 35. Dr. Rasmussen also diagnosed claimant with chronic bronchitis, but indicated that its etiology was "non-occupational." *Id.* Dr. Jarboe, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 1.

The administrative law judge chose not to accord substantial weight to Dr. Rasmussen's opinion, because she found that Dr. Rasmussen had relied on a positive x-ray that was inconsistent with the weight of the negative x-ray evidence, and which was reread by a better qualified reader as negative for pneumoconiosis. *Id.* By contrast, the administrative law judge found that Dr. Jarboe's opinion, that claimant does not have clinical or legal pneumoconiosis, was well-reasoned and well-documented. Decision and Order at 12-13.

Claimant contends that the administrative law judge erred in rejecting Dr. Rasmussen's opinion because it was based, in part, on a positive x-ray. Claimant further asserts that Dr. Rasmussen's opinion was well-reasoned, and that the administrative law judge "appears to have" interpreted medical data and substituted her own conclusion for that of Dr. Rasmussen. Claimant's Brief at 4-5. Claimant's arguments lack merit.

The administrative law judge reasonably discounted Dr. Rasmussen's diagnosis of clinical coal workers' pneumoconiosis, since Dr. Rasmussen relied on an x-ray that was reread by a better qualified reader as negative for pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Substantial evidence supports the administrative law judge's permissible weighing of the opinion of Dr. Rasmussen. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Further, contrary to claimant's contention, Dr. Rasmussen did not attribute claimant's chronic bronchitis to coal mine dust exposure. Director's Exhibit 11; *see* 20 C.F.R. §718.201(a)(2),(b). As no other new opinions are supportive of claimant's position, we

affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the new opinions of Drs. Rasmussen and Jarboe did not establish total disability. In his report dated December 18, 2006, Dr. Rasmussen stated that claimant has "normal lung function," and retains the pulmonary capacity to perform his usual coal mine employment as a general manager of surface mining operations. Director's Exhibit 11 at 30-31, 35. The administrative law judge found Dr. Rasmussen's opinion to be credible, because he "was familiar with the exertional requirements of [c]laimant's coal mine employment and found him capable of performing that work." Decision and Order at 16. Consequently, contrary to claimant's assertion, the administrative law judge properly found that Dr. Rasmussen's opinion supported a finding that claimant does not have a totally disabling respiratory or pulmonary impairment. *See Cornett v. Benham Coal,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Dr. Jarboe opined that claimant has "no impairment" and is not totally disabled. Employer's Exhibit 1. Therefore, substantial evidence supports the administrative law judge's determination that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).[6]

Because we have affirmed the administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis or total disability, we affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement, and we affirm the denial of benefits pursuant to Section 725.309(d).

[6] We reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Accordingly, the administrative law judge's Decision and Order denying 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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JUDITH S. BOGGS
Administrative Appeals Judge