BRB No. 05-0941 BLA

BILLIE ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/27/2006
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd, & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2004-BLA-5793) of Administrative Law Judge Daniel J. Roketenetz with respect to a 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). Claimant filed his initial application for benefits on October 19, 1991. Administrative Law Judge Michael O'Neill's Decision and Order denying benefits was affirmed by the Board on May 10, 1995. Director's Exhibit A. Claimant took no further action until filing a second claim on June 21, 2002. Director's Exhibit 2. Judge Roketenetz (the administrative law judge) credited claimant with 24.6 years of coal mine employment and noted that the claim before him was a subsequent claim pursuant to 20 C.F.R. §725.309. The administrative law judge determined that the prior claim was denied on the ground that claimant did not establish any of the elements of entitlement. The administrative law judge considered, therefore, whether the newly submitted evidence demonstrated that the claimant was totally disabled due to pneumoconiosis arising out of coal mine employment. The administrative law judge found that claimant did not prove any of the elements of entitlement. Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(b)(2)(iv). Claimant also contends that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.[1]

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

[1] We affirm as unchallenged on appeal the administrative law judge's decision to credit claimant with 26.4 years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), and 718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement shall be limited to 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 any of the elements of entitlement. Director's Exhibit A. Consequently, claimant could establish a change in an applicable condition of entitlement by submitting new evidence establishing that he now has pneumoconiosis arising out of coal mine employment, that he is now totally disabled, or that he is now totally disabled due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of four x-rays in light of the readers' radiological qualifications. Dr. Simpao, who lacks radiological qualifications, read the September 24, 2002 x-ray as positive for pneumoconiosis. Decision and Order at 7; Director's Exhibit 9. The administrative law judge noted, however, that Dr. Wheeler, a Board-certified radiologist and B-reader, read this film as negative for pneumoconiosis. Decision and Order at 7; Director's Exhibit 13. Based on Dr. Wheeler's higher qualifications, the administrative law judge found the September 24, 2002 x-ray to be negative for pneumoconiosis. *Id*. Similarly, the administrative law judge considered that Dr. Baker, a B-reader, read the August 10, 2004 x-ray as positive for pneumoconiosis, and that Dr. Wheeler read the same x-ray as negative. Decision and Order at 7; Director's Exhibits 11, 13. Based on Dr. Wheeler's greater qualifications, the administrative law judge found the August 10, 2004 x-ray negative for pneumoconiosis. Decision and Order at 7. Because the two remaining x-rays, taken on November 22, 2002 and August 10, 2004, received only negative readings, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the x-ray evidence. *Id*.; Director's Exhibit 12; Employer's Exhibits 1, 2. The administrative law judge also indicated that the x-ray interpretations appearing in the treatment records did not establish the existence of pneumoconiosis because they did not appear to have been read for the disease. Decision and Order at 8.

The administrative law judge based his finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis on a proper qualitative analysis of the x-ray evidence. *See* 20 C.F.R. 718.202(a)(1); *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. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed"' the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 4. Contrary to claimant's contention, the administrative law judge reasonably discounted Dr. Baker's diagnosis of "Coal Workers' Pneumoconiosis, category 1/1," since it was based on Dr. Baker's positive reading of the August 10, 2004 x-ray, which the administrative law judge found outweighed by the negative reading of a physician with superior qualifications. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Claimant additionally contends that Dr. Baker's opinion was documented and reasoned and thus should not have been discredited. Claimant's Brief at 5. Claimant essentially requests a reweighing of the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's permissible determination that Dr. Baker's opinion was not as well-reasoned or explained as the contrary opinion of Dr. Broudy. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Consequently, 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), claimant asserts that the administrative law judge erred in failing to find that Dr. Baker's opinion is sufficient to establish total disability. Claimant contends that in addressing the issue of total disability, the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's finding that claimant has a Class II respiratory impairment as defined in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Claimant's Brief at 7-8, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

The claimant's usual coal mine work included being (sic) working on a belt

> line. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the opinion of Dr. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White*, 23 BLR at 1-6-7. We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv). *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Finally, claimant contends that because the administrative law judge did not credit Dr. Simpao's September 24, 2002 opinion provided by the Department of Labor when weighing the evidence relevant to the existence of pneumoconiosis, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5-6. The Director responds that Dr. Simpao's report was sufficient to meet his statutory obligation to claimant in this case.

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. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-

102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (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). The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's report was incomplete. On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/0" was based largely on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 12; Director's Exhibit 9. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge ultimately determined that the specific medical data underlying Dr. Simpao's diagnosis was outweighed. *Id*. Additionally, the administrative law judge chose to "rely on the well-reasoned and well-documented opinion of Dr. Broudy." Decision and Order at 14; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). We hold, therefore, that there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because the administrative law judge properly found that the newly submitted evidence was insufficient to establish any of the applicable elements of entitlement adjudicated against claimant in the prior denial pursuant to Section 725.309, we affirm this finding and the denial of benefits. *White*, 23 BLR at 1-3.

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