BRB No. 05-0944 BLA

DWIGHT DAVID MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/26/2006
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 - 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.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5903) of Administrative Law Judge Daniel J. Roketenetz rendered on 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). The administrative law judge found that employer was the responsible operator and credited claimant with nineteen years of coal mine employment.[1] Decision and Order at 2-4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 5. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 8-16. The administrative law judge therefore concluded that claimant did not demonstrate a "material change in condition," and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 16.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[3]

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).

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 6.

[2] Claimant's initial claim for benefits, filed on October 13, 1994, was denied on November 26, 1996 because claimant failed to establish any element of entitlement. Director's Exhibit 1. The Board affirmed the denial on December 4, 1997. *Morgan v. Shamrock Coal Co.,* BRB No. 97-0427 BLA (Dec. 4, 1997) (unpub.). Claimant filed his current claim on May 25, 2001. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations, and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 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 three new x-rays in light of the readers' radiological qualifications. Decision and Order at 8. The administrative law judge considered that the "1/1" reading of the August 15, 2001 x-ray by Dr. Alexander, a B-reader and Board-certified radiologist, was countered by a negative reading for pneumoconiosis by Dr. Hayes, also a B-reader and Board-certified radiologist. Director's Exhibit 15; Employer's Exhibit 1. The administrative law judge therefore found that this x-ray was in "equipoise" and did not satisfy claimant's burden of proof. *See Director, OWCP v. Greenwich Collieries*, [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 8. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See 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); *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 "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 20 C.F.R. §718.202(a)(4), the administrative law judge considered three new medical reports by Drs. Hussain, Broudy, and Rosenberg, hospitalization records, and medical treatment notes from Drs. Baker and Chaney. Drs. Hussain, Broudy, and Rosenberg concluded that claimant does not have pneumoconiosis. Director's Exhibits 8, 10; Employer's Exhibits 1-3. The administrative law judge found these three reports "well-reasoned and well-documented." Decision and Order at 10, 11. Additionally, the administrative law judge noted that Dr. Chaney's treatment records did "not relate to the [c]laimant's respiratory condition," and he found that the hospitalization records merited "little weight" because they contained x-rays not taken or classified for the purpose of diagnosing pneumoconiosis, and because the records primarily related to claimant's other health conditions. Decision and Order at 11, 12; Director's Exhibit 8. Finally, the administrative law judge considered that "Dr. Baker made various notations of coal workers' pneumoconiosis and chronic obstructive pulmonary disease throughout" his treatment notes. Decision and Order at 11; Director's Exhibit 9. The administrative law judge, however, found that Dr. Baker's diagnosis of clinical pneumoconiosis was "unreasoned" because Dr. Baker did not provide the underlying documentation for or explain his diagnosis. Decision and Order at 12. The administrative law judge further found that Dr. Baker did not relate the chronic obstructive pulmonary disease with claimant's coal mine employment, and thus did not diagnose "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Based on the medical reports of Drs. Hussain, Broudy, and Rosenberg, the administrative law judge found that claimant did not establish the existence of pneumoconiosis.

Claimant argues that an administrative law judge should not discredit a medical report as based merely upon a positive x-ray interpretation. With this general contention, claimant specifies no error by the administrative law judge. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, claimant's argument is irrelevant because the administrative law judge in this case did not discredit any medical report as based on a positive x-ray. Additionally, claimant contends that the administrative law judge "appears to have" interpreted medical data and substituted his own conclusion for that of a physician. Claimant's Brief at 4. This contention lacks merit. The administrative law judge permissibly found that Dr. Baker's diagnosis of pneumoconiosis was unsupported by any documentation or reasoning. *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). We therefore 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 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Drs. Hussain, Broudy, and Rosenberg concluded that claimant has no respiratory or pulmonary impairment. Director's Exhibits 8, 10; Employer's Exhibits 1-3. The

administrative law judge noted further that the hospital records and the treatment notes from Drs. Chaney and Baker did not address the issue of total disability, and he accorded them "little weight." Decision and Order at 15. Based on the "well-reasoned and well-documented medical reports of Drs. Hussain, Broudy, and Rosenberg," the administrative law judge found that claimant did not establish that he is totally disabled. *Id*.

Claimant asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5-6, citing *Cornett v. Benham Coal,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. 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 a head drive operator and roof bolter. 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, 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 6. 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, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.,* 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge credited medical reports diagnosing no impairment. Thus, it was unnecessary for him to compare the exertional requirements of claimant's job duties with the medical reports. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

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. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled. Consequently, we affirm the

administrative law judge's finding that claimant did not establish that one of the applicable conditions of entitlement changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge