BRB No. 05-0968 BLA

MONROE NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/28/2006
KEM COAL COMPANY	)	
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
Employer-Respondent	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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 - Denying Benefits (03-BLA-5559) of Administrative Law Judge Joseph E. Kane 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 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). The administrative law judge therefore concluded that claimant did not demonstrate a change in an applicable condition of entitlement as required by 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 admitting into the record x-ray readings submitted by employer that exceeded the evidentiary limits set by 20 C.F.R. §725.414. Claimant further asserts that the administrative law judge erred in his analysis of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues 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.

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, 718.204. Failure to establish any one of these elements precludes a finding of 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

[1] Claimant's initial claim for benefits, filed on March 31, 1995, was denied on August 28, 1995. Director's Exhibit 1. Claimant's second claim, filed on November 6, 1996, was denied on March 5, 1997. Director's Exhibit 2. Claimant filed his current claim on March 19, 2001. Director's Exhibit 4.

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 2. 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 former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of seven new x-rays in light of the readers' radiological qualifications. The administrative law judge noted that "the vast preponderance of readings is negative for pneumoconiosis." Decision and Order at 9. Although claimant submitted a positive x-ray reading by Dr. Alexander, a Board-certified radiologist and B reader, the administrative law judge found this reading outweighed by several negative readings rendered by Dr. Wiot, who is also a Board-certified radiologist and B reader.

Claimant contends that this finding was error because several of the negative x-ray readings from Dr. Wiot that the administrative law judge relied upon exceeded the evidentiary limits set forth at 20 C.F.R. §725.414.[2] Review of the record reflects that the administrative law judge admitted and considered negative readings by Dr. Wiot of the following x-rays that employer designated as "rebuttal" evidence: January 30, 2002, March 13, 2002, December 26, 2002, May 29, 2003, and July 12, 2003. Employer's Exhibit 14. The record discloses that these five x-rays were contained in medical treatment records originally submitted by claimant pursuant to 20 C.F.R. §725.414(a)(4). Claimant's Exhibit 1. The regulations contain no specific provision for the rebuttal of hospitalization and medical treatment records that are received into evidence pursuant to

[2] The applicable provisions limited employer to "no more than two chest X-ray interpretations" submitted "in support of its affirmative case," and to "no more than one physician's interpretation of each chest X-ray" in rebuttal of claimant's affirmative case x-ray readings and "no more than one physician's interpretation of each chest x-ray" submitted by the Director as part of the complete pulmonary examination under 20 C.F.R. §725.406. 20 C.F.R. §§725.414(a)(3)(i), (ii). Employer had to demonstrate "good cause" to exceed those limits. 20 C.F.R. §725.456(b)(1).

20 C.F.R. §725.414(a)(4).[3] Since employer had already submitted its two affirmative case x-ray readings at Employer's Exhibits 2 and 11, and the administrative law judge did not find that "good cause" justified the admission of the x-ray readings at Employer's Exhibit 14, the administrative law judge failed to provide a basis for admitting Dr. Wiot's negative readings of claimant's January 30, 2002, March 13, 2002, December 26, 2002, May 29, 2003, and July 12, 2003 x-rays into the record. *See* 20 C.F.R. §§725.414(a)(3)(i), (ii); 725.456(b)(1).

However, in this particular case claimant has not identified an error requiring remand. To establish entitlement to benefits on the merits of his claim, claimant must prove that he is totally disabled. *Anderson*, 12 BLR at 1-112. As the administrative law judge found, claimant's pulmonary function and blood gas studies are non-qualifying,[4] and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii). Similarly, in claimant's two denied claims, the district director found that the evidence did not show that claimant was totally disabled. Director's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that claimant cannot establish total disability via these methods.

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[3] In its second notice of proposed rulemaking, the Department of Labor explained why there was no rebuttal provision for records of a miner's hospitalization or treatment for a respiratory or pulmonary or related disease:

> The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the "good cause" provision of §725.456.

64 Fed. Reg. 54965, 54996 (Oct. 8, 1999).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered medical reports by Drs. Baker, Dahhan, and Rosenberg, and claimant's medical treatment records. Drs. Baker, Dahhan, and Rosenberg concluded that claimant has no respiratory or pulmonary impairment. Director's Exhibit 11; Employer's Exhibits 8, 10, 11, 13. The administrative law judge noted further that "the treatment records make no mention of pulmonary disability." Decision and Order at 11; Claimant's Exhibit 1. Based on the medical reports of Drs. Baker, Dahhan, and Rosenberg, the administrative law judge found that claimant did not establish that he is totally disabled.

Claimant contends that the administrative law judge did not compare the exertional requirements of claimant's coal mine employment as a dozer operator and truck driver with "the medical reports assessing a disability." Claimant's Brief at 5. Such a comparison was unnecessary because the medical reports concluded that claimant has no impairment at all, and thus can perform his usual coal mine work or any type of coal mine work. *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). Additionally, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Finally, review of the records of claimant's two prior claims discloses that the only medical opinion was that claimant retained the respiratory capacity to perform his usual coal mine work. Director's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled based on medical opinion evidence.

Thus, on this record, claimant's entitlement is precluded. Even were the administrative law judge to find that claimant has established that he has pneumoconiosis, the administrative law judge would have to deny the claim because claimant cannot establish the total disability element. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, any error by the administrative law judge in admitting and considering the new x-ray readings was harmless. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Baker's September 8, 2001 medical report provided by the Department of Labor, "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 4. The Director responds that the administrative law judge's finding that Dr. Baker's opinion was equivocal on the

existence of pneumoconiosis does not establish a violation of the Director's duty to provide claimant with a complete pulmonary evaluation. The Director adds that Dr. Baker's opinion "is ultimately unhelpful to claimant" in any event, because the administrative law judge credited Dr. Baker's opinion that claimant is not totally disabled. Director's Brief at 3.

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. Baker 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 11; 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. Baker's report was incomplete. On the issue of the existence of pneumoconiosis, the administrative law judge found Dr. Baker's diagnosis to be equivocal and determined that it was outweighed by better reasoned and documented medical opinions. *See, e.g., Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). On the issue of total disability, the administrative law judge credited Dr. Baker's opinion that claimant is not totally disabled. Because the administrative law judge merely found that Dr. Baker's report was outweighed on the pneumoconiosis element, and he fully credited it on the total disability element, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Since claimant failed to establish that he is totally disabled, a necessary element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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