BRB No. 06-0829 BLA

IRA LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L&L COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	DATE ISSUED: 06/26/2007
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 Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, 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 Denying Benefits (04-BLA-6259) of Administrative Law Judge William S. Colwell 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). Claimant's prior application for benefits, filed on October 21, 1994, was finally denied on March 24, 1995, because claimant failed to establish

either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. On July 22, 2002, claimant filed his current application, which is considered a "subsequent claim for benefits," because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order dated February 15, 2006, the administrative law judge credited claimant with thirty-three and one-half years of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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

[1] The record indicates that claimant's coal mine employment occurred 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*).

[2] The administrative law judge's finding of thirty-three and one-half years of coal mine employment, and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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" 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. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant asserts that in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge erred in failing to accord greater weight to the positive x-ray reading by Dr. Baker, based on Dr. Baker's qualifications. Claimant's Brief at 4. We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that the new x-ray evidence consists of four readings of three x-rays.[3] Decision and Order at 7, 14-15. The administrative law judge permissibly found that the sole positive reading of record, that of an October 19, 2002 x-ray by Dr. Baker, a B reader, was outweighed by the negative reading of the same x-ray by Dr. Halbert, who is a dually qualified B reader and Board-certified radiologist, and thus possesses superior qualifications to Dr. Baker. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); Decision and Order at 7, 15. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), again asserting that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Baker. Claimant's assertion lacks merit.

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the October 19, 2002 x-ray. Director's Exhibit 11.

In considering the medical opinion evidence, the administrative law judge properly noted that Dr. Baker, a Board-certified pulmonologist, diagnosed coal workers' pneumoconiosis, and chronic bronchitis and minimal hypoxemia due in part to coal dust exposure. Decision and Order at 10, 17. Dr. Baker indicated that the degree of claimant's impairment was "minimal to none," and stated that each of the diagnosed conditions contributed "fully" to the impairment. Claimant's Exhibit 1; Director's Exhibit 10. By contrast, Drs. Rosenberg and Fino, also Board-certified pulmonologists, opined that claimant does not suffer from either clinical or legal pneumoconiosis, and does not suffer from any respiratory impairment causally related to coal dust exposure. Employer's Exhibits 1-5; Decision and Order at 10-11, 17. In addition, the administrative law judge accurately noted that the hospital and treatment notes of record contain no mention of pneumoconiosis or pulmonary disability. Employer's Exhibit 8; Decision and Order at 10-11, 17. Contrary to claimant's argument, in determining that the medical evidence did not establish the existence of pneumoconiosis, the administrative law judge permissibly found Dr. Baker's conclusions outweighed by the better reasoned and more comprehensive opinions of Drs. Rosenberg and Fino. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Claimant's Exhibit 1; Director Exhibit 10; Employer's Exhibits 1-5; Decision and Order at 17.

In addition, we reject claimant's assertion that the administrative law judge selectively analyzed the evidence relevant to the existence of pneumoconiosis. Claimant's Brief at 4. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the evidence. *See White*, 23 BLR at 1-5.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Here, the administrative law judge properly examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4). We therefore affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the evidence submitted since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

With respect to this issue of total disability, the administrative law judge found that all of the new pulmonary function and blood gas studies were non-qualifying,[4] the record contained no evidence of cor pulmonale with right sided congestive heart failure, and none of the new medical opinions diagnosed a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant failed to establish a change in the applicable condition of total disability at 20 C.F.R. §§718.204(b)(2)(i)-(iv), 725.309(d). Claimant's Exhibits 1, 2; Director's Exhibit 10; Employer's Exhibits 1-5, 8; Decision and Order at 18-19.

Regarding these findings, claimant generally asserts that the administrative law judge erred in failing to find total disability established. Claimant's Brief at 2, 5. Board review is properly invoked when the appealing party assigns specific allegations of legal or factual error in the administrative law judge's decision. Failure to do so precludes review and requires the Board to affirm the decision below. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Claimant's assertion that the administrative law judge erred in failing to find total disability established does not fulfill his duty to identify any error with specificity or to raise and brief any issues arising from the administrative law judge's findings. 20 C.F.R. §802.211(a), (b); *Sarf*, 10 BLR at 1-120. We thus hold that claimant fails to invoke the Board's review of the administrative law judge's findings at 20 C.F.R. §718.204(b), and, therefore, these findings are affirmed. *Sarf*, 10 BLR at 1-121.

Consequently, as we have affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

[4] 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 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 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