BRB No. 06-0835 BLA

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| WILLIE G. MORGAN | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MILLER RICE TRUCKING | ) | DATE ISSUED: 06/28/2007 |
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| 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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Robert A. Caplen (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5390) of Administrative Law Judge Rudolf L. Jansen on a subsequent claim[1] 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 initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twelve years. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b), elements previously adjudicated against him. The administrative law judge concluded, therefore, that claimant failed to demonstrate that an applicable condition of entitlement had changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309; *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by new x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4) and total respiratory disability established by new medical opinion evidence under Section 718.204(b)(2)(iv). Claimant additionally contends that because the administrative law judge discredited the opinion of Dr. Simpao, as to the existence of pneumoconiosis, because it was based solely on an x-ray interpretation, the Director, Office of Workers' Compensation Programs (the Director), has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the denial of benefits. The Director responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are

[1] Claimant first filed a claim for benefits on November 30, 1993. That claim was denied by Administrative Law Judge Edward J. Murty, Jr. on July 18, 1995. The denial was affirmed by the Board. Director's Exhibit 1. Claimant filed his second application for benefits on June 14, 2002, which is the subject of this appeal. Director's Exhibit 3.

[2] We affirm the administrative law judge's findings of twelve years of coal mine employment, that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) and that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 5-6, 11-14.

rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying almost solely on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to "defer to a doctor with superior qualifications," or to "accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further contends that the administrative law judge may have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, properly considered the radiological expertise of the physicians who interpreted the new x-rays and found that the positive interpretation of the June 5, 2002 x-ray by Dr. Baker, who was a B reader, and the positive interpretation of the August 13, 2002 x-ray by Dr. Simpao, who possessed no specialized radiological qualifications or expertise, were outweighed by the negative interpretations of the same x-rays by Dr. Wiot, who was both a Board-certified radiologist and B reader.[3] 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge also noted that the September 11, 2002 x-ray was read as negative by Dr. Jarboe, a B reader, and by Dr. Wiot, a Board-certified B reader. Decision and Order at 6; Director's Exhibits 9, 13. Hence, the administrative law judge's consideration of the x-ray evidence constituted both a qualitative and quantitative analysis of the x-ray evidence, and we affirm his weighing of the conflicting readings, and his finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *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. 1994). In addition, we reject claimant's contention that the administrative law judge may have "selectively analyzed" the x-ray evidence because claimant has not provided any support for that assertion, nor does a review of the evidence or the administrative law judge's Decision and Order, reveal such an analysis. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4-5 (2004).

[3] Dr. Barrett read the August 13, 2002 film for quality only. Director's Exhibit 10.

Claimant next contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established at Section 718.202(a)(4). In support of this contention, claimant contends that the opinion of Dr. Baker establishes the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in according less weight to the opinion of Dr. Baker because it was based on a positive x-ray interpretation, contrary to the weight of the other x-ray evidence of record, and because the x-ray was subsequently read negative. Claimant contends that because the interpretation of medical data is for medical experts, and Dr. Baker's finding of pneumoconiosis was based on a physical examination, medical and work histories, a chest x-ray, and pulmonary function and arterial blood gas studies, it was error for the administrative law judge to interpret medical tests, and to substitute his own conclusions for those of the physician, and not find that Dr. Baker's opinion was reasoned.

Claimant also contends that the administrative law judge's rejection of Dr. Simpao's opinion on the issue of pneumoconiosis as unreasoned, means that claimant did not receive a complete, credible pulmonary evaluation as required by the Act.[4] In response, the Director asserts that the Act only requires him to provide claimant with a complete, credible pulmonary evaluation, not a dispositive one. The Director avers, "[t]he mere fact that an [administrative law judge] may find other reports more persuasive does not mean that the Director failed to satisfy his statutory obligation." Director's Letter Brief at 2.

In weighing the opinions of Drs. Simpao, Baker, and Jarboe, pursuant to Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Baker and Simpao provided little or no basis for their conclusions that claimant had pneumoconiosis, other than their positive x-ray readings and claimant's history of coal mine employment. The administrative law judge found that Dr. Jarboe explained, in detail, through his written report and by deposition, why claimant did not have pneumoconiosis. The administrative law judge, therefore, found that "Dr. Jarboe's opinion, [which was] well-documented and reasoned, deserv[ed] greater weight [than] the less reasoned and less documented opinions by Drs. Baker and Simpao." Decision and Order at 12. This was rational. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (administrative law judge as factfinder should decide whether physician's report is sufficiently reasoned and documented); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17

[4] Claimant does not assert a similar defect with respect to Dr. Simpao's total disability finding.

BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 12; Director's Exhibit 9.

Further, as the Director contends, the determination to accord less weight to Dr. Simpao's opinion was not tantamount to a finding that Dr. Simpao's opinion was entitled to no weight, and thus, lacking in credibility altogether. Because Dr. Simpao clearly rendered an opinion addressing all issues of entitlement, and the administrative law judge merely found another opinion more reasoned, we reject claimant's argument that the Director failed to provide claimant with a complete, credible pulmonary evaluation on the issue of pneumoconiosis. *See Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Turning to the issue of total disability, claimant argues that the administrative law judge erred in rejecting the well-reasoned and documented opinion of Dr. Baker, that claimant's respiratory impairment precluded him from working in his usual coal mine employment or a similar dusty occupation and erred, therefore, in finding that claimant did not establish total disability. Claimant contends that "his usual coal mine work included being a coal truck driver," and that it could "be reasonably concluded that such duties involved … being exposed to heavy concentrations of dust on a daily basis." Claimant's Brief at 8. Further, citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant argues that a single medical opinion, such as that of Dr. Baker, may be sufficient to invoke the presumption of total disability.

Claimant's reliance on *Meadows* is misplaced because that case dealt with the application of the interim presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. Part 727. The instant case arises under 20 C.F.R. Part 718, which requires that claimant affirmatively establish each element of entitlement. 20 C.F.R. §§718.2, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In finding that Dr. Baker's opinion failed to establish total respiratory disability, the administrative law judge noted that Dr. Baker found 1) that claimant had a "Class I" impairment under the Guides to the Evaluation of Permanent Impairment, 5th Edition because his $FEV_1$ and vital capacity were both above 80% of predicted," and 2) that claimant had an "occupational impairment" since he should "refrain from further exposure to coal dust." Decision and Order at 14.

The administrative law judge rationally attributed less weight to the opinion of a "Class I" impairment based on claimant's $FEV_1$ and FVC pulmonary function study results, because Dr. Baker failed to address whether such an impairment precluded claimant from returning to his usual coal mine work. The administrative law judge also found that the probative value of the opinion was undermined because Dr. Baker's description of the impairment was vague and equivocal and the doctor failed to definitively state whether claimant retained the physiological capacity to continue his usual coal mine employment from a respiratory standpoint. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4, 1-6 (1986) (*en banc*) (administrative law judge rejected doctor's opinion where doctor failed to term claimant totally disabled or to address severity of the impairment in such a way as to permit administrative law judge to infer total disability); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge properly found that Dr. Baker's opinion, that claimant was "100% occupationally disabled for work in the coal mining industry," because he could no longer be exposed to coal dust, was insufficient to establish total respiratory disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Bentley v. Director, OWCP*, 7 BLR 1-612, 614 (1984); *New v. Director, OWCP*, 6 BLR 1-597 (1983). The administrative law judge's finding that Dr. Baker's opinion does not establish a totally disabling respiratory impairment is, therefore, affirmed. Moreover, as claimant does not otherwise challenge the administrative law judge's finding that the relevant evidence failed to establish total respiratory disability, it is likewise affirmed. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Because we affirm the administrative law judge's determination that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), we also affirm the administrative law judge's finding that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge