BRB No. 06-0839 BLA

JOHN W. FORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/28/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor

John W. Ford, Nicholasville, Kentucky, *pro se*.

Emily Goldberg-Kraft (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, without the assistance of counsel, the Decision and Order on Remand – Denying Benefits of Administrative Law Judge Rudolf L. Jansen 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). This case is before the Board for the second time.[1] In our prior Decision and Order, the Board

[1] Claimant filed a claim for benefits on August 14, 1980. After claimant indicated that he no longer wished to pursue that claim, it was administratively closed. Claimant filed another claim for benefits on August 31, 1998. In a Decision and Order – Denial of Benefits issued on September 19, 2000, Administrative Law Judge Robert L. Hillyard

affirmed the administrative law judge's finding that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), because claimant failed to challenge, with specificity, the administrative law judge's findings. *See 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). Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Ford v. Director, OWCP*, BRB No. 04-0559 BLA (Feb. 28, 2005)(unpub.).

Claimant appealed to the United States Court of Appeals for the Sixth Circuit. In an Order issued on October 26, 1995, the court vacated the Board's Decision and Order and remand the case for consideration of the evidence addressing complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Ford v. Director, OWCP*, No 05-3357 (6th Cir. Oct. 26, 2005)(unpub.). The Board remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the opinion of the Sixth Circuit. *Ford v. Director, OWCP*, BRB No. 04-0559 BLA (Mar. 15, 2006)(Order)(unpub.).

On remand, the administrative law judge found that the newly submitted evidence did not support a finding of complicated pneumoconiosis, and he therefore determined that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis contained in Section 718.304. The administrative law judge reiterated his earlier findings that the new medical evidence did not establish total disability pursuant to Section 718.204(b)(2). Thus, the administrative law judge found that the newly submitted evidence did not establish one of the applicable conditions of entitlement previously decided against claimant. Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by

---

determined that the claim before him did not constitute a duplicate claim, as the prior claim was never denied. Judge Hillyard found that claimant established the existence of pneumoconiosis, but did not establish that he was totally disabled by a respiratory or pulmonary impairment. Therefore, Judge Hillyard denied benefits. Director's Exhibit 1. On October 9, 2001, claimant filed this claim. Director's Exhibit 2. On March 4, 2004, Administrative Law Judge Rudolf L. Jansen (the administrative law judge) denied benefits because he found that the newly submitted evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against claimant. *See* 20 C.F.R. §725.309(d).

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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 entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

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 that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3). The administrative law judge on remand found that the new evidence developed with the subsequent claim did not establish invocation of the irrebuttable presumption that claimant is totally disabled due to pneumoconiosis.

Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.[2]

[2] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . . ; or

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Pursuant to Section 718.304(a), the administrative law judge considered that Dr. Westerfield, a B reader, interpreted claimant's November 8, 2001 x-ray as positive for a Category A large opacity. Director's Exhibits 7, 10. However, the administrative law judge also considered that Dr. Barrett, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis, and interpreted a later x-ray, taken on January 8, 2003, as negative for pneumoconiosis. Director's Exhibits 12, 18. Based on Dr. Barrett's "superior radiological credentials," the administrative law judge accorded "less probative weight" to Dr. Westerfield's reading. Decision and Order on Remand at 5. This was a permissible qualitative evaluation of the conflicting x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *White*, 23 BLR at 1-4. The record reflects that no other new x-rays were interpreted as positive for complicated pneumoconiosis.[3] We therefore affirm the

---

> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304. The administrative law judge must, however, weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

[3] Consequently, the administrative law judge's failure to discuss Dr. Baker's negative interpretation of the April 14, 2003 x-ray does not constitute reversible error,

administrative law judge's finding that complicated pneumoconiosis was not established pursuant to Section 718.304(a).

Pursuant to Section 718.304(c), the administrative law judge considered that Dr. Westerfield examined claimant in 2001 and diagnosed complicated pneumoconiosis and coronary artery disease. Director's Exhibit 7. The administrative law judge stated:

> Dr. Westerfield does not make any other physical findings on examination which would justify a medical conclusion that Claimant suffers from complicated pneumoconiosis under §718.304(c). Since his x-ray reading has been discredited, the newly submitted record evidence contains no support for the complicated pneumoconiosis finding.

Decision and Order on Remand at 5. We affirm the administrative law judge's finding that Dr. Westerfield's opinion is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c), as the administrative law judge reasonably found that the underlying documentation did not support the physician's diagnosis of complicated pneumoconiosis.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's finding that the evidence did not support a finding of complicated pneumoconiosis, and that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304.

---

because Dr. Baker's negative interpretation would not assist claimant in establishing the existence of complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 17. Additionally, any error by the administrative law judge in commenting that the recency of Dr. Barrett's negative reading of the January 18, 2003 x-ray was another reason for discounting Dr. Westerfield's positive reading of the November 8, 2001 x-ray, is harmless: The administrative law judge provided a valid alternate ground, based on the qualifications of the physicians interpreting the x-rays, for crediting Dr. Barrett's negative interpretation of the November 8, 2001 x-ray. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni*, 6 BLR 1-1278.

[4] The administrative law judge did not address the opinions of Dr. Fleming-Phillips or Dr. Baker, *see* Director's Exhibit 17; Claimant's Exhibits 1, 2. However, because neither of these physicians diagnosed complicated pneumoconiosis, their opinions would not assist claimant in establishing the existence of complicated pneumoconiosis pursuant to Section 718.304. Therefore, the administrative law judge did not commit reversible error by failing to specifically address these opinions. *See Larioni*, 6 BLR 1-1278.

The administrative law judge reiterated his findings that claimant did not establish total disability by any of the other types of new medical evidence pursuant to Section 718.204(b)(2). Decision and Order on Remand at 4; Decision and Order -Denying Benefits [2004] at 9-10. Substantial evidence supports those findings. Specifically, the administrative law judge correctly found that none of the new pulmonary function studies and blood gas studies was qualifying[5] for total disability, and that there was no evidence of cor pulmonale with right-sided congestive heart failure, under Section 718.204(b)(2)(i)-(iii). We therefore affirm those findings.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge accurately noted that the opinion of Dr. Fleming-Phillips did not address whether claimant was totally disabled, and that Dr. Westerfield opined that claimant has no respiratory impairment and is not totally disabled. Claimant's Exhibit 2; Director's Exhibit 7. The administrative law judge permissibly found that Dr. Westerfield's opinion was well-documented and reasoned because it was based on his pulmonary function and blood gas testing of claimant. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). By contrast, the administrative law judge found that Dr. Baker's opinion that claimant has a mild impairment and is "occupationally disabled" by the need to limit further dust exposure, Director's Exhibit 17, was not a diagnosis of total disability, because it stated only that claimant should not work in a dusty environment. Decision and Order [2004] at 9. Further, in considering Dr. Baker's opinion, along with the other medical opinions that did not support a finding of total disability, and the non-qualifying pulmonary function study and blood gas study evidence, the administrative law judge concluded that the evidence failed to establish a totally disabling respiratory impairment. Decision and Order [2004] at 10. On reviewing Dr. Baker's opinion and the administrative law judge's findings, we conclude that the administrative law judge permissibly accorded Dr. Baker's opinion less weight as being a recommendation against further dust exposure, and therefore, insufficient to establish total disability.[6] *See 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). Substantial

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

[6] In a report dated January 8, 2003, referring to objective testing, history, and symptoms, Dr. Baker diagnosed a mild impairment and stated that "persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled . . . ." Director's Exhibit 17 at 4. Review of Dr. Baker's report does not reveal any statement by the doctor that claimant is totally disabled by a respiratory impairment.

evidence supports the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv), which we therefore affirm.

Based on the foregoing, we affirm the administrative law judge's finding that the new medical evidence did not establish total disability pursuant to Section 718.204(b). Further, we affirm the administrative law judge's finding that claimant has not established a change in one of the applicable conditions of entitlement pursuant to Section 725.309, and we affirm the administrative law judge's denial of benefits. *See White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge