BRB No. 06-0910 BLA

B.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/22/2007
LAD MINING, INCORPORATED	)	
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

B.S., Whitwell, Tennessee, *pro se*.

Herbert B. Williams (Stokes & Rutherford, P.C.), Knoxville, Tennessee, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Rejection of Claim (05-BLA-5098) of Administrative Law Judge Edward Terhune Miller 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). Claimant

[1] Ron Carson, Program Director with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

filed a subsequent claim on August 29, 2003.[2] After crediting claimant with "a little over nine years of coal mine employment,"[3] Decision and Order at 3, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b), based on the newly submitted evidence. He therefore found 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 generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief.

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 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. 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 the existence of pneumoconiosis. Director's Exhibit 1. Consequently,

[2] Claimant filed a previous claim on July 29, 1996. Director's Exhibit 1. It was denied on August 28, 2000, because claimant did not establish the existence of pneumoconiosis. *Id.*

[3] Claimant's last coal mine employment occurred in Tennessee. Director's Exhibits 4, 7 at 10. 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*).

claimant had to submit new evidence establishing the existence of pneumoconiosis, to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of five new x-rays. Two x-rays, dated January 9, 2004 and September 14, 2004, were each read once by a B reader as positive for pneumoconiosis.[4] However, the administrative law judge also considered that Dr. Wiot, a Board-certified radiologist and B reader, read the same two x-rays as negative for pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 2. Based on Dr. Wiot's "superior qualifications," the administrative law judge permissibly found that the January 9, 2004 and September 14, 2004 x-rays did not support a finding of pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The remaining three x-rays, dated October 20, 2003, April 8, 2004, and July 14, 2004 were each read once as positive for pneumoconiosis and once as negative for pneumoconiosis by Board-certified radiologists who are also B readers.[5] Given the conflicting readings by equally qualified doctors, the administrative law judge reasonably found the readings of the October 20, 2003, April 8, 2004, and July 14, 2004 x-rays to be "in equipoise."[6] *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267,

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[4] Dr. Baker, a B reader, read the January 9, 2004 x-ray as positive for pneumoconiosis, and Dr. Pathak, a B reader, read the September 14, 2004 x-ray as positive for pneumoconiosis. Director's Exhibit 16, Claimant's Exhibit 2.

[5] Drs. Alexander and Wiot, both of whom are Board-certified radiologists and B readers, read the October 20, 2003 x-ray as positive and negative for pneumoconiosis, respectively. Director's Exhibits 17, 18. Drs. Ahmed and Wheeler, both Board-certified radiologists and B-readers, read the April 8, 2004 x-ray as positive and negative for pneumoconiosis, respectively. Director's Exhibits 18, 20. Drs. Alexander and Wheeler read the July 14, 2004 x-ray as positive and negative for pneumoconiosis, respectively. Claimant's Exhibit 1; Employer's Exhibit 1.

[6] The administrative law judge noted that Dr. Ahmed provided a second positive reading of the April 8, 2004 x-ray, but that only the initial reading was considered. Decision and Order at 9 n.2. Claimant submitted Dr. Ahmed's second reading as rehabilitative evidence following employer's rebuttal reading. Claimant's Exhibit 5. The administrative law judge excluded Dr. Ahmed's second reading, because he found that merely submitting a second reading, without some additional explanation or support from Dr. Ahmed for his reading, did not qualify as rehabilitative evidence. Hearing Transcript at 43-44. Since 20 C.F.R. §725.414(a)(2)(ii) allows a claimant to submit "an additional

281, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 10. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Adcock, Baker, Cooper, and McSharry.[7] A diagnosis of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis. Dr. Adcock opined that claimant's "impairment could be due at least in part to coal dust." Director's Exhibit 18. The administrative law judge permissibly found that Dr. Adcock's diagnosis was too equivocal to support a finding of pneumoconiosis. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 11.

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statement" from the original x-ray reader where employer has submitted a rebuttal reading, the regulatory language supports the administrative law judge's conclusion that more than a mere repeat reading is contemplated. Moreover, the administrative law judge reasonably found that even if Dr. Ahmed's second positive reading of the April 8, 2004 x-ray were considered, the weight of the evidence would not change, because Dr. Ahmed offered no additional support or explanation for his reading. Decision and Order at 9-10 n.2. Thus, the administrative law judge committed no error with regard to Dr. Ahmed's second x-ray reading.

[7] The administrative law judge also considered a report from a nurse-practitioner diagnosing claimant with coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 18. The administrative law judge rationally determined that this report did not establish the existence of pneumoconiosis, because the nurse-practitioner did not explain her diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 3, 11 n.3.

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Dr. Cooper diagnosed claimant with "a significant amount of lung disease from Black Lung," based on history, lung function tests, and his impairments. Claimant's Exhibit 4. The administrative law judge, however, noted that Dr. Cooper based his diagnosis on a pulmonary function study that he did not identify. Since it is not clear from a review of Dr. Cooper's opinion which pulmonary function study he relied upon to support his diagnosis of moderately severe obstructive lung disease, or whether that study is among those in the record,[9] the administrative law judge reasonably questioned the reliability of the doctor's opinion. *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985).

Dr. Baker diagnosed clinical pneumoconiosis based on an abnormal chest x-ray and coal dust exposure. Director's Exhibit 16. The administrative law judge permissibly considered that the January 9, 2004 x-ray that Dr. Baker, a B reader, read as positive for pneumoconiosis, was read by a better qualified physician as negative for pneumoconiosis, thus calling into question the reliability of Dr. Baker's diagnosis of clinical pneumoconiosis.[10] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983).

Dr. Baker also diagnosed chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking. Director's Exhibit 16. We affirm the administrative law judge's discrediting of this diagnosis, because it was based on a pulmonary function study that was nonconforming. *See Hutchens*, 8 BLR at 1-19; Decision and Order at 11.

Dr. Baker also diagnosed chronic bronchitis due to coal mine employment. We affirm the administrative law judge's decision to give "some weight" to Dr. Baker's diagnosis, because he reasonably found that, notwithstanding the problems with Dr. Baker's x-ray reading and pulmonary function study, the diagnosis of chronic bronchitis

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[9] All but one pulmonary function study of record was invalidated. Decision and Order at 5. In considering the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge stated that Dr. Cooper relied upon the February 16, 2004 study. Decision and Order at 11. However, in considering the evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge later stated that Dr. Cooper did not identify the study but "presumably" it was the September 14, 2004 study. Decision and Order at 13. The pulmonary function study's percentages noted by Dr. Cooper in his report do not correspond to any pulmonary function study in the record. Claimant's Exhibit 4.

[10] As discussed earlier, Dr. Wiot, a Board-certified radiologist and B reader, read the January 9, 2004 x-ray as negative for pneumoconiosis. Director's Exhibit 19.

was supported by claimant's symptoms and medical history.[11] *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); Decision and Order at 11; Director's Exhibit 16.

Dr. McSharry examined claimant and reviewed his medical records, and stated that there was insufficient objective evidence to diagnose pneumoconiosis. Employer's Exhibit 3, internal exhibit 4 at 1. Dr. McSharry attributed claimant's respiratory impairment to asthma unrelated to his coal mine employment. Employer's Exhibit 3, internal exhibit 4 at 2. The administrative law judge permissibly gave "substantial weight" to Dr. McSharry's opinion, because the administrative law judge found that Dr. McSharry adequately explained his opinions and supported them with objective medical evidence. *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, 1-89 (1993); Decision and Order at 11.

Based on this weighing of the evidence, the administrative law judge rationally found that the medical opinion evidence was in equipoise on the issue of pneumoconiosis. Decision and Order at 11; *see Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). It is therefore affirmed.

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis.[12] Consequently, we affirm the finding that claimant did not establish that the applicable condition of entitlement changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

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[11] The administrative law judge did not state how much weight he accorded Dr. Baker's diagnosis of hypoxemia due to coal mine employment. Any error by the administrative law judge was harmless, since only "chronic" lung diseases arising out of coal mine employment constitute legal pneumoconiosis, 20 C.F.R. §718.201(a)(2), and Dr. Baker did not specify that the hypoxemia was chronic. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Because the issue of total disability was not an element of entitlement decided against claimant in his prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2); Director's Exhibit 1. Therefore, we need not address the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*); Decision and Order at 11-13.

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues' decision to affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3), and his findings regarding Dr. Ahmed's second reading of the April 8, 2004 x-ray. I additionally agree that the administrative law judge permissibly found Dr. Adcock's opinion to be equivocal at 20 C.F.R. §718.202(a)(4). However, I would vacate and remand the administrative law judge's findings as to the opinions of Drs. Baker, Cooper, and McSharry. The administrative law judge failed to adequately explain why he did not credit the opinions of Drs. Baker and Cooper, that claimant has pneumoconiosis, or why he credited the opinion of Dr. McSharry, that claimant does not have pneumoconiosis. Thus, I would remand this case to the administrative law judge for such explanations in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge's treatment of the opinions of Drs. Baker, Cooper, and McSharry must be revisited, I would also vacate the administrative law judge's finding that the evidence at 20 C.F.R. §718.202(a)(4) is in equipoise.

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BETTY JEAN HALL
Administrative Appeals Judge