BRB No. 07-0816 BLA

K.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOE SLUSHER TRUCKING	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 06/30/2008
	)	
Employer/Carrier- Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (2005-BLA-06067) of Administrative Law Judge Ralph A. Romano 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] Based on the parties' stipulation, the administrative law judge found that claimant had fourteen years of coal mine employment. The administrative law judge found that the evidence supported a finding that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), but further determined that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the evidence relevant to Section 718.202(a). Claimant also contends that remand to the district director is required, as he did not receive a complete, credible pulmonary evaluation as is required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation (the Director), has issued a limited response and contends that remand for a complete pulmonary evaluation is not warranted in this case.[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 rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

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[1] Claimant filed his initial claim for benefits on June 24, 1993. Director's Exhibit 1A. After the Board affirmed the denial of benefits, claimant took no further action on the claim. *Id.*; [*K.H.*] *v. Joe Slusher Trucking Co.*, BRB No. 95-2236 BLA (April 23, 1996)(unpub.).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (en banc); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). 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); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d). Claimant's prior claim was denied because he failed to establish any element of entitlement. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Consequently, claimant had to submit new evidence establishing one of the elements of entitlement. *Sharondale,* 42 F.3d at 997-998, 19 BLR at 2-18. The administrative law judge found that the newly submitted pulmonary function studies established that claimant was totally disabled pursuant to Section 718.204(b)(2)(i). Decision and Order at 14-16. However, the administrative law judge incorrectly stated that claimant "failed to establish any medical element of entitlement by the newly submitted evidence." Decision and Order at 18. Contrary to the administrative law judge's conclusion, his finding that the pulmonary function studies outweighed the medical opinions and established total disability is sufficient to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See* Decision and Order at 4.

In this appeal, claimant challenges the administrative law judge's consideration of the x-ray evidence pursuant to Section 718.202(a)(1), and argues that the administrative law judge selectively analyzed the evidence. We disagree. The administrative law judge permissibly accorded significantly diminished weight to the evidence submitted in conjunction with the prior claim after finding that its age severely compromised its persuasiveness and reliability, noting that the evidence from the initial claim was at least six years older than the newly submitted medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); Decision and Order at 7. In addition, we reject claimant's argument that the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. The administrative law judge engaged in a proper quantitative and qualitative analysis of the x-ray evidence and acted within his discretion as fact-finder in

determining that, based upon the interpretations performed by physicians with superior qualifications, none of the four newly submitted films was positive for pneumoconiosis.[4] *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, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-68 (1990); *Clark*, 12 BLR at 1-155; Decision and Order at 9; Director's Exhibits 11, 15, 31, 47; Employer's Exhibit 3. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

At Section 718.202(a)(4), claimant argues that the administrative law judge erred in failing to grant controlling weight to the medical opinion of Dr. Baker, claimant's treating physician, who diagnosed chronic obstructive pulmonary disease (COPD) and pneumoconiosis due to coal mine employment. Claimant contends that the administrative law judge erred in substituting his own medical conclusions for those of Dr. Baker in according the physician's medical opinion less weight due to his reliance upon an x-ray interpretation that was contrary to the administrative law judge's finding at Section 718.202(a)(1). We disagree.

The administrative law judge acknowledged that Dr. Baker's treatment records note claimant's history of coal mine employment and pulmonary function study values, his diagnosis of COPD, and the course of treatment. Decision and Order at 13. The administrative law judge reasonably found, however, that despite Dr. Baker's status as treating physician, his opinion as to the existence of pneumoconiosis was outweighed by the better reasoned contrary opinions of Drs. Broudy and Dahhan, who explained how the evidence they developed and reviewed supported their conclusions. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511-512, 22 BLR 2-625, 2-646 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 709**,** 22 BLR 2-537, 2-546 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 521**,** 22 BLR 2-495, 2-509 (6th Cir. 2002); *Woodward*, 991 F.2d at 320**,** 17 BLR at 2-87; *Clark*, 12 BLR at 1-155; Decision and Order at 11-13.

Moreover, the administrative law judge permissibly accorded Dr. Baker's opinion less weight because it was based, in part, upon a positive x-ray reading that was contrary to the administrative law judge's finding that the x-ray evidence was insufficient

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[4] The only positive x-ray reading was Dr. Baker's interpretation of the March 23, 2001 film, which conflicted with Dr. Wiot's negative interpretation. Director's Exhibits 11, 31. The administrative law judge permissibly credited Dr. Wiot, who is a Board-certified radiologist, over Dr. Baker, who has no radiological credentials. *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 9; Director's Exhibits 11, 31.

to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233-1234, 17 BLR 2-97, 2-103 (6th Cir. 1993); *Abshire v. D & L Coal Co*., 22 BLR 1-202, 214 (2002)(*en banc*); Decision and Order at 10; Director's Exhibit 11. Consequently, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4) as supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We also affirm, therefore, the administrative law judge's determination that claimant did not prove that he has pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement. Thus, an award of benefits is precluded in this case. *Anderson*, 12 BLR at 1-112.

Finally, we disagree with claimant's assertion that the denial of benefits must be vacated and the case remanded to the district director because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge at Section 718.202(a)(4). Dr. Hussain 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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 12. Dr. Hussain diagnosed COPD but stated it was not caused by coal dust exposure.[5] Director's Exhibit 12. The administrative law judge found that Dr. Hussain did not explain the basis for his opinion and therefore found it was "less than well-reasoned and entitled to less weight." *Id.* Although the administrative law judge determined that the physician rendered conclusions with no supporting rationale, a remand for further explanation of Dr. Hussain's opinion as to the cause of the COPD is not required since he has ruled out coal dust exposure and therefore further explanation would not affect the outcome of this claim.[6] *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-

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[5] The administrative law judge found that there was no persuasive and reasoned explanation given as to why claimant's impairment resulted from coal mine employment, and concluded that claimant failed to meet his burden of establishing that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 18.

[6] As the Director, Office of Workers' Compensation Programs, correctly contends, Dr. Hussain's opinion is ultimately unhelpful to claimant as the physician found that claimant does not have any occupational disease arising out of coal mine employment, and opined that claimant is not totally disabled by his mild impairment due to chronic obstructive pulmonary disease related to tobacco abuse. Director's Brief at 2; Director's Exhibit 12. Therefore, even if Dr. Hussain's opinion was deemed to be the most

133 (6th Cir. 1995). We therefore reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. 20 C.F.R. §725.406(a); *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).

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persuasive opinion of record, it would not support an award of benefits because Dr. Hussain's conclusions are contrary to a finding that claimant has pneumoconiosis and is totally disabled due to pneumoconiosis. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995); *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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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