BRB No. 07-0827 BLA

J. J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEM COAL COMPANY	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 06/24/2008
	)	
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 Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (06-BLA-5843) of Administrative Law Judge Kenneth A. Krantz rendered 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] Claimant filed this claim for benefits on July 5, 2005. Director's Exhibit 3. The administrative law judge credited claimant with sixteen years of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering the subsequent claim, the administrative law judge concluded that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),[3] and total disability pursuant to 20 C.F.R. §718.204(b)(2).[4]

[1] Claimant's initial claim for benefits, filed on September 13, 1995, was finally denied by the district director on February 12, 1996. Director's Exhibit 1. Claimant filed his second claim on February 17, 2000, which was denied by Administrative Law Judge Daniel J. Roketenetz on August 23, 2002, based on claimant's failure to establish the existence of pneumoconiosis and that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 2. The Board affirmed the denial of benefits. [*J. J.*] *v. Pro-Land Inc./Kem Coal*, BRB No. 02-0855 BLA (July 21, 2003)(unpub.). *Id.*

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 8. Accordingly, the Board will apply the law 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*).

[3] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(4), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Since the total disability element was decided in claimant's favor in the 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). Accordingly, the administrative law judge did not address total disability, and we do not reach claimant's arguments on the total disability issue.

Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.

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 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). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing either of these elements to obtain review of the merits of 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 four readings of three new x-rays, all of which were negative for pneumoconiosis.[5] The administrative law judge therefore properly found that "there can be no positive

[5] Dr. Broudy, a B reader, read the September 8, 2005 x-ray as negative for pneumoconiosis. Director's Exhibit 13. Dr. Rasmussen, a B reader, and Dr. Wheeler, a B reader and Board-certified radiologist, both read the November 7, 2005 x-ray as negative for pneumoconiosis. Director's Exhibits 11, 17. Dr. Dahhan, a B reader, read the February 20, 2006 x-ray as negative for pneumoconiosis. Director's Exhibit 19. Dr. Barrett reviewed the November 7, 2005 x-ray solely to assess its quality. Director's Exhibit 12.

determination of pneumoconiosis by x-ray" because all the x-rays were read as negative by "highly qualified" physicians. Decision and Order at 9; *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); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, and "may have 'selectively analyzed'" the x-ray readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Because the administrative law judge properly found that the new evidence did not establish the existence of pneumoconiosis, we affirm his finding that claimant failed to establish a change in that condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined that "without a finding of pneumoconiosis, [c]laimant cannot prove that the pneumoconiosis arose from coal mine employment []or that pneumoconiosis contributes to his total disability," and therefore, failed to establish a change in those conditions of entitlement. Decision and Order at 11-12. Claimant does not challenge that determination by the administrative law judge. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, claimant contends that, because the administrative law judge "concluded that Dr. Rasmussen never adequately quantified the etiology of the claimant's legal pneumoconiosis and that . . . his opinion was unreasoned," the Director failed to provide claimant with a "credible pulmonary evaluation." Claimant's Brief at 4. The Director responds that there was no violation of his duty to provide claimant with a complete pulmonary evaluation.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The record reflects that Dr. Rasmussen 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 24. The administrative law judge permissibly accorded "lessened weight" to Dr. Rasmussen's diagnosis of legal pneumoconiosis because Dr. Rasmussen did not apply the studies he cited to the facts of this case to determine the etiology of claimant's respiratory impairments. Decision and Order at 11; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (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). Additionally, the administrative law judge chose to give "heightened weight" to the better reasoned and documented opinions of Drs. Dahhan and Broudy, that claimant does not suffer from pneumoconiosis. *Id.* at 10*; see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "[administrative law judges]

may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). We agree with the Director that the administrative law judge found Dr. Rasmussen's opinion to be less credible and outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Accordingly, the Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

_____
REGINA C. McGRANERY
Administrative Appeals Judge