BRB No. 09-0709 BLA

LORENZO GUERRA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/30/2010
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 Denying Living Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Living Miner's Benefits (2007-BLA-5817) of Administrative Law Judge William S. Colwell rendered on a subsequent claim filed on December 19, 2003, pursuant to the provisions of the Black Lung Benefits

Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited claimant with twenty-nine years of coal mine employment, based on the parties' stipulation, and adjudicated the claim under 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the x-ray evidence is insufficient to establish the existence of pneumoconiosis and alleges that the administrative law judge erred in finding that claimant failed to establish total disability. In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible, pulmonary evaluation on the issue of respiratory disability pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director has filed a letter brief in response to claimant's appeal, asserting that he has satisfied his obligation to provide claimant with a complete pulmonary evaluation.[2]

By Order dated April 9, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[3] *Guerra v. Big Elk Creek Coal Co.*, BRB No. 09-0709 BLA (Apr. 9, 2010)(unpub. Order). The parties have responded. Claimant suggests that the amendments to the Act may apply because he established twenty-nine years of coal mine employment and he was diagnosed with coal workers' pneumoconiosis and a totally disabling pulmonary

[1] Claimant's first claim, filed on June 11, 1998, was ultimately denied on April 30, 2001, because the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Relevant to a living miner's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010.

impairment. Both employer and the Director assert that Section 1556 does not apply in this case because all of the claims of record were filed before January 1, 2005. We agree with employer and the Director. The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, are not applicable in this case, as the miner's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 3.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[4] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

If 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., Inc.*, 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 at 20 C.F.R. §718.202(a). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

In challenging the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, 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 exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant further alleges that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant also maintains that Dr. Simpao's positive interpretation of the digital x-ray obtained on February 9, 2004, supports a finding of pneumoconiosis.

[4] 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.

Claimant's contentions are without merit. In the present case, the administrative law judge accurately determined that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), as none of the relevant, newly submitted x-ray readings was positive for pneumoconiosis. Decision and Order at 7; Director's Exhibits 13, 28, 29, 39 at 62, 39 at 118. Furthermore, we reject claimant's assertion that the administrative law judge "may have" selectively analyzed the x-ray evidence, as claimant has provided no support for his assertion. Claimant's Brief at 3; *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *White*, 23 BLR at 1-5. We affirm, therefore, the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to Section 718.202(a)(1).

Regarding Dr. Simpao's positive reading of the digital x-ray, the administrative law judge determined, pursuant to 20 C.F.R. §718.107, that it was outweighed by Dr. Wiot's negative reading, based upon Dr. Wiot's superior qualifications.[5] Claimant's statement, that Dr. Simpao's reading supports a finding of pneumoconiosis, does not identify any error in the administrative law judge's weighing of this evidence. We affirm, therefore, the administrative law judge's determination that Dr. Simpao's reading was insufficient to establish the existence of pneumoconiosis.[6] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant also alleges that the administrative law judge erred in finding that he failed to establish "a total pulmonary disability under Section 718.204(c)(1), (2), (3) and (4)."[7] Claimant's Brief at 5. Claimant's argument has no merit as, to the extent that the

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[5] The record reflects that Dr. Wiot is dually-qualified as a Board-certified radiologist and B reader. Director's Exhibit 14. The administrative law judge found that Dr. Simpao "does not possess any specialized radiological qualifications." Decision and Order at 7.

[6] Interpretations of digital x-rays constitute "other medical evidence" under 20 C.F.R. §718.107(a). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

[7] Claimant's counsel identifies 20 C.F.R. §718.204(c) as the regulation applicable to whether he has established that he is suffering from a totally disabling respiratory or pulmonary impairment. We note, however, that after the 2000 amendments to the regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R.

administrative law judge addressed the issue, he found that "the medical experts agree that [claimant] suffers from a totally disabling respiratory impairment." Decision and Order at 16.

Finally, claimant contends that the Director failed to provide him with "a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required by the Act," based upon the administrative law judge's weighing of Dr. Simpao's opinion. Claimant's Brief at 4. 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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *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). The United States Court of Appeals for the Sixth Circuit has recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the [Department of Labor's] duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The [Department of Labor] meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 2-575 F.3d 628, 641-42, 24 BLR 2-199, 221 (6th Cir. 2009). The court held in *Greene* that, while the physician who performed the [Department of Labor] sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given

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§718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Greene*, 575 F.3d at 641, 24 BLR at 2-199.

The record reflects that, at the request of the Department of Labor, Dr. Simpao conducted an examination of claimant on February 9, 2004. Director's Exhibit 11. Dr. Simpao obtained a digital chest x-ray, a pulmonary function study, a blood gas *study* and an EKG. *Id*. Dr. Simpao diagnosed "CWP 2/2" and a severe obstructive impairment, which he attributed to coal dust exposure. *Id*. Administrative Law Judge Joseph E. Kane found that Dr. Simpao's report did not constitute a complete pulmonary evaluation and remanded the claim to the district director. Dr. Simpao provided a supplemental report in which he indicated that claimant has clinical pneumoconiosis and a chronic lung disease related to his coal mine employment. Director's Exhibit 39 at 15. Dr. Simpao identified the bases for his diagnoses as the chest x-ray, objective test results, and symptoms. *Id*. Dr. Simpao subsequently provided a second supplemental report in which he diagnosed "a chronic lung disease and/or [chronic obstructive pulmonary disease]" and stated that coal dust exposure was a significant contributing factor in causing claimant's pulmonary disease. *Id*. at 8. Dr. Simpao also indicated that claimant has a totally disabling respiratory impairment to which smoking is an "aggravating factor." *Id*.

The administrative law judge concluded that Dr. Simpao's diagnosis of clinical pneumoconiosis was outweighed by Dr. Jarboe's contrary diagnosis, as Dr. Jarboe's finding was "better in accord with the preponderance of the objective medical data of record, *i.e.* the preponderantly negative analog x-ray, digital x-ray, and CT-scan interpretations." Decision and Order at 15. The administrative law judge further found that because both Drs. Simpao and Jarboe relied, in part, on their x-ray interpretations, Dr. Jarboe's negative interpretations carried greater weight because of his superior qualification as a B reader. *Id*. In addition, the administrative law judge gave greater weight to Dr. Jarboe's opinion, that claimant does not have clinical pneumoconiosis, because it was based upon more extensive medical evidence. *Id*. at 16. With respect to the issue of legal pneumoconiosis, the administrative law judge noted that Dr. Jarboe determined that claimant smoked in his preteens and that elevated carboxyhemoglobin levels revealed that he continued smoking at the time of the 2004 examination by Dr. Jarboe, while Dr. Simpao noted that claimant quit smoking in 1999. *Id*. Moreover, the administrative law judge determined that, although Dr. Simpao opined that coal dust exposure contributed to the miner's lung disease, he did not provide an adequate rationale in contrast to Dr. Jarboe's detailed explanation of his contrary opinion. *Id*. at 16-17.

Contrary to claimant's contention, the fact that the administrative law judge found Dr. Simpao's opinion to be unpersuasive as to the existence of pneumoconiosis does not establish that claimant did not receive a complete pulmonary evaluation. Because Dr. Simpao performed all of the necessary tests and addressed the requisite elements of entitlement, we agree with the Director that claimant received a complete pulmonary evaluation. *Greene*, 575 F.3d at 641-42, 24 BLR at 2- 221; *Hodges*, 18 BLR at 1-93. We

also agree with the Director that, to the extent that the administrative law judge discredited Dr. Simpao's opinion because he relied upon an inaccurate smoking history, claimant has not established that this error was attributable to Dr. Simpao, rather than to claimant's inaccurate recitation of his smoking history.

Because we have affirmed the administrative law judge's determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, he has failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Entitlement to benefits in this subsequent claim, therefore, is precluded. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's 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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BETTY JEAN HALL
Administrative Appeals Judge