BRB No. 06-0719 BLA

WILLIAM H. NAUGLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/27/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Paul K. Patterson (Mascelli & Patterson), Scranton, Pennsylvania, for claimant.

Michael J. Rutledge (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5723) of Administrative Law Judge Robert D. Kaplan 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] After crediting claimant with ten years and eight months of coal mine employment, the administrative law judge found that the

[1] The initial claim was filed August 14, 1975, and was denied on July 9, 1976, for failure to establish any element of entitlement. Director's Exhibit 1. The second claim was filed on April 9, 1987, and was denied on May 21, 1987, due to claimant's failure to establish any element of entitlement. Director's Exhibit 2. The present claim was filed November 19, 2003. Director's Exhibit 4.

newly submitted evidence failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 and, thus, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 7, 16. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish that he has pneumoconiosis arising out of coal mine employment and is totally disabled due to pneumoconiosis under 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b)(2)(iv), (c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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 had pneumoconiosis, that he was totally disabled, or that his total disability was due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant was required to submit new evidence establishing at least one of these elements of entitlement

[2] We affirm the administrative law judge's determination that claimant worked as a miner for ten years and eight months, his finding that employer is the responsible operator, and his findings that the evidence did not establish the existence of pneumoconiosis or total disability under 20 C.F.R. §§718.202(a)(2)-(3), and 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-78, 87 (3rd Cir. 1995).[3]

Pursuant to Section 718.202(a)(1), the administrative law judge considered the interpretations of three newly submitted x-rays. Decision and Order at 8-9. Dr. Levinson, an A reader, interpreted the October 13, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 37. Dr. Sundheim, dually qualified as a Board-certified radiologist and B reader, read the March 29, 2004 film as negative for pneumoconiosis. Director's Exhibit 25. Dr. Smith, also a dually qualified physician, interpreted the same x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Navani, a Board-certified radiologist and B reader, read the December 22, 2005 x-ray as negative for pneumoconiosis. Director's Exhibit 51.

The administrative law judge found that the conflicting interpretations of the March 29, 2004 x-ray offered by Drs. Sundheim and Smith were in equipoise, based upon the physicians' identical radiological credentials. Decision and Order at 9. The administrative law judge found that Dr. Navani's negative reading of the December 22, 2005 film outweighed Dr. Levinson's positive interpretation of the October 13, 2003 x-ray, based upon Dr. Navani's superior qualifications. *Id*. Thus, the administrative law judge determined that the weight of the x-ray evidence was insufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id*.

Claimant asserts that the administrative law judge erred in failing to consider Dr. Levinson's credentials as an A reader in finding that the x-ray evidence was insufficient to establish the presence of pneumoconiosis. Claimant's Brief at 3. Claimant's assertion is without merit. Although the administrative law judge did not explicitly indicate that he was aware of Dr. Levinson's status as an A reader, he stated correctly that "Dr. Navani's qualifications as a Board-certified radiologist and B reader are superior to those of Dr. Levinson."[4] Decision and Order at 9; *Roberts v. Bethlehem Mine Corp.*, 8 BLR 1-211 (1985); *see Fletcher v. Director, OWCP*, 2 BLR 1-911, 1-915 (1980). The administrative law judge acted within his discretion in according greater weight to Dr. Navani's negative reading on this basis. *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400, 1-402 (1984). As the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record and permissibly concluded, based on the weight of the negative x-ray readings, that claimant failed to meet his burden of proof to establish

[3] This claim arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 1, 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] A review of the record indicates that Dr. Levinson is identified as an A reader on his *curriculum vitae*. Hearing Transcript at 9; Claimant's Exhibit 5.

the existence of pneumoconiosis by a preponderance of the x-ray evidence, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1). *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Cali, Levinson, and Simelaro. Dr. Cali examined claimant on February 9, 2004, indicating that claimant had twenty years of coal dust exposure. Director's Exhibit 26. Dr. Cali diagnosed chronic bronchitis due to coal dust exposure. *Id.* In a supplemental letter dated May 21, 2004, Dr. Cali reiterated his diagnosis and his opinion that chronic bronchitis is a diagnosis based on a history of certain symptoms, although no physical findings may be present. *Id.* Dr. Levinson examined claimant on October 13, 2003, and recorded an "occupational employment history" of twenty-two to twenty-three years. Director's Exhibit 37. Dr. Levinson diagnosed pneumoconiosis, opining that claimant acquired it as a result of working many years in the coal mining industry. *Id.* Dr. Simelaro examined claimant on November 17, 2005, noting a coal mine employment history of approximately twenty-five years. Claimant's Exhibit 3. Dr. Simelaro indicated that claimant has anthracosilicosis. *Id.*

The administrative law judge determined that the opinion of Dr. Cali was entitled to diminished weight because he relied upon an overestimation of claimant's coal mine employment history and did not adequately explain how the underlying documentation supported his diagnoses. Decision and Order at 12; Director's Exhibit 26. The administrative law judge found that Dr. Levinson's opinion was entitled to diminished weight, as he also relied upon an overestimation of the length of claimant's history of coal mine employment. *Id.*; Director's Exhibit 37. Regarding Dr. Simelaro's opinion, the administrative law judge determined that it was also entitled to diminished weight because Dr. Simelaro relied upon a chest x-ray that he acknowledged did not meet the standards set forth by the National Institute for Occupational Safety and Health (NIOSH) and did not refer to medical evidence to support his diagnoses. *Id.*; Claimant's Exhibit 3.

Claimant asserts that the administrative law judge erred by concluding that the medical opinions of Drs. Cali, Levinson, and Simelaro are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant alleges specifically that contrary to the administrative law judge's finding, the opinions of Drs. Cali and Levinson are supported by "claimant's history and symptomology," and by the fact that "there is no other cause for claimant's pulmonary condition and disability," since claimant has no reported smoking history. Claimant's Brief at 4. Claimant also points to the statements of Drs. Cali and Levinson, that "chronic bronchitis can be present in the absence of certain physical findings and diagnostic testing," when alleging that the administrative law judge made a baseless "medical determination he is not qualified to make." Claimant's Brief at 3-4. With respect to Dr. Simelaro's opinion, claimant argues that, contrary to the administrative law judge's finding, Dr. Simelaro's report constitutes

evidence sufficient to establish that claimant is totally disabled. Claimant's allegations are without merit.

Contrary to claimant's assertion that the administrative law judge "dismissed" Dr. Cali's opinion, Claimant's Brief at 4, the administrative law judge permissibly accorded the opinion little weight. The administrative law judge rationally found that Dr. Cali's diagnosis of legal pneumoconiosis was not adequately documented because it is "problematic that the physician found no significant abnormalities on physical examination and did not offer any further support of his diagnosis through objective testing." Decision and Order at 12; *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993)**;** *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000, 1-1001 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1293 (1984). Further, the administrative law judge noted that Dr. Cali's opinion was based upon a coal mine employment history of over seventeen years, in contrast to the ten years and eight months of coal mine employment with which he credited claimant. Decision and Order at 10; *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); *Long v. Director, OWCP*, 7 BLR 1-254, 1-256 (1984). Similarly, the administrative law judge properly accorded Dr. Levinson's opinion diminished weight because of the physician's apparent reliance upon a coal mine employment history of twenty-two to twenty-three years, as the physician opined that claimant's pneumoconiosis was "a result of working many years in the coal mine industry." Decision and Order at 12; Director's Exhibit 37; *Addison*, 11 BLR at 1-70; *Hall*, 8 BLR at 1-195; *Long*, 7 BLR at 1-256.

Claimant's argument that the administrative law judge erred in discrediting Dr. Simelaro's opinion also has no merit. The administrative law judge determined that Dr. Simelaro did not refer to any medical evidence that supported his diagnosis of anthracosilicosis, other than a chest x-ray that the doctor acknowledged did not meet the standards set forth by NIOSH. Thus, the administrative law judge rationally found that Dr. Simelaro's opinion was inadequately reasoned and documented and properly accorded it little weight. Decision and Order at 12-13; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, *citing Phillips v. Director, Office of Workers' Compensation Programs*, 768 F.2d 982, 984-85 (8th Cir. 1985)**;** *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985). In light of claimant's failure to raise any meritorious allegations of error, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Under Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions provided by Drs. Cali, Simelaro, Levinson, and

Rashid. Dr. Cali opined that claimant was totally disabled from performing his duties as a coal miner due to a daily cough and chronic bronchitis. Director's Exhibit 26. In reaching this conclusion, the physician relied upon his physical examination of claimant, a non-qualifying pulmonary function test, and a non-qualifying arterial blood gas study.[5] Director's Exhibit 26. Dr. Simelaro obtained non-qualifying objective studies and stated that claimant was "totally disabled due to his pulmonary function history and chest film examination." Claimant's Exhibit 3. Dr. Levinson opined that claimant has a mild to moderate pulmonary impairment that prevents him from being able to perform his usual coal mine work. Director's Exhibit 37. Dr. Levinson relied upon his examination of claimant, a non-qualifying arterial blood gas study, and a non-qualifying pulmonary function test. *Id*. Dr. Rashid noted that the slight impairment in claimant's blood gas and pulmonary function studies, which were nonetheless non-qualifying, was attributable to a previous injury to claimant's left lung. Director's Exhibit 52.

The administrative law judge determined that the opinions of Drs. Cali and Simelaro, diagnosing total disability, were entitled to little weight because they did not adequately explain how the objective evidence supported their diagnoses. Decision and Order at 15-16. With respect to the opinions of Drs. Levinson and Rashid, the administrative law judge determined that they were in equipoise, as they were both well-reasoned and well-documented. *Id*. at 16. The administrative law judge concluded, therefore, that claimant failed to establish total disability under Section 718.204(b)(2)(iv) by a preponderance of the evidence. *Id*.

Claimant argues that the administrative law judge's findings under Section 718.204(b)(2)(iv) should be reversed because the administrative law judge did not offer a rational basis for "ignoring" the opinions in which Drs. Cali and Simelaro stated that claimant is totally disabled. Claimant's Brief at 3. Claimant's argument is without merit. Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; *Peskie*, 8 BLR at 1-128. In weighing the medical opinion evidence, the administrative law judge properly found that Dr. Cali failed to explain how the objective evidence and the lack of significant physical abnormalities that he found upon examination supported his finding that claimant is totally disabled and unable to perform his duties as a coal miner. Decision and Order at 15; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8**;** *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; *Peskie*, 8 BLR at 1-128. The administrative law judge properly concluded that Dr. Simelaro's opinion is not adequately reasoned and documented because Dr. Simelaro failed to discuss the results of

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

any objective testing that provided support for his diagnosis. *Id*.; *see also Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Thus, we affirm the administrative law judge's determination that the opinions of Drs. Cali and Simelaro are insufficient to establish total disability under Section 718.204(b)(2)(iv).

With respect to the administrative law judge's weighing of Dr. Rashid's opinion, clamant argues that the administrative law judge should have discounted it "as it is in the minority." Claimant's Brief at 5. In making this argument, claimant is suggesting that the administrative law judge should have relied upon numerical superiority in resolving conflicts in the evidence of record. Claimant's argument has no merit, as an administrative law judge must make his findings based upon the quality of the relevant evidence, not the quantity. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Because claimant has raised no other allegations of error regarding the administrative law judge's consideration of Dr. Rashid's opinion under Section 718.204(b)(2)(iv), we affirm his determination that the well-reasoned and well-documented conflicting opinions of Drs. Rashid and Levinson were in equipoise.[6] Thus, we affirm the administrative law judge's determination that claimant failed to establish total disability under Section 718.204(b)(2)(iv) by a preponderance of the newly submitted evidence.

Claimant also asserts generally that the administrative law judge did not properly weigh the medical opinions of Drs. Cali, Simelaro, Levinson, and Rashid in finding that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). We reject this argument. The administrative law judge properly concluded that, based upon his findings that claimant did not establish that he has pneumoconiosis or that he is totally disabled, the newly submitted evidence is insufficient to establish that claimant is totally disabled due to pneumoconiosis at Section 718.204(c). Decision and Order at 16; 20 C.F.R. §718.204(c)(1); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Because we have affirmed the administrative law judge's finding that claimant did not demonstrate any of the elements of entitlement that were previously adjudicated against him, we must also affirm the denial of benefits. 20 C.F.R. §725.309(d); *Swarrow*, 72 F.3d at 314, 20 BLR at 2-87; *White*, 23 BLR at 1-3.

[6] Claimant also maintains that the administrative law judge ignored Dr. Levinson's opinion diagnosing total respiratory disability. Claimant's Brief at 3. Claimant is not correct. As indicated, the administrative law judge determined that Dr. Levinson's opinion contained a well-reasoned and well-documented diagnosis of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge