BRB No. 07-0525 BLA

D.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/14/2008
	)	
GATLIFF COAL COMPANY	)	
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 (05-BLA-5895) of Administrative Law Judge Adele Higgins Odegard 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). Claimant filed his first claim on July 21, 1994, and it was denied by a Department of Labor claims examiner on January 4, 1995, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibit 1. Claimant filed this subsequent claim on April 14, 2004. Director's Exhibit 3. The administrative law judge credited claimant with seventeen years of coal mine employment.[1] Decision and Order at 8. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). The administrative law judge therefore determined that claimant did not 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 existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv).[2] Moreover, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The Director responds that the Board should reject claimant's argument that he is entitled to a new pulmonary evaluation. Employer responds in support of the administrative law judge's denial of benefits.

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).

---

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); August 22, 2006 Transcript at 40.

[2] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-20.

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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. Consequently, claimant had to submit new evidence establishing any element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant first argues that the administrative law judge erred in finding that pneumoconiosis was not established at Section 718.202(a)(1). The administrative law judge considered four readings of three new x-rays dated September 13, 2004, May 10, 2004, and August 21, 2006. Dr. Simpao, with no known radiological qualifications, interpreted the September 13, 2004 x-ray as positive for pneumoconiosis, while Dr. Poulos, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis.[3] Director's Exhibit 13; Employer's Exhibit 2. Dr. Wiot, a Board-certified radiologist and B reader, interpreted the May 10, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 3, and Dr. Broudy, a B reader, interpreted the August 21, 2006 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

The administrative law judge accorded greater weight to Dr. Poulos's negative reading of the September 13, 2004 x-ray, based upon Dr. Poulos's superior radiological qualifications. Decision and Order at 13. Weighing all of the interpretations together, with the remaining x-rays all read as negative for pneumoconiosis, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by chest x-ray pursuant to Section 718.202(a)(1). The administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence. *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,*

[3] Dr. Barrett, a Board-certified radiologist and B reader, interpreted the September 13, 2004 x-ray for its film quality only. Director's Exhibit 14.

OWCP, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; Decision and Order at 13; Director's Exhibit 13; Employer's Exhibits 1-3. Consequently, we reject claimant's arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that she "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. As claimant raises no other arguments relevant to this issue, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new opinions of Drs. Simpao and Broudy. Dr. Simpao diagnosed a moderate impairment and opined that claimant could not perform the physical labor required by his job as an electrician. Director's Exhibits 13, 16. Dr. Broudy diagnosed a restrictive defect, and noted that claimant's pulmonary function and blood gas studies "both exceed the minimum . . . criteria for disability in coal workers." Employer's Exhibit 1 at 4. The administrative law judge found that although Dr. Simpao indicated that he knew the requirements of claimant's coal mine employment, he did not adequately explain the basis for his conclusion that claimant is totally disabled. Decision and Order at 21. Further, the administrative law judge inferred that Dr. Broudy believed that claimant is not totally disabled, but she found that Dr. Broudy did not provide "substantial explanation" of the basis for his opinion beyond citing claimant's test results. *Id*. The administrative law judge concluded that claimant did not establish total disability based on the new medical opinions.

Claimant argues that, in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being an electrician and repairman on the mine site. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the

administrative law judge considered whether Dr. Simpao knew the exertional requirements of claimant's job when she weighed the medical opinions. Decision and Order at 21.

Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the newly submitted medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv) based on the new evidence. *See White*, 23 BLR at 1-6-7. Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d).

Claimant lastly argues that the Director failed to provide him with a complete, credible pulmonary evaluation, as required under the Act, because the administrative law judge concluded that Dr. Simpao's report "was not well reasoned because said physician based his conclusions merely upon an erroneous x-ray interpretation and an erroneous coal mine employment history (Decision, page 18) and because said physician relied upon non-qualifying test results (Decision, page 21)." Claimant's Brief at 4. The Director responds that claimant was provided with a complete pulmonary evaluation, which the administrative law judge was not required to accept as dispositive of the issues in this case. Director's Brief at 2.

We agree with the Director, whose duty it is to ensure the proper administration of the Act, *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994), that a remand of this case to the district director for another pulmonary evaluation is not required. 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 record reflects that Dr. Simpao 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

Exhibits 13, 16. The fact that the administrative law judge chose to accord "less weight" or "little weight" to Dr. Simpao's opinion because it was not as clear or as fully explained or well-reasoned as it could have been, and because Dr. Simpao's x-ray reading was outweighed by that of a more highly qualified reader, does not establish a violation of the Director's duty to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-88. Consequently, we reject claimant's argument that he is entitled to a remand of this case for a new pulmonary evaluation.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge