BRB No. 08-0410 BLA

R. S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 03/24/2009
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Robert D. Whitfield, Chicago, Illinois, for claimant.

John C. Webb (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-06177) of Administrative Law Judge Robert D. Kaplan 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] The administrative law judge

[1] Claimant filed an initial claim on September 18, 1994. Director's Exhibit 1. In a Decision and Order issued on February 14, 1997, Administrative Law Judge Thomas M. Burke denied benefits, finding that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.* Claimant appealed, and

credited claimant with twenty-nine years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was insufficient to establish that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), or that he is totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) and denied benefits.

On appeal, claimant asserts that "the testimony of [c]laimant, and his treating physician, Dr. Crain, should have been given much greater weight than the medical opinions of various [non-]treating physicians in determining whether [c]laimant suffers from pneumoconiosis, and is disabled from doing his last coal mine job." Claimant's Brief at 6. Claimant further asserts that the administrative law judge erred in failing to explain the basis for his credibility determinations. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a response brief unless requested to do so by the Board.[2]

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the Board affirmed Judge Burke's denial of benefits. [*R.S.*] *v. Jim Walters Resources Inc*., BRB No. 97-0790 BLA (Jan. 26, 1998) (unpub.). Claimant took no further action on the denial of his claim, until he filed a second application for benefits on January 28, 1999. Director's Exhibit 1. On January 21, 2003, Administrative Law Judge Gerald M. Tierney issued a Decision and Order-Denying Benefits, finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2001). *Id.* Claimant appealed, and the Board affirmed Judge Tierney's denial of benefits. [*R.S.*] *v. Jim Walters Resources Inc*., BRB No. 03-0358 BLA (Jan. 30, 2004) (unpub.). On March 11, 2004, claimant requested modification. Director's Exhibit 1. By Order dated July 5, 2005, the Office of Administrative Law Judges granted claimant's motion to withdraw his modification request. *Id.* Claimant next filed this subsequent claim on November 4, 2005. Director's Exhibit 3. On January 30, 2008, the administrative law judge issued his Decision and Order Denying Benefits, which is the subject of this appeal.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established twenty-nine years of coal mine employment, and that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[3] 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 his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *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*).

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). Since claimant's prior claim was denied on the grounds that the evidence was insufficient to establish any of the requisite elements of entitlement, claimant was required to submit new evidence establishing one of those elements in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(d).

Pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in failing to give controlling weight to the opinion of his treating physician, Dr. Crain, as to the issue of whether he suffers from pneumoconiosis. We disagree.

The record in this case contains the opinions of four physicians. Dr. Crain opined that claimant has pneumoconiosis,[4] while Drs. Hasson, Goldstein and Renn opined that

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

[4] Claimant submitted one treatment note from Dr. Crain dated May 16, 1995. Claimant's Exhibit 1. Dr. Crain wrote under "Impression" that claimant suffered from coal workers' pneumoconiosis, mild asthma, and possibly asbestosis. *Id*. Dr. Crain reported that claimant has radiographic evidence of lung disease due to coal dust exposure, that a previous mediastinal biopsy showed "dust deposition in the lymph nodes" and that a pathology report from a biopsy performed on December 16, 1993 "showed evidence of anthracotic pigment disease." *Id*.

claimant does not have pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibits 2, 4. Contrary to claimant's contention, the administrative law judge was not required to assign controlling weight to Dr. Crain's opinion based solely on his status as a treating physician. The regulation at 20 C.F.R. §718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) the nature of the relationship; 2) the duration of the relationship; 3) the frequency of treatment; and 4) the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation further requires that the administrative law judge consider the credibility of the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

The administrative law judge properly weighed Dr. Crain's opinion in accordance with Section 718.104. The administrative law judge noted that "although [c]laimant testified that Dr. Crain had treated him for two years, it [was] not clear [from the record] how frequently the physician saw [c]laimant during that period." Decision and Order at 8. The administrative law judge permissibly assigned only "slight probative weight" to Dr. Crain's diagnosis of pneumoconiosis, noting that it was based, in part, on a positive x-ray interpretation that is not in the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); Decision and Order at 8; Claimant's Exhibit 1. The administrative law judge also correctly noted that while Dr. Crain referenced a December 16, 1993 pathology report as showing "evidence of anthracotic pigment disease," a finding of anthracotic pigmentation, standing alone, is insufficient to establish the existence of pneumoconiosis. Decision and Order at 7, citing Claimant's Exhibit 1; *see* 20 C.F.R. §718.202(a)(2).

Furthermore, the administrative law judge permissibly determined that Dr. Crain's opinion was outweighed by the contrary opinions of Drs. Hasson, Goldstein, and Renn, that claimant does not have pneumoconiosis, as they are Board-certified in internal medicine and pulmonary disease, while Dr. Crain's credentials are not in the record. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 8; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibits 2, 4. Because the administrative law judge has discretion, as the trier-of-fact, in reaching his credibility determinations, we affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the newly submitted evidence.

Pursuant to Section 718.204(b)(2)(iv), claimant also argues that the administrative law judge erred in failing to credit Dr. Crain's opinion that he is totally disabled. Claimant asserts that the administrative law judge erred in failing to explain why the medical reports "which completely discount claimant's extensive coal mining employment" were not given less weight. Claimant's Brief at 6. Claimant's arguments are without merit.

Contrary to claimant's contention, in weighing the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge properly found that claimant failed to satisfy his burden of proof. As noted by the administrative law judge, although Dr. Crain reported on May 16, 2005, that claimant's pulmonary function tests indicated some mild obstruction and mild restriction, Dr. Crain also specifically wrote in his treatment note that claimant had "normal ventilatory capacity." Claimant's Exhibit 1. Furthermore, the administrative law judge permissibly found that Drs. Goldstein and Renn provided reasoned opinions,[5] taking into consideration the results of the objective testing and claimant's history of coal mine employment, that claimant is not totally disabled by a respiratory or pulmonary impairment from performing his usual coal mine work.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*); Decision and Order at 10; Employer's Exhibits 2, 4. Because substantial evidence supports the administrative law judge's determination that that the medical opinion evidence fails to establish that claimant is totally disabled, we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv). Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability based on the newly submitted evidence.

Therefore, as the administrative law judge properly found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total disability, we affirm the administrative law judge's finding that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309. *White*, 23 BLR at 1-3.

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[5] A "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[6] Also, Dr. Hasson opined that claimant is not totally disabled but the administrative law judge considered Dr. Hasson's opinion to be equivocal and entitled to no weight. Decision and Order at 10; Director's Exhibit 10.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge