BRB No. 09-0560 BLA

WALTER BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/16/2010
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Benefits of Edward Terhune Miller, 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.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (05-BLA-5003) of Administrative Law Judge Edward Terhune Miller 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 credited claimant with seventeen years of coal mine employment, as stipulated.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). 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 by the new x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1), (4), and that total disability was not established by the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a substantive response brief.

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

---

[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibit 1. His second claim, filed on October 12, 1999, was denied on October 11, 2002, because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Claimant filed his current claim on November 24, 2003. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction 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] The administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are unchallenged on appeal. Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing either the existence of pneumoconiosis or a totally disabling respiratory impairment. 20 C.F.R. §725.309(d)(2),(3).

With respect to the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of three new x-rays, taking into account the readers' radiological qualifications. Dr. Baker, a B reader, interpreted the February 19, 2003 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 2. Dr. Simpao, who lacks radiological qualifications, interpreted the December 11, 2003 x-ray as positive for pneumoconiosis, while Dr. Wheeler interpreted this x-ray as negative for pneumoconiosis.[4] Director's Exhibit 13; Employer's Exhibit 3. Based upon Dr. Wheeler's "dual credentials as a [B]oard-certified radiologist and B-reader," the administrative law judge accorded greater weight to Dr. Wheeler's negative readings, and found both the February 19 and December 11, 2003 x-rays to be negative for pneumoconiosis. Decision and Order at 17. Turning to the third x-ray, the administrative law judge considered that Dr. Alexander, a Board-certified radiologist and B reader, interpreted the May 5, 2004 x-ray as positive for pneumoconiosis, while Dr. Wheeler, and Dr. Dahhan, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge found that the conflicting interpretations of the May 5, 2004 x-ray were, at best, equally probative. Based on this analysis of the x-ray readings, the administrative law judge concluded that claimant did not carry his burden to establish the existence on pneumoconiosis based on the new x-ray evidence.

The administrative law judge based his finding on a proper qualitative analysis and weighing of the new x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d

[4] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the December 11, 2003 x-ray to assess its film quality only. Director's Exhibit 14.

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, 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 he "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four new medical opinions. Dr. Simpao diagnosed claimant with "CWP 2/2" based on an x-ray reading, and opined that "multiple years of coal dust exposure [were] medically significant in [claimant's] pulmonary impairment." Director's Exhibit 13 at 26. Dr. Baker diagnosed claimant with clinical coal worker's pneumoconiosis based on a positive x-ray reading and claimant's coal dust exposure history. Director's Exhibit 15 at 3. Additionally, Dr. Baker diagnosed chronic obstructive airway disease based on pulmonary function testing, and chronic bronchitis by history. *Id*. Dr. Baker indicated that "any pulmonary impairment wi[ll] be caused at least in part by [claimant's] coal dust exposure." Director's Exhibit 15 at 4. By contrast, Drs. Dahhan and Rosenberg, opined that claimant does not have either clinical or legal pneumoconiosis.[5] Director's Exhibit 16; Employer's Exhibits 6, 6A.

The administrative law judge discounted the diagnoses of clinical pneumoconiosis by Drs. Baker and Simpao, because each doctor relied on his own positive reading of an x-ray that the administrative law judge found to be negative for pneumoconiosis, based on the reading of a better qualified reader. Additionally, the administrative law judge found that, to the extent that Drs. Baker and Simpao diagnosed legal pneumoconiosis, they did not provide "reasoned explanations" as to why "[c]laimant's pulmonary condition is significantly related to or substantially aggravated by his coal mine dust exposure." Decision and Order at 19. By contrast, the administrative law judge found the opinions of Drs. Dahhan and Rosenberg, that claimant does not have clinical or legal

[5] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pneumoconiosis, to be more persuasive because they were better documented and explained.

Claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Baker and Simpao as based on positive x-ray readings that were "contrary to the [administrative law judge's] findings." Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge reasonably discounted Dr. Baker's and Dr. Simpao's diagnoses of clinical pneumoconiosis, since they were based on x-rays that the administrative law judge properly found to be negative for pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985).

Claimant argues further that the opinions of Drs. Baker and Simpao were well-reasoned and should not have been discredited. Claimant's Brief at 5. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Substantial evidence supports the administrative law judge's permissible determination that Drs. Baker and Simpao did not adequately explain the bases for their diagnoses of legal pneumoconiosis. *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, 1-155 (1989) (*en banc*). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Claimant also contends that the administrative law judge erred in finding that claimant had not established total pulmonary or respiratory disability. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Baker, Simpao, Dahhan, and Rosenberg. Dr. Baker reported that, based on the results of a pulmonary function study, claimant has a "Class 2 impairment" under the American Medical Association Guides to the Evaluation of Permanent Impairment. Director's Exhibit 15 at 3. Dr. Baker further opined that claimant is "100% occupationally disabled" because of the need to avoid further exposure to coal mine dust. *Id*. Dr. Simpao diagnosed claimant with a "mild impairment." Director's Exhibit 13 at 26. By contrast, Drs. Dahhan and Rosenberg opined that claimant retains the pulmonary capacity to perform his previous coal mining job. Director's Exhibit 16; Employer's Exhibits 6, 6A.

The administrative law judge found that Dr. Baker did not explain whether a "Class 2" impairment prevents claimant from performing his usual coal mine employment, and he found that the remaining portion of Dr. Baker's opinion merely advised against further dust exposure. Additionally, the administrative law judge found that, although Dr. Simpao's assessment of a mild impairment "could fulfill an assessment

of total disability," the contrary opinions of Drs. Dahhan and Rosenberg, that claimant is not totally disabled, were better documented and explained and, therefore, were "more persuasive than those of Dr. Baker and Dr. Simpao." Decision and Order at 21.

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 8, 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 specific argument claimant sets forth is that:

> The claimant's usual coal mine work included being a drill and dozer operator. 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, as well as the medical opinions of Drs. Baker and Simpao, 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 8. Claimant's argument is without merit. The administrative law judge properly found that Dr. Baker's opinion, that claimant should limit further exposure to coal dust, is not a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Claimant argues further that the administrative law judge did not consider claimant's usual coal mine work "in conjunction with Dr. Baker and Simpao's opinions of disability." Claimant's Brief at 8. We disagree. In weighing Dr. Baker's opinion, the administrative law judge permissibly found that, because Dr. Baker did not discuss whether a "Class 2" impairment would prevent claimant from performing his usual coal mine work, Dr. Baker's opinion did not establish total disability.[6] *See Gee v. W. G.*

[6] The administrative law judge noted that, "[a]ccording to the American Medical Association Guides, a 'Class 2' impairment translates to a '10% - 25% Impairment of the Whole Person.'" Decision and Order at 21 (citation omitted). The administrative law judge concluded that, although such an impairment "may constitute total respiratory disability if it precludes a miner's usual coal mine employment," Dr. Baker "did not persuasively translate this assessment . . . into an opinion as to whether [c]laimant's pulmonary or respiratory impairment prevents further coal mine employment or work requiring similar effort." *Id*.

Moore and Sons, 9 BLR 1-4, 1-6 (1986)(*en banc*). In any event, the administrative law judge considered that, even if the opinions of Drs. Baker and Simpao were viewed as "forthright assessments of a totally disabling pulmonary or respiratory impairment," they were outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, because Drs. Dahhan and Rosenberg based their opinions on a thorough review of the medical records, and their opinions were better supported and explained. Decision and Order at 21-22. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore reject claimant's allegation of error.

Further, we reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 8. An administrative law judge's findings cannot be based on assumptions; they must be based on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total respiratory disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d).

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