BRB No. 97-1163 BLA

WHITLEY JORDAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand -- Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, (Kenneth S. Stepp, P.A.), Manchester, Kentucky, for the claimant.

Helen H. Cox (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Co-Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, Whitley Jordan, appeals the Decision and Order on Remand -- Denial of Benefits (96-BLA-1175) of Administrative Law Judge Robert L. Hillyard rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Benefits under the Act are awarded to persons who become totally disabled due to coal worker's pneumoconiosis. 30 U.S.C. §901(a); *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11

BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

This claim[1] is before the Board for the third time. The administrative law judge denied benefits on remand after conducting a formal hearing and considering the record as a whole, including newly submitted medical evidence that had been developed pursuant to the Director's obligation to provide claimant with a complete and credible pulmonary evaluation. 30 U.S.C. § 923(b); *Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992). Although claimant had earlier been found to have proven the existence of pneumoconiosis by x-ray evidence upon application of the true doubt rule, a finding which had been affirmed by the Board, the administrative law judge reconsidered this question in light of the invalidation of the rule by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994), to find that claimant failed to prove the existence of pneumoconiosis. 20 C.F.R. § 718.202(a); Decision and Order on Remand at 10. Turning to the question of whether claimant established total respiratory disability, *see* 20 C.F.R. § 718.204(c), the administrative law judge reviewed all of the medical evidence, and credited Dr. Dahhan's 1996 medical opinion and associated clinical tests as the most recent and credible medical evidence of record, to find that claimant failed to establish this element of

[1]Claimant first filed for benefits on August 13, 1979. This claim was denied as abandoned. The instant claim, filed on February 20, 1985, DX-1, constitutes a duplicate claim. 20 C.F.R. § 725.309(d). In its first decision in this case, the Board affirmed the administrative law judge's finding that claimant established a material change in conditions. *See Jordan v. Director, OWCP*, BRB No. 88-0758 BLA, slip op. at 2 n. 1. (Aug. 28, 1990)(unpub.)(*Jordan I*). Given the filing date, this claim was properly evaluated under the permanent criteria set forth at 20 C.F.R. Part 718. *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 BLR 2-376, 2-384 (6th Cir.1989). The remaining procedural history of this claim is adequately set forth in prior decisions by the Board and the administrative law judge. *See Jordan I*; *Jordan v. Director, OWCP*, BRB No. 91-1767 BLA (Feb. 22, 1995)(unpub.)(*Jordan II*).

entitlement as well. Decision and Order on Remand at 11-12. Benefits were denied and claimant brought this appeal.

On appeal, claimant takes issue with the administrative law judge's reconsideration of the question of whether pneumoconiosis has been established, contending that the prior determination of this issue in his favor constitutes the law of the case. Claimant also contests the administrative law judge's weighing of the x-ray and medical opinion evidence, further contends that the administrative law judge ignored relevant lay testimony, and asserts that the administrative law judge erred in his deference to the medical opinion of Dr. Dahhan against "overwhelming" evidence of entitlement as demonstrated by the lay testimony and the medical opinions of Drs. Baker, Moore and Wells.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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). Upon consideration of the Decision and Order of the administrative law judge, the arguments raised on appeal, and of the administrative record as a whole, we conclude that the Decision and Order on Remand -- Denial of Benefits is supported by substantial evidence and accords with applicable law.

We first address the challenge to the administrative law judge's finding that claimant failed to establish total respiratory disability. In order to establish entitlement to benefits, claimant must prove, *inter alia*, that he suffers from a totally disabling pulmonary or respiratory impairment. 20 C.F.R. § 718.204(c); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036,1041-42, 17 BLR 2-16, 2-21 (6th Cir. 1993); *Carson v. Westmoreland Coal Company*, 19 BLR 1-16, 1-21 (1994), *modified on recon*. 20 BLR 1-64 (1996). In the absence of contrary probative evidence, a reasoned medical opinion may satisfy this element if it concludes that a miner is totally disabled or if its assessment of the miner's physical limitations, when credited by the administrative law judge and compared with the exertional requirements of the miner's usual coal mine work, supports the inference that the miner is disabled from performing his usual coal mine work. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141, 19 BLR 2-257, 2-263-64 (4th Cir. 1995); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1988).

The record does not contain any pulmonary function or arterial blood gas studies which qualify under the criteria set forth for Section 718.204(1), (2).[2] *See* DXs-8, 10, 24, 33.

[2]A "non-qualifying study does not meet the disability standards set forth in 20 C.F.R. Part 718, Appendices B & C. *See Director, OWCP v. Siwiec*, 894 F.2d 635,

In evidence are the medical opinions of four physicians: Drs. Baker, DX-9, Dahhan, DX-33, Moore, DX-28 and Wells. DX-24. The administrative law judge reviewed all of the evidence relevant to the disability inquiry, and credited the assessment by Dr. Dahhan that claimant is not totally disabled from a pulmonary or respiratory standpoint. DX-33.

Dr. Dahhan saw claimant on March 1, 1996, DX-33, over ten years after the previous medical examination of claimant. He conducted a physical examination, and recorded his conclusions in a medical report and in a supplemental letter report. DX-33. After reviewing the results of non-qualifying pulmonary function and arterial blood gas tests, an exercise regimen, physical examination, Dr. Dahhan assessed that claimant retained the pulmonary capacity to perform the job of an underground coal miner as that strenuous job was described to him by claimant. *Id*.

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637 n. 5, 13 BLR 2-259, 2- 262 n. 5 (3d Cir. 1990). There is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3).

Dr. Baker examined claimant on April 1, 1985, and also administered both arterial blood gas and pulmonary function studies and diagnosed ischemic heart disease, chronic bronchitis and "possibly pneumoconiosis." DX-9. The clinical tests produced non-qualifying results with "good" to "fair" comprehension and cooperation. DX-8. Dr. Baker assessed that claimant's walking was limited to "25 yds," and that he could climb "[less than] one flight" of stairs, and lift and carry no more than "5-10 lbs." *Id*. Dr. Wells examined claimant on December 10, 1985. He opined that claimant's [non-qualifying] arterial blood gas and pulmonary function tests revealed a "moderate obstructive disease," and concluded that claimant was "totally and permanently disabled." DX-24. Dr. Charles Moore examined claimant on February 25, 1986, and pronounced claimant to be totally disabled based on his chronic obstructive pulmonary disease alone.[3]

[3]In its first opinion, the Board had affirmed the administrative law judge's findings that the medical opinions of Drs. Moore and Wells were entitled to little probative weight. *Jordan I*, slip op. at 1-2 n. 1. In its second decision, the Board agreed with the Director that claimant was entitled to a new pulmonary evaluation pursuant to Section 413(b), 30 U.S.C. § 923(b), because the extant medical opinions were found not to be either complete or credible. *Jordan II*.

We affirm the administrative law judge's finding that claimant failed to establish total pulmonary or respiratory disability. The administrative law judge was entitled to credit Dr. Dahhan's conclusion, that claimant did not suffer from a totally disabling pulmonary or respiratory impairment, as a more accurate indication of the current state of claimant's pulmonary or respiratory impairment. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988); *accord Milburn Colliery Co. v. Hicks*, No. 96-2438, 1998 WL 95275 at *3 (4th Cir. Mar. 6, 1998); *Gray v. Director, OWCP*, 943 F.2d 513, 520-21, 15 BLR 2-214, 2-225 (4th Cir. 1991). Moreover, Dr. Dahhan's examination was not only the most current by over ten years, but was also considered by the administrative law judge to be more thoroughly documented and better reasoned. He considered the results of objective clinical tests, all of which produced non-qualifying results, a physical examination, and evaluated in detail the specific exertional requirements of claimant's coal mine employment, which he viewed as strenuous work.[4] DX-33; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge is charged with the evaluation and weighing of the medical evidence, may draw appropriate inferences therefrom, *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-298 (6th Cir. 1994); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962), and is not required to credit the conclusions of any particular medical expert. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the administrative law judge's evaluation of the evidence of record is not "inherently

[4]The administrative law judge agreed with a prior administrative law judge that Dr. Baker's limitations assessment reflected in part claimant's subjective complaints as to his limitations, and was thus not an independent disability opinion. Decision and Order on Remand at 12. The administrative law judge rationally found that the medical opinions of Drs. Moore and Wells were unreasoned. *Id.*; *see also* n. 3, *ante*. Further, given his rejection of all of the medical opinions save that of Dr. Dahhan as unreasoned and lacking sufficient documentation, the administrative law judge was not bound to evaluate claimant's testimony, which is of little probative value because it is uncorroborated by any medical evidence. *See generally Fife v. Director, OWCP*, 888 F.2d 365, 370, 13 BLR 2-109, 2-116 (6th Cir. 1989).

incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and because substantial evidence supports the administrative law judge's finding that claimant failed to establish total respiratory disability, a necessary element of entitlement, *see Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir. 1989); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*), we affirm the denial of benefits.

Although claimant's failure to establish total respiratory disability precludes entitlement, we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. At the outset, we disagree with claimant that the prior findings of pneumoconiosis constitute the "law of the case." Under this doctrine, "a [tribunal] is ordinarily precluded from reexamining an issue previously decided by the same [tribunal] or a higher court, in the same case." *Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 905 n. 5, 20 BLR 2-152, 2-165 n. 5 (6th Cir. 1996). This discretionary rule should not obtain "where a subsequent contrary view of the law is decided by the controlling authority[.]" *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997). Because the prior finding of pneumoconiosis rested on the true doubt rule which was subsequently invalidated by the Supreme Court in *Greenwich Collieries*, the administrative law judge correctly reconsidered whether claimant carried his burden of establishing the existence of pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

The administrative law judge was entitled to credit the negative x-ray interpretations by experts on the basis of their qualifications, as well as the preponderance of the negative readings, to make a "qualitative," as well as a quantitative evaluation of the x-ray readings to find that claimant failed to establish the existence of pneumoconiosis on the basis of x-ray evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-85 (6th Cir. 1993). He correctly found that there was no positive interpretation of the latest x-ray which was "classified" for the presence of the disease as required, *see* 20 C.F.R. § 718.102, and his reasoning, that the preponderance of negative interpretations by better qualified readers as a whole, along with the latest film, provides an adequate basis for the conclusion that claimant's positive x-ray evidence was insufficiently persuasive to carry his burden of establishing the presence of pneumoconiosis at Section 718.202(a)(1).[5] The administrative

[5]The administrative law judge accorded more weight to the negative rereadings of the x-ray, taken on April 1, 1985, by Drs. Elmer and Sargent, both board-certified radiologists and B-readers, over the contrary positive interpretation by Dr. Baker on the basis of credentials. DXs-12-14; Decision and Order on Remand at 8. The second x-ray, taken on December 10, 1985, was also found to be negative. One board-certified radiologist and B-reader, Dr. Bassali, and one board-certified radiologist, Dr. Marshall, interpreted this film as positive for pneumoconiosis. DXs-22, 26. Dr. Wells, who did not have any special credentials,

law judge acknowledged the impressive credentials of claimant's experts, Decision and Order on Remand at 8-9, but was entitled to find that claimant's x-ray evidence did not carry his burden of proof at Section 718.202(a)(1). We affirm his finding that claimant did not establish pneumoconiosis on the basis of x-ray evidence.

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interpreted this film to demonstrate "nodular fibrocities." DX-24. Drs. Elmer and Sargent, both qualified as board-certified radiologists and B-readers, read this film as negative for the disease. DXs-25, 27. The final x-ray of record was taken on March 1, 1996. Dr. Bassali, a board-certified radiologist and B-reader, read this film as indicative of "[n]o parenchymal changes indicative of pneumoconiosis, but pleural abnormalities diagnostic of pneumoconiosis, especially asbestosis." CX-2. Dr. Dahhan, a B-reader, and Dr. Sargent read this film as negative for pneumoconiosis. DX-33. The administrative law judge did not accept Dr. Bassali's interpretation as a positive reading for pneumoconiosis because it was not classified as required under 20 C.F.R. § 718.102(b), and because "the majority of interpretations by the more qualified physicians are negative." Decision and Order on Remand at 8. The administrative law judge also determined that the x-ray evidence was not persuasive because Dr. Bassali interpreted the December 10, 1985 x-ray to show "parenchymal abnormalities," while his March 1, 1996 reading did not show these features. Decision and Order on Remand at 8-9.

Further, the administrative law judge at Section 718.202(a)(4) also rationally deferred to the opinions of Dr. Dahhan, who did not diagnose pneumoconiosis, because his report was the most current, *see Cooley*; *Hicks*, reasoned and documented, *Rowe*, and because claimant's experts relied on an inaccurate history of claimant's coal mine employment[6] to find that claimant failed to establish the presence of pneumoconiosis on the basis of medical opinion evidence at Section 718.202(a)(4). *See generally Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We thus affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, and affirm the denial of benefits in this case.

[6]Dr. Baker recorded that claimant "stated he worked 25 years underground." His diagnoses of chronic bronchitis and "possible pneumoconiosis" were based on an x-ray and "significant duration of exposure." DX-9. Dr. Wells recorded a history of 15 years of underground coal mine employment, and he diagnosed "Coalworker's pneumoconiosis, Category II A." DX-24. Dr. Moore recorded 15 years of coal mine employment, and diagnosed "chronic obstructive lung disease caused by exposure to mine dust." DX-28. In the first decision in this case, the administrative law judge found eight years of coal mine employment based on the parties' stipulation at the December 2, 1987 hearing, and on his review of the record. This finding was upheld by the Board. *Jordan I*, slip op. at 2-3.

Accordingly, we affirm the Decision and Order on Remand -- Denial of Benefits in all respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge