BRB No. 05-0983 BLA

JESSIE J. HUBBARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LENA COAL COMPANY	)	DATE ISSUED: 05/24/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, 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.

Rita Roppolo (Howard M. Radzely, 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 (04-BLA-5685) of Administrative Law Judge Robert L. Hillyard denying benefits on a 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). The administrative law judge found thirty-two years of qualifying coal mine employment and that employer was the proper responsible operator.[1] Decision and Order at 4-5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 8. After determining that the instant claim was a subsequent claim,[2] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 2, 8-13. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 13. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts, with respect to the medical opinion evidence, that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond on the merits of the appeal but asserting that claimant has been provided with a complete pulmonary examination.[3]

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 6.

[2] Claimant filed his initial claim for benefits on June 6, 2000, which was finally denied by the Department of Labor on August 29, 2000 as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on October 16, 2002, which was denied by the district director on October 23, 2003. Director's Exhibits 3, 29. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 30.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 (1987); *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 (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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Considering the newly submitted evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(b)(2). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the four[4] newly submitted readings of the three x-rays of record in light of the readers' radiological qualifications. Decision and Order at 9. Only one reading was positive for pneumoconiosis, a "1/1" reading of the January 6, 2003 x-ray by Dr. Simpao, who has no specialized qualifications for the interpretation of x-rays. Director's Exhibit 12. Taking into account that the January 6, 2003 x-ray was read as negative for the existence of pneumoconiosis by Dr. Wiot, a B-reader and Board-certified radiologist, the administrative law judge found that the January 6, 2003 x-ray was negative for pneumoconiosis. Because the x-rays dated April 4, 2003 and January 11, 2005 were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 10. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Director's Exhibits 12, 13; Employer's Exhibits 1, 3, 5; Decision and Order at 9-10. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings and that the administrative law judge "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge, in considering the medical opinion evidence, found that the weight of the better documented and reasoned opinion did not establish the existence of pneumoconiosis. Decision and Order 11-12. This finding has not been challenged by claimant and is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Regarding the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), claimant initially asserts 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 5-6, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

[4] Dr. Barrett interpreted the January 6, 2003 x-ray for quality purposes only. Director's Exhibit 13.

> The claimant's usual coal mine work included being a foreman, scoop operator, and coal loader. 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 6. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that 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, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1889); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

Further, we also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See White*, 23 BLR 1-1; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant contends that because the administrative law judge did not fully credit Dr. Simpao's January 6, 2003 opinion provided by the Department of Labor because the physician is not a pulmonary specialist, "the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4-5. The Director responds that Section 413(b) requires the Director to provide the claimant with a complete and credible examination, not a dispositive one, and states that the Department is under no obligation to provide miners with examinations by physicians who are Board-certified in relevant specialties or sub-specialties and thus claimant has been provided the medical examination required by the Act and regulations. Director's Brief at 1-2.

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 Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84

(1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

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 Exhibit 12. The administrative law judge did not find nor does claimant allege that Dr. Simpao's report was incomplete. Nor did the administrative law judge find that Dr. Simpao's report lacked credibility on any issue. The administrative law judge reasonably accorded less weight to Dr. Simpao's opinion, with respect to his diagnosis of pneumoconiosis, because he did not find it as well reasoned and documented as the contrary opinions by Drs. Dahhan and Broudy. Decision and Order at 11-12; *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one ... over the other"). Because the regulations do not require the Director to provide an examination by a pulmonary specialist and the administrative law judge did not find that Dr. Simpao's report lacked credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-84; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162, 7 BLR 2-25.

Because the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b) are supported by substantial evidence and are in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *White*, 23 BLR 1-1; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26. Consequently, we affirm the denial of benefits in this subsequent claim. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *White*, 23 BLR at 1-7.

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