

BRB No. 05-0487 BLA

FLEM SMITH)
)
 Claimant-Petitioner)
)
 v.)
)
 HACKER & SMITH TRUCKING)
 COMPANY, INCORPORATED) DATE ISSUED: 11/01/2005
)
 and)
)
 AMERICAN RESOURCES 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferrerri & Fogle), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (03-BLA-5741) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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 instant case involves a subsequent claim filed on May 14, 2001.¹ 20 C.F.R. §725.309(d). After crediting claimant with seventeen years of coal mine employment, the administrative law judge found that the newly submitted medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). He further found that the new evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant’s 1976 claim. Accordingly, the administrative law judge denied benefits pursuant to Section 725.309(d).

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence in finding that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.²

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’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant’s initial application for benefits, filed on February 24, 1976, was finally denied by the district director on May 5, 1980 because claimant did not establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director’s Exhibit 1.

² We affirm as unchallenged on appeal the administrative law judge’s decision to credit claimant with seventeen years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415-16, 21 BLR 2-192, 2-196-7 (6th Cir. 1997). Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (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., Inc.*, 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 either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 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 former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the four readings of the single new x-ray film in light of the readers' radiological qualifications.³ Decision and Order at 8. Of the relevant readings, two were read as positive for pneumoconiosis, a "1/0" reading by Dr. Baker, who has no specialized qualifications for the interpretation of x-rays, and a "1/1" reading by Dr. Alexander, a B reader and Board-certified radiologist. Director's Exhibit 11; Claimant's Exhibit 1. However, this film was also read as negative by Drs. Spitz and Wiot, both of whom are B readers and Board-certified radiologists. Director's Exhibits 25, 26. Considering these films together, the administrative law judge found that the weight of the evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 8. A review of the record shows that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. See *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). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely

³ Dr. Sargent evaluated the October 30, 2001 x-ray for quality purposes only. Director's Exhibit 11.

counted the negative readings, and “may have ‘selectively analyzed’” the readings, lack merit. Claimant’s Brief at 2-3. 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 declined to rely on the opinion of Dr. Baker and thus found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 10-11. As claimant alleges no error by the administrative law judge with respect to Section 718.202(a)(4), or his weighing of Dr. Baker’s opinion, we affirm the administrative law judge’s finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

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, 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:

The claimant’s usual coal mine work included running a coal machine as well as being a bolt machine operator, shuttle car operator, coal loader and coal shooter. 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, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

Further, contrary to claimant’s argument, the administrative law judge was not required to consider claimant’s age, education, and work experience in determining whether claimant is totally disabled. These factors “are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).” *White*, 23 BLR at 1-6-7. 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 Section 718.204(b)(2)(iv). *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Baker's October 30, 2001 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that although the administrative law judge acted within his discretion in declining to rely on Dr. Baker's diagnosis of pneumoconiosis, Dr. Baker nonetheless provided a reasoned and documented pulmonary evaluation as it was based on the information and testing available to Dr. Baker. Director's Brief at 2. Moreover, the Director states that because the administrative law judge credited Dr. Baker's opinion regarding the extent of disability, a finding sufficient to support a denial of benefits in this case, there was no violation of his duty to provide claimant with a complete and credible pulmonary examination. Director's Brief at 2-3.

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 issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lack credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Baker 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 11. The administrative law judge did not find nor does claimant allege that Dr. Baker's opinion was incomplete. Although the administrative law judge declined to rely on Dr. Baker's opinion regarding the existence of pneumoconiosis, with respect to the issue of total disability, the administrative law judge credited Dr. Baker's opinion that claimant has the respiratory capacity to perform his usual coal mine employment. Decision and Order at 11; Director's Exhibit 11. Review of the record as whole,

including the evidence submitted with claimant's prior claim, reveals no medical evidence supportive of a finding of total disability. Director's Exhibits 1, 11. Because Dr. Baker's opinion regarding total disability was complete and the administrative law judge did not find that it lacked credibility, and this record as a whole contains no evidence of total disability, a remand to the district director is not required. *See Hodges*, 18 BLR at 1-88 n.3.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge