BRB No. 07-0239 BLA

J. R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 11/14/2007
	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Robert A. Caplen (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order denying benefits (04-BLA-6140) of Administrative Law Judge Janice K. Bullard, 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). Claimant filed his subsequent claim

on April 10, 2002.[1] Director's Exhibit 3. Based on the parties' stipulation, the administrative law judge credited claimant with nineteen years of coal mine employment. The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to §718.204(b)(2). Thus, she found that claimant failed to 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 challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant initially filed a claim for benefits on November 6, 1990, which was denied by Administrative Law Judge Ralph A. Romano on March 16, 1994 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant appealed, and the Board affirmed the denial of benefits. [*J.R*]*. v. Nally & Hamilton Enterprises*, BRB No. 94-2276 BLA (Mar. 28, 1995) (unpub.). Claimant took no further action with regard to the denial of his November 6, 1990 claim until he filed this subsequent claim on April 10, 2002. Director's Exhibit 3.

[2] Although claimant asserts that the administrative law judge erred by not finding that he was totally disabled, he references the regulation at 20 C.F.R. §718.204(c). Claimant's Brief at 5. We note, however, that under the revised regulations, Section 718.204(c) is the regulation pertaining to disability causation while 20 C.F.R. §718.204(b)(2) is the regulation pertaining to total respiratory or pulmonary disability.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of nineteen years of coal mine employment, her determination that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), and her determination that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). Because claimant's initial claim for benefits, filed on November 6, 1990, was denied for failure to establish any of the requisite elements of entitlement, claimant was required to prove, based on the newly submitted evidence, either that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment.

In order to establish entitlement to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge erred in his consideration of the x-ray evidence at Section 718.202(a)(1) because she "selectively analyzed" the evidence, and improperly relied upon the physician's qualifications, and the numerical superiority of the negative x-ray interpretations, to find that claimant failed to establish the existence of pneumoconiosis under that subsection. Claimant's Brief at 3. Claimant's assertion of error has no merit. Section 718.202(a)(1) specifically provides that "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Therefore, contrary to claimant's assertion, the administrative law judge was required to weigh the conflicting x-ray readings in view of the reader's qualifications.

In this case, the record contains four readings of three newly submitted x-rays dated July 18, 2002, June 9, 2003 and May 25, 2004. The administrative law judge correctly noted that the July 18, 2002 x-ray was read as positive by Dr. Simpao, who holds no radiological qualifications, and negative by Dr. Halbert, a Board-certified

radiologist and B reader.[5] Decision and Order at 7; Director's Exhibit 12; Employer's Exhibit 2. Because the administrative law judge properly considered Dr. Halbert to be more qualified than Dr. Simpao, she permissibly assigned controlling weight to Dr. Halbert's negative reading of the July 18, 2002 x-ray, in comparison to Dr. Simpao's positive reading of that x-ray. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 7. Moreover, as the administrative law judge properly determined that neither the June 9, 2003 x-ray, nor the May 25, 2004, was read as positive for pneumoconiosis, Decision and Order at 7; Director's Exhibit 3; Employer's Exhibit 1, we affirm, as supported by substantial evidence, her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in rejecting Dr. Simpao's opinion, that claimant suffers from coal workers' pneumoconiosis. Claimant's Brief at 4-5. We disagree. Contrary to claimant's contention, the administrative law judge permissibly gave diminished weight to Dr. Simpao's opinion, that claimant has pneumoconiosis, since she determined that it was based primarily on claimant's history of coal mine employment, and Dr. Simpao's own positive reading of the July 18, 2002 x-ray, which was read as negative by a more qualified physician. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 11. The administrative law judge permissibly relied on Dr. Dahhan's diagnosis, that claimant does not suffer from clinical or legal pneumoconiosis, because the administrative law judge determined that Dr. Dahhan's opinion was reasoned and documented, and supported by the results of his examination and the evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 9-11.

Because the administrative law judge's credibility determinations are a matter within her discretion as the trier of fact, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002), we affirm her finding that newly submitted medical opinion evidence failed to demonstrate that claimant has pneumoconiosis

[5] A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(c)(ii).

pursuant to 20 C.F.R. §718.202(a)(4).[6] Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Turning to the issue of total disability, claimant argues that the administrative law judge erred in her consideration of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), because he "made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability."[7] Claimant's Brief at 7. Contrary to claimant's contention, the administrative law judge stated that Dr. Simpao "failed to offer an opinion on the effect of [claimant's mild impairment] on [his] ability to perform his coal mine employment."[8] Decision and Order at 15. In contrast, the administrative law judge noted that, "Dr. Dahhan testified that he was familiar with the exertional requirements of [c]claimant's work as a mechanic," Decision and Order at 15, citing Employer's Exhibit 4 at 9-10, and he specifically opined that claimant was not totally disabled from performing his usual coal mine employment. Because the administrative

[6] The administrative law judge accorded little weight to Dr. Broudy's diagnosis of pneumoconiosis, because he found that the doctor's opinion was not well-reasoned, and therefore, was insufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.202(a)(4). Decision and Order at 15-16; Employer's Exhibits 3, 5. Since claimant does not raise any error with respect to the weight the administrative law judge accorded Dr. Broudy's opinion, it is affirmed. *Skrack*, 6 BLR at 1-711.

[7] We reject claimant's assertion that Dr. Simpao's opinion is sufficient to invoke the presumption of total disability. Claimant's Brief at 6. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that Dr. Simpao's opinion is sufficient to "invoke a presumption of total disability." *Id*. Claimant's reliance on *Meadows* is misplaced. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

[8] Dr. Simpao check-marked a box on the Department of Labor examination questionnaire, indicating that claimant did not have the respiratory capacity to work as a miner or to perform comparable work in a dust-fee environment. Director's Exhibit 12. Dr. Simpao did not specify the physical requirements of claimant's job duties in his examination report, or explain how a diagnosis of mild respiratory impairment precluded claimant from performing those job duties. *Id*.

law judge determined that Dr. Dahhan's opinion was reasoned and documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*), and she credited Dr. Dahhan's credentials as a Board-certified pulmonary specialist,[9] Decision and Order at 15, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), we affirm her finding that claimant failed to prove a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.202(b)(2)(iv).[10] We therefore affirm the administrative law judge's overall finding that claimant is not totally disabled.

Because the administrative law judge determined that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm her finding that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Consequently, we affirm the denial of benefits in this subsequent claim. *See White,* 23 BLR at 1-3.

[9] The administrative law judge stated that "although there is documentation attached to Dr. Simpao's [curriculum vitae] that suggests that the doctor is Board-certified in pulmonary disease, his [curriculum vitae] makes no such claim[,] and therefore fails to prove that Dr. Simpao is as equally qualified as Dr. Dahhan. Decision and Order at 15; Claimant's Exhibit 1; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

[10] We reject claimant's assertion that, since pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge