BRB No. 07-0252 BLA

J. C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 11/30/2007
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

J.C., Isom, Kentucky, *pro se*.

Rita Roppolo (Jonathan L. Snare, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (04-BLA-6359) of Administrative Law Judge Adele Higgins Odegard 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). The administrative law judge credited claimant with 5.81 years of coal mine employment and she noted that this case involves a subsequent claim.[1] The administrative law judge

[1] The record reflects that claimant filed four previous claims for benefits, all of which were finally denied. Director's Exhibit 1. His most recent prior claim, filed on July 7, 2000, was denied on October 19, 2000, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment, or that claimant was

found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), and disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge found that claimant failed to establish each of the elements of entitlement previously adjudicated against him, and she denied benefits. *See* 20 C.F.R. §725.309(d).

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. 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*).

If a miner files an application 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 he failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that he was totally disabled by a respiratory or pulmonary impairment.

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totally disabled. Claimant took no further action on that claim. Director's Exhibit 1. Claimant filed the instant claim on June 5, 2002. Director's Exhibit 3.

Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain consideration of the merits of the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

In his letters to the Board, claimant asserts that he had additional years of coal mine employment that were not credited by the administrative law judge. The Director argues that the administrative law judge's length of coal mine employment finding is supported by substantial evidence. We agree.

The administrative law judge considered claimant's Social Security Administration earnings records, claimant's statements in his application for benefits, and claimant's deposition testimony concerning his coal mine employment. She found that, "Based on the foregoing earnings, as reported to the Social Security Administration, and using the method permitted in §725.101(a)(32), I find that the Claimant has established a total of 5.81 years of coal mine employment."[2] Decision and Order at 5.

It is well established that claimant bears the burden of proof to establish the number of years he worked in coal mine employment, *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985), and the Board has held that any reasonable method of calculation of the years of coal mine employment may be used. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988). Under the facts of this case, the administrative law judge permissibly applied the formula set forth at 20 C.F.R. §725.101(a)(32), and reasonably credited claimant with 5.81 years of coal mine employment. *See Dawson*, 11 BLR at 1-60. Therefore, we affirm the administrative law judge's length of coal mine employment finding, as it is reasonable and supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis,

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[2] The regulation applied by the administrative law judge provides a definition of "year," and provides further that:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). . . .

20 C.F.R. §725.101(a)(32)(iii).

because "Dr. Baker, who interpreted the [only] X-ray as positive for pneumoconiosis, has called into question his own interpretation." Decision and Order at 8. As the administrative law judge found, Dr. Baker later changed that interpretation to "0/1," a negative interpretation, after the district director informed him that claimant had 5.81 years of coal mine employment, rather than the twenty-seven to twenty-eight years initially reported to Dr. Baker. *See* 20 C.F.R. §718.102(b); Director's Exhibits 10, 13. The administrative law judge permissibly determined that Dr. Baker's subsequent comments undermined the credibility of his initial positive ILO classification. *See Cranor v. Peabody Coal Co*., 22 BLR 1-1 (1999)(*en banc*); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, we affirm the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as this finding is supported by substantial evidence.[3]

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis. In so finding, the administrative law judge correctly determined that Dr. Alam's diagnoses of pulmonary diseases, which the doctor did not relate to claimant's coal mine employment, did not constitute diagnoses of pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). In addition, we affirm the administrative law judge's finding that claimant's treatment records, which contained diagnoses of coal workers' pneumoconiosis, were not well-reasoned, as the physicians did not provide any explanation for these conclusory opinions. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge permissibly accorded little weight to Dr. Baker's initial opinion diagnosing pneumoconiosis, as she found that it was based on an overstated history of coal mine employment. *See Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); Director's Exhibit 10. In addition, we affirm the administrative law judge's permissible finding that Dr. Baker's later opinion, that claimant's symptoms are not related to his 5.81 years of coal mine dust exposure, was based on a "more accurate" coal mine employment history, was well-reasoned, and entitled to greater weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Addison*, 11 BLR at 1-69-70; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as this finding is supported by substantial evidence. We

[3] We also affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) or (3), as the record does not contain any biopsy evidence or evidence of complicated pneumoconiosis in this living miner's claim filed in 2002. 20 C.F.R. §718.202(a)(2), (3).

also affirm the administrative law judge's finding that the evidence did not establish that claimant had pneumoconiosis that arose out of coal mine employment pursuant to 20 C.F.R. §718.203, as this finding is supported by substantial evidence.

The administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). All four of the newly submitted pulmonary function studies and all three of the newly submitted blood gas studies, yielded non-qualifying values,[4] Director's Exhibits 10, 13; Claimant's Exhibits 1, 2, and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we affirm the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are supported by substantial evidence.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge concluded that the newly submitted medical opinion evidence did not demonstrate total disability. The administrative law judge accurately noted Dr. Baker's opinion that claimant has no impairment and retains the respiratory capacity to perform the work of a coal miner, and noted further that claimant's medical records do not address whether claimant is totally disabled. Director's Exhibit 10; Claimant's Exhibits 1, 2. The administrative law judge reasonably found that Dr. Baker's opinion does not support claimant's burden of establishing total respiratory disability. In addition, the administrative law judge correctly found that the newly submitted hospital and treatment records do not assist claimant in establishing total disability. Claimant's Exhibits 1, 2. Therefore, we affirm the administrative law judge's finding that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5]

In view of the foregoing, we affirm the administrative law judge's determination that claimant has not established a change in one of the applicable conditions of entitlement. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

Further, we reject claimant's assertion that the administrative law judge did not consider all of the medical evidence. The evidence submitted with prior claims is not

[4] A "qualifying" objective study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

[5] The administrative law judge also found the newly submitted evidence insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), based on her finding that claimant did not establish that he is totally disabled. We affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), as it is supported by substantial evidence.

considered by the administrative law judge until claimant proves a change in an applicable condition of entitlement since the prior denial. *See* 20 C.F.R. §725.309; *White*, 23 BLR at 1-3. We also reject claimant's suggestion that the Department of Labor should request reports from certain doctors listed by claimant. Claimant bears the burden of developing his own case, and submitting evidence to support entitlement, which he must establish by a preponderance of the evidence.[6] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

[6] Claimant also argues that some of the physicians did not sign their opinions. However, claimant does not identify any specific evidence in his allegation. Moreover, the record reflects that Dr. Baker, whose opinion was the only opinion deemed unfavorable to claimant's position, signed his opinion. Director's Exhibits 10, 13. Consequently, a failure by any other doctor to sign his or her opinion was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).