BRB No. 07-0259 BLA

H.M., JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APOGEEE COAL COMPANY/ ARCH COAL, INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 11/30/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (04-BLA-6118) of Administrative Law Judge William S. Colwell 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 September 30, 2002.[1] The administrative law judge determined that the new evidence,

[1] Claimant filed a prior claim for benefits on March 13, 1985, which was denied by the district director on September 6, 1985 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action with

developed since the denial of claimant's prior claim, was sufficient to establish the existence of pneumoconiosis and, therefore, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Based on his review of all the record evidence, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). He further found that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting Dr. Baker's diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4), and in finding that claimant had demonstrated a change in an applicable condition of entitlement under Section 725.309. Employer also challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b)(2), (c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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.[2] 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 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

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respect to the denial of his 1985 claim until he filed the current subsequent claim on September 30, 2002. Director's Exhibit 3.

[2] Because the miner's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2); *see White v. New White Coal Co.*, 23 BLR 1-1 (2004). In this case, because claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement, he was required to submit new evidence establishing either that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment in order to satisfy the requirements of Section 725.309 and to have his claim reviewed on the merits.

Weighing the new evidence at Section 718.202(a)(4), the administrative law judge determined that claimant had established the existence of legal pneumoconiosis based on the medical opinion of Dr. Baker.[3] Employer asserts that the administrative law judge erred in crediting Dr. Baker's diagnosis of pneumoconiosis at Section 718.202(a)(4), noting that it was based, primarily, on the doctor's positive reading of the October 31, 2002 x-ray, which reading was rejected by administrative law judge in his consideration of the x-ray evidence at Section 718.202(a)(1). Employer's Brief at 18. We disagree.

Contrary to employer's assertion, the administrative law judge was not required to discredit Dr. Baker's opinion on the existence of legal pneumoconiosis merely because the administrative law judge did not credit the doctor's diagnosis of clinical pneumoconiosis under Section 718.202(a)(1). Section 718.202(a)(4) specifically permits claimant to establish the existence of pneumoconiosis based on a physician's reasoned opinion that he has either clinical or legal pneumoconiosis as defined at 20 C.F.R. §718.201. Legal pneumoconiosis encompasses a broader range of respiratory conditions than clinical pneumoconiosis, and includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(c). In this case, because Dr.

[3] The administrative law judge found that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). Decision and Order Granting Benefits (Decision and Order) at 13. Because there was no biopsy evidence of record, he found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Furthermore, under 20 C.F.R. §718.202(a)(3), the administrative law judge determined that claimant was ineligible for any of the regulatory presumptions available to establish the existence of pneumoconiosis. *Id*. We affirm the administrative law judge's findings pursuant to Section 718.202(a)(1)-(3), as they are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Baker opined that claimant suffered from chronic obstructive pulmonary disease (COPD), due to a combination of coal dust exposure and smoking, the administrative law judge properly considered Dr. Baker's opinion to be supportive of a finding of legal pneumoconiosis, notwithstanding his rejection of Dr. Baker's diagnosis of clinical pneumoconiosis based on a positive x-ray at Section 718.202(a)(1).

We also reject employer's assertion that the administrative law judge erred in crediting Dr. Baker's opinion over the contrary opinions of Drs. Jarboe and Hudson at Section 718.202(a)(4).[4] As noted by the administrative law judge, although Dr. Hudson opined that claimant did not have pneumoconiosis, the doctor acknowledged that he was unable to render an opinion as to the presence or absence of any obstructive lung disease given that his pulmonary function testing was invalid. Decision and Order at 14. As such, the administrative law judge permissibly determined that Dr. Hudson's opinion was entitled to little weight on the issue of whether claimant had legal pneumoconiosis. *Id*. With respect to Dr. Jarboe, the administrative law judge stated:

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[4] Dr. Baker examined claimant on October 31, 2002 at the request of the Department of Labor. In his medical report, Dr. Baker diagnosed coal workers' pneumoconiosis, based in part on his own positive reading of the x-ray obtained during his examination. Director's Exhibit 9. He also diagnosed chronic obstructive pulmonary disease (COPD) and hypoxemia, which he related to coal dust exposure and smoking. *Id*. In a deposition conducted on July 25, 2005, Dr. Baker indicated that he based his diagnosis of COPD on the results of claimant's pulmonary function studies, which showed a moderate obstructive defect and restrictive impairment. Claimant's Exhibit 2.

The deposition testimony of Dr. Hudson was taken on July 31, 2003. Dr. Hudson testified that he had examined claimant on January 14, 2003. Director's Exhibit 12. Although Dr. Hudson opined that claimant did not suffer from pneumoconiosis or a chronic lung disease due to coal mine employment, he acknowledged that the pulmonary function tests he obtained were invalid. He testified that he did not "know to what extent [claimant] has an obstructive respiratory disease" and, therefore, that he was unable "to say with certainty" that claimant does not require treatment for a respiratory condition. Director's Exhibit 12 at 12.

Dr. Jarboe prepared a consultative report on May 18, 2003, and he was also deposed on two occasions. Director's Exhibits 11, 13; Employer's Exhibit 1. Based on his review of the medical evidence, Dr. Jarboe opined that that claimant did not suffer from pneumoconiosis. Dr. Jarboe diagnosed a moderately severe respiratory impairment due to smoking. Employer's Exhibit 1.

> When reviewing the totality of the medical report and deposition evidence of Dr. Jarboe, I do not find his opinion sufficiently reasoned to rule out the possibility of legal pneumoconiosis. I also do not find Dr. Jarboe's explanation for ruling out coal mine dust exposure as a factor in claimant's pulmonary condition to be persuasive in light of the fact that [c]laimant last smoked cigarettes in 1972 while he last worked in the nation's coal mines in the 1980's. Dr. Jarboe's heavy reliance on [c]laimant's smoking history, which was less than half the number of years spent in coal mining, is not persuasive on this issue. I find the report of Dr. Baker to be better reasoned on this issue. Dr. Jarboe did not have the benefit of examining [c]laimant, while Dr. Baker did. Dr. Jarboe relies on a medical report and objective testing which is not in the record, that being the report of Dr. Hudson. While Dr. Jarboe discusses at length the findings of hyperinflation [sic] and air trapping as found by Dr. Hudson, Dr. Hudson's testimony did not discuss these findings. I accord the opinion of Dr. Jarboe less weight than that of Dr. Baker.

Decision and Order at 15.

Contrary to employer's assertion, the administrative law judge, permissibly assigned less weight to Dr. Jarboe's opinion, that claimant did not have pneumoconiosis, since the administrative law judge determined that Dr. Jarboe did not persuasively explain, based on the record evidence, why claimant's COPD was due entirely to smoking.[5] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*). In contrast, the administrative law judge rationally found that Dr. Baker's diagnosis of COPD due, in part, to coal dust exposure, satisfied the regulatory definition of legal pneumoconiosis under Section 718.201, and was deserving of credit under Section 718.202(a)(4) because it was reasoned and documented. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, 12 BLR at 1-155 (1989) (*en banc*); Decision and Order at 15. We therefore affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and his finding that claimant demonstrated a change in an applicable condition of entitlement under Section 725.309. *See Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002) (*en banc*); *Troup*

[5] Dr. Jarboe relied upon the narrative medical report of Dr. Hudson, which was referenced by Dr. Hudson in his deposition, but which was not proffered into evidence by employer. Director's Exhibit 11. The administrative law judge also specifically excluded Dr. Hudson's x-ray as it was proffered in excess of the evidentiary limitations at 20 C.F.R. §725.414. Decision and Order at 6 n.4; s*ee Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

v. Reading Anthracite Coal Co., 22 BLR 1-11 (1999) (*en banc*).[6] Additionally, in considering all of the record evidence, the administrative law judge determined that claimant satisfied his burden of establishing the existence of pneumoconiosis.[7] Decision and Order at 16. Because substantial evidence supports the administrative law judge's finding at 20 C.F.R. §718.202(a), it is affirmed.

Lastly, we reject employer's contention that the administrative law judge erred in finding that claimant was totally disabled. Employer asserts that the administrative law judge erred in his consideration of whether claimant established total disability because he did not perform a comparative analysis of the old and new evidence to determine whether claimant's respiratory condition had "materially changed" since the denial of his prior claim. Employer's argument is without merit. Since the administrative law judge properly found that claimant established the existence of pneumoconiosis, and a change in an applicable condition of entitlement under Section 725.309, he was not required to also perform a comparative analysis of the old and new evidence on the issue of whether claimant's respiratory condition had worsened. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In addressing the issue of total disability, the administrative law judge correctly determined that all of claimant's pulmonary function studies were qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). He also properly noted that none of the arterial blood gas studies demonstrated qualifying values under 20 C.F.R. §718.204(b)(2)(ii).[8] Decision and Order at 17; Director's Exhibits 1, 9, 12. With respect to the medical opinion evidence, the administrative law judge noted that "Dr. Baker in 2002 and Dr. Dahhan in 1985 found Claimant to be disabled, due at least in part, to coal workers' pneumoconiosis." Decision and Order 17. Dr. Jarboe also opined that claimant

[6] Pursuant to 20 C.F.R. §718.203, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of thirty-eight years of coal mine employment. We affirm the administrative law judge's determination at Section 718.203, as it is unchallenged by the parties on appeal. *Skrack*, 6 BLR at 1-711.

[7] The administrative law judge noted that Dr. Dahhan examined claimant on April 24, 1985 and July 18, 1985 in conjunction with claimant's prior claim. Dr. Dahhan also diagnosed COPD, although he was unable to identify the etiology of claimant's lung condition. Decision and Order at 16; Director's Exhibit 1.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

suffered from a pulmonary impairment that prevented his return to coal mine employment. *Id*. Based upon the medical opinions of Drs. Dahhan, Baker and Jarboe, the administrative law judge properly found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Furthermore, weighing all of the evidence together at Section 718.204(b)(2), the administrative law judge determined that claimant had satisfied his burden of establishing total disability. *Id*. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is totally disabled pursuant to Section 718.204(b)(2). *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991) (*en banc*).

Lastly, the administrative law judge considered whether claimant satisfied his burden to establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In so doing, the administrative law judge permissibly assigned less weight to the opinions of Drs. Hudson and Jarboe on the issue of disability causation since these physicians opined that claimant did not suffer from pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 18; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLA 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). In contrast, the administrative law judge properly credited the opinion of Dr. Baker, that claimant was totally disabled due to pneumoconiosis, as he found Dr. Baker's opinion to be well reasoned. Decision and Order at 18. Based on the administrative law judge's credibility determinations, *Clark*, 12 BLR at 1-155; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), and in light of our affirmance of his findings at Section 718.202(a)(4), we also affirm, as supported by substantial evidence, the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis under Section 718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Thus, we affirm the administrative law judge's award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order Granting 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