BRB No. 05-0304 BLA

DANIEL LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLENN'S TRUCKING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/18/2005
and	)	
	)	
AETNA/TRAVELERS INSURANCE	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5295) of Administrative Law Judge Daniel J. Roketenetz, (the administrative law judge) 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 credited claimant with at least nine years of coal mine employment and noted that the instant claim constitutes a subsequent claim.[1] The administrative law judge reviewed the newly developed evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), total disability pursuant to 20 C.F.R. §718.204(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant did not establish that one of the applicable conditions of entitlement has changed since the denial of his prior claim, *see* 20 C.F.R. §725.309, and the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, urging the Board to reject claimant's arguments that he was not provided with a complete and credible pulmonary evaluation.[2]

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[1] Claimant filed his initial application for benefits on October 13, 1987 which was ultimately denied by the district director on March 8, 1991. Director's Exhibit 1. More than one year later, on January 10, 1995, claimant filed another application for benefits. On May 27, 1998, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order – Denial of Benefits. Judge Roketenetz credited claimant with nine years and ten months of coal mine employment and noted that the claim before him was a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). Judge Roketenetz considered the evidence submitted since the denial of the prior claim and found it insufficient to establish the existence of pneumoconiosis or total disability. Thus, Judge Roketenetz determined that claimant had failed to demonstrate a material change in conditions pursuant to Section 725.309 (2000), and he denied benefits. On appeal, the Board affirmed the denial of benefits. *Lewis v. Glenn's Trucking Co.*, BRB No. 98-1192 BLA (June 8, 1999)(unpub.). Director's Exhibit 2. Claimant filed the instant claim on May 16, 2001. Director's Exhibit 4. This claim was also assigned to Judge Roketenetz.

[2] No party has challenged the administrative law judge's finding of at least nine years of coal mine employment, his finding that the newly submitted evidence does not

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

Since this case involves a subsequent claim pursuant to 20 C.F.R. §725.309, it is necessary to consider the basis for the denial of the prior claim. In a Decision and Order – Denial of Benefits, issued on May 27, 1998 in the miner's second claim, the administrative law judge found that the newly submitted evidence did not establish the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. Consequently, the administrative law judge determined that claimant had not established a material change in conditions. 20 C.F.R. §725.309 (2000).[3] The Board affirmed the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[4] The Board, therefore, held that substantial evidence supported the finding that claimant failed to establish a material change in conditions, and the Board affirmed the denial of benefits. *Lewis v. Glenn's Trucking Co.*, BRB No. 98-1192 BLA (June 8, 1999)(unpub.). In the instant claim, the administrative law judge considered the evidence submitted since the prior denial and found it insufficient to establish any of the elements of entitlement previously decided against claimant, and therefore determined that claimant has not established that one of the applicable conditions of entitlement has changed pursuant to Section 725.309. Accordingly, the administrative law judge denied benefits.

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establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3) or (a)(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) or (iii). Because these finding have not been challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000) is now found at 20 C.F.R. §718.204(b), while the prevision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b)(2000), is now found at 20 C.F.R. §718.204(c).

Claimant asserts that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that the administrative law judge improperly relied on the qualifications of the physicians interpreting the x-rays as negative and the numerical superiority of the negative x-ray interpretations. The administrative law judge considered the newly submitted x-ray interpretations,[5] and found that because all of the newly submitted x-rays have been interpreted as negative, claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Since the administrative law judge has rationally considered both the quality and the quantity of the evidence, we affirm his finding that the newly submitted x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Railroad 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).

Regarding the administrative law judge's weighing of the evidence relevant to 20 C.F.R. §718.204(b)(2)(iv),[7] claimant 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 employment in conjunction with the medical assessments of

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[5] The newly submitted evidence consists of four interpretations of three films. Dr. Dahhan, a B-reader, read the June 19, 2003 film as negative. Employer's Exhibit 3. Dr. Rosenberg, a B-reader, and Dr. Poulos, a Board-certified radiologist and B-reader, both interpreted the March 5, 2002 film as negative for pneumoconiosis. Employer's Exhibits 10, 11. Dr. Baker read the June 13, 2001 film as negative for pneumoconiosis. Director's Exhibit 12.

[6] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for this contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the newly submitted x-ray evidence without engaging in a selective analysis. Decision and Order at 7-8. We therefore reject claimant's suggestion.

[7] The relevant newly submitted evidence contains three medical opinions. Both Dr. Dahhan and Dr. Rosenberg opined that claimant has no respiratory impairment. Employer's Exhibits 3, 15. Dr. Baker diagnosed a mild impairment but stated that claimant is capable, from a respiratory standpoint, of performing the work of a coal miner in a dust-free environment. Director's Exhibit 12.

claimant's respiratory impairment. Claimant's Brief at 4-5. Specifically, claimant maintains that:

> The claimant's usual coal mine work included being an equipment operator as well as hauling coal. 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. The administrative law judge found that none of the newly submitted medical opinions contains a diagnosis of a totally disabling respiratory impairment. Decision and Order at 14; Director's Exhibit 12; Employer's Exhibits 3, 15. As claimant does not contend that any of these opinions are sufficient to support a finding of total disability pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 5-6. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant, in this case, however, has not established that he has pneumoconiosis by way of medical evidence, much less that it has worsened over time. We therefore decline to address this allegation further.

In light of the foregoing, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2).

We next consider claimant's assertion that the Director has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.

See 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). Specifically, claimant alleges that since, in evaluating the newly submitted evidence at Section 718.202(a)(4), the administrative law judge found that Dr. Baker's report was poorly documented and poorly reasoned because the physician did not indicate that he used any objective medical testing in his diagnosis, *see* Decision and Order at 11, the Director has not fulfilled his statutory duty. Claimant's Brief at 3-4. The Director responds, urging the Board to reject claimant's assertion. The Director states:

> Although the ALJ did not credit Dr. Baker's report on the issue of legal pneumoconiosis, he specifically credited and relied upon Dr. Baker's negative opinion on total disability. Since the ALJ's finding of no total disability is sufficient to uphold his denial of benefits, any defect in Dr. Baker's opinion with respect to the existence of pneumoconiosis does not matter. Moreover, [claimant] has not shown that evidence from a prior claim conclusively proves disability and would trump the current negative evidence, assuming he establishes that he now has pneumoconiosis. Thus, the Board should reject claimant's contention with respect to the Director's Section 413(b) obligation.

Director's Letter at 2.

We agree with Director. In view of the Board's previous affirmance of the finding of the administrative law judge that claimant failed to establish total disability, *see Lewis v. Glenn's Trucking Co.*, BRB No. 98-1192 BLA (June 8, 1999)(unpub.) slip op. at 6, and in light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2), a finding of total disability on the merits of entitlement is precluded. Therefore, any change in Dr. Baker's opinion regarding the existence of pneumoconiosis would be irrelevant, as the evidence is insufficient to establish total disability, one of the essential elements of entitlement pursuant to Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denial of 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