BRB No. 06-0341 BLA

DENNIS H. FELTNER Claimant-Petitioner v. SHAMROCK COAL COMPANY and JAMES RIVER COAL COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))))))	DATE ISSUED: 10/31/2006 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, 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.

Sarah M. Hurley (Howard M. Radzely, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5944) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge credited claimant with ten years of coal mine employment[1] and found that employer is the responsible operator. The administrative law judge then noted that claimant has filed three applications for benefits.

Claimant's first application for benefits, filed on December 20, 1993, was finally denied by the district director on July 26, 1994, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant's second application, filed on April 23, 1997, was treated as a duplicate claim pursuant to 20 C.F.R. §725.309 (2000) and was denied by Administrative Law Judge Rudolf L. Jansen on July 12, 1999. Director's Exhibit 2. Judge Jansen found that claimant did not establish any element of entitlement and thus did not demonstrate a material change in conditions since the denial of his first claim. *Id*. The Board affirmed Judge Jansen's decision on October 17, 2000. *Feltner v. Shamrock Coal Co.*, BRB No. 99-1109 BLA (Oct. 17, 2000)(unpub.). On March 5, 2001, the district director permitted claimant to withdraw his 1997 duplicate claim. Director's Exhibit 2. On March 12, 2001, claimant filed his current application for benefits. Director's Exhibit 3.

The administrative law judge found that the district director improperly granted claimant's request to withdraw the 1997 claim, because the claim had already been denied and the denial was affirmed by the Board. Decision and Order at 3, 10 n.17, citing *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*). The administrative law judge therefore determined that the district director's granting of the withdrawal request was "void."[2] Decision and Order at 3.

The administrative law judge concluded that claimant's current application for benefits had to be treated as a subsequent claim pursuant to 20 C.F.R. §725.309(d). He therefore examined the newly-submitted evidence to determine whether claimant

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] On appeal, no party challenges this aspect of the administrative law judge's decision.

established a "material change in condition."[3] Decision and Order at 10, 17. The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim did not establish the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment. Consequently, the administrative law judge found that claimant did not establish a material change in condition since the denial of his previous claim. Accordingly, the administrative law judge denied benefits.

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 argues further that the administrative law judge erred in his consideration of the medical opinion evidence when he found 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 pulmonary evaluation.[4]

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

[3] The Director, Office of Workers' Compensation Programs, notes correctly that "[i]n view of the ALJ's finding that claimant's previous claim had been improperly withdrawn, the ALJ should have treated this claim as a request for modification because it was filed within one year of the Board's October 17, 2000 decision denying benefits." Director's Brief at 2; *see* 20 C.F.R. §725.310. We note further that because claimant did not establish a material change in conditions in his 1997 duplicate claim, he still had to establish a material change in conditions on modification. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). As we will discuss, substantial evidence supports the administrative law judge's determination that claimant did not establish a material change. Therefore, the administrative law judge's failure to treat claimant's most recent filing as a modification request of his 1997 duplicate claim constituted harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[4] We affirm as unchallenged on appeal the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three x-rays. Dr. Hussain, who the administrative law judge noted lacks radiological qualifications, read claimant's July 27, 2001 x-ray as positive for pneumoconiosis. Decision and Order at 11; Director's Exhibit 8. The administrative law judge also considered that Dr. Wiot, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis.[5] Decision and Order at 11; Director's Exhibit 36. Based on Dr. Wiot's qualifications, the administrative law judge found the July 27, 2001 x-ray to be negative for pneumoconiosis. *Id*. Because the two remaining x-rays, taken on August 13, 2001 and June 16, 2004, received only negative readings, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed"' the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Hussain's opinion that claimant is totally disabled, and the contrary opinions of Drs. Broudy and Rosenberg stating that claimant's pulmonary function is normal and he is not totally disabled.[6] Decision and Order at 7-8, 16-17; Director's Exhibits 8, 36;

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[5] Dr. Sargent evaluated the July 27, 2001 x-ray for its quality only. Director's Exhibit 9.

[6] The administrative law judge also reviewed six pages of treatment records from Dr. Baker. Director's Exhibit 25. The administrative law judge gave these records "no weight" because they contained no diagnosis of a pulmonary impairment. Decision and

Employer's Exhibits 2, 3.. The administrative law judge found Dr. Hussain's opinion entitled to "less weight" because it was not supported by its underlying documentation and because Dr. Hussain did not adequately explain his conclusion that claimant is totally disabled. Decision and Order at 16. By contrast, the administrative law judge accorded "substantial weight" to the "reasoned and documented" opinions of Drs. Broudy and Rosenberg because they were based on "normal" examinations and test results. Decision and Order at 17.

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*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. 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 being a mechanic, repairman and roof bolter. 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, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge permissibly accorded greater weight to the medical opinions he found to be better documented and reasoned, which stated that claimant's pulmonary function is normal and he is not totally disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).

Additionally, because an administrative law judge's findings regarding total disability must be based solely on the medical evidence of record, we reject claimant's argument that, since pneumoconiosis is a progressive disease, it must have worsened, thus affecting his ability to perform his usual coal mine employment. *White*, 23 BLR at

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Order at 17. Substantial evidence supports this finding, which claimant does not challenge.

1-7 n.8. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's July 27, 2001 medical opinion 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 because claimant's most recent filing was a modification request from the denial of his 1997 duplicate claim, "the Director was not obligated to provide claimant with a second complete pulmonary examination;" he "had already provided claimant with an opportunity to substantiate his April 23, 1997 claim by means of the complete pulmonary examination conducted by Dr. Glen Baker on May 29, 1997." Director's Brief at 5 n.5.

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 (2000), 725.406 (2000). The Board has deferred to the Director's interpretation that Section 923(b) requires him to provide a complete pulmonary evaluation once per claim filed by a miner, but not a new pulmonary evaluation with each modification request, because a modification request merely continues the miner's original claim. *Eversole v. Perry County Coal Corp.*, BRB Nos. 05-0186 BLA, 05-0186 BLA-A (Jun. 27, 2005)(unpub.).

The record reflects that on May 29, 1997, 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.[7] Director's Exhibit 2 (report labeled Director's Exhibit 11). Claimant does not allege that Dr. Baker's report was incomplete. Review of the record reflects that Judge Jansen accepted Dr. Baker's report as credible but found it outweighed by more probative evidence. [1999] Decision and Order - Rejection of Claim at 7-9. Thus, we find no merit in claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.[8] *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994).

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[7] Dr. Baker diagnosed pneumoconiosis and reported that claimant had a mild respiratory impairment that was not totally disabling. Director's Exhibit 2 (report labeled Director's Exhibit 11 at 3-5).

[8] Consequently, we need not address whether Dr. Hussain's 2001 report, provided before the Director realized that claimant's March, 2001 application was not a new claim, fulfilled the Director's obligation under Section 923(b) of the Act.

Because claimant failed to establish either the existence of pneumoconiosis or total disability, the elements of entitlement that were previously adjudicated against him, we affirm the administrative law judge's denial of benefits. *See* 20 C.F.R. §§725.309(d), 725.310; *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge