BRB No. 06-0424 BLA

OTIS ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 10/31/2006
	)	
Employer-Respondent	)	
	)	
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.

Helen H. Cox (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5405) of Administrative Law Judge Daniel J. Roketenetz 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).[1] After crediting claimant with twenty

[1] The instant subsequent claim is governed by the regulations that took effect on

years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b), elements of entitlement previously adjudicated against claimant. Assuming, *arguendo,* that claimant established the existence of pneumoconiosis and total disability, the administrative law judge found that disability causation was not established at 20 C.F.R. §718.204(c), another element of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement, and denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability pursuant to 20 C.F.R. §718.204(b). Claimant also argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim as required by the Act. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, asserting that the Board can reject claimant's request that the case be remanded to provide claimant with a complete, credible pulmonary evaluation if it affirms the administrative law judge's finding that pneumoconiosis is not established. If, however, the Board cannot affirm that finding, the Director asserts that remand is warranted to provide claimant with a complete and credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[2] The newly submitted x-ray evidence consists of interpretations of two x-rays taken on August 22, 2001, and April 7, 2004.[3] In considering

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January 19, 2001, as it was filed on May 31, 2001. Decision and Order at 4, 5; Director's Exhibit 3.

[2] Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

[3] Dr. Hussain, who has no radiological qualifications, interpreted claimant's August 22, 2001 x-ray as positive for pneumoconiosis. Director's Exhibits 10, 11. Dr. Poulos, a

the newly submitted x-ray evidence, the administrative law judge found the 2001 x-ray stood in equipoise, and that it neither proved nor disproved the existence of pneumoconiosis because it was interpreted as both positive and negative by highly qualified physicians. Decision and Order at 7-8. The administrative law judge found the 2004 x-ray negative for pneumoconiosis as it was read as negative by two qualified readers. Decision and Order at 8. The administrative law judge acted within his discretion in relying on the weight of the readings by qualified physicians to find that the x-ray evidence was negative for pneumoconiosis. *Staton v. Norfolk & Western Ry. 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); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7-9; Director's Exhibits 10, 11, 15; Claimant's Exhibits 2, 3; Employer's Exhibits 2, 4, 11. Thus, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).[4]

Claimant additionally contends that the administrative law judge erred in finding Dr. Baker's newly submitted medical opinion insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because Dr. Baker's opinion of clinical pneumoconiosis was based on a positive chest x-ray, contrary to the administrative law judge's findings, and because the record contains subsequent negative x-rays.[5] We reject claimant's contentions. The administrative law judge did not discredit Dr. Baker's diagnosis of clinical pneumoconiosis for the reasons claimant suggests. Rather, the administrative law

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Board-certified radiologist and B reader, interpreted the 2001 x-ray as negative for pneumoconiosis, Director's Exhibit 15, while Dr. Alexander, also a Board-certified radiologist and B reader, interpreted this x-ray as positive for the disease. Claimant's Exhibits 2, 3. Dr. Dahhan, a B reader, interpreted claimant's April 7, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 4. Dr. Wiot, a Board-certified radiologist and B reader, also interpreted this x-ray as negative for the disease. Employer's Exhibits 2, 11.

[4] We also reject claimant's assertion that the administrative law judge "may have selectively analyzed the x-ray evidence" as claimant has provided no support for his assertion. Claimant's Brief at 3.

[5] In a report dated March 23, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis, 1/0, based on a chest x-ray and a pulmonary function study. Claimant's Exhibit 4. Dr. Baker recorded a twenty-seven year underground coal mine employment history, and reported that claimant smoked cigarettes for five years, but quit ten to fifteen years ago. *Id*. Dr. Baker's treatment notes from 2001-2003 include diagnoses of coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis. Claimant's Exhibit 5.

judge gave less weight to Dr. Baker's 2004 report diagnosing clinical pneumoconiosis on the basis that it was undocumented, where Dr. Baker did not include the reports from the objective testing which supported his opinion.[6] Decision and Order at 11; Claimant's Exhibit 4. A documented report sets forth the clinical findings and observations on which the doctor based his diagnosis. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). It is within the discretion of the administrative law judge to determine whether a physician's conclusions are adequately supported by their underlying documentation. *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Thus, we affirm the administrative law judge's assignment of less weight to Dr. Baker's 2004 diagnosis of clinical pneumoconiosis, as undocumented. Additionally, the administrative law judge found that Dr. Baker did not diagnose legal pneumoconiosis, where he did not attribute claimant's obstructive pulmonary disease to coal mine employment. Decision and Order at 13; Claimant's Exhibits 4, 5. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Consequently, we affirm the administrative law judge's finding that Dr. Baker did not diagnose legal pneumoconiosis.[7] As claimant raises no other argument at Section 718.202(a)(4), the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis thereunder is affirmed. Therefore, the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), based on the newly submitted evidence, is affirmed. Moreover, inasmuch as the existence of pneumoconiosis was not established in the prior claim, Director's Exhibit 34-7 of Director's Exhibit 1, and claimant did not contest it, we affirm the finding that the existence of pneumoconiosis is not established on the merits, based on all the evidence of record. Therefore, entitlement is precluded under the Act. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26

[6] Dr. Baker referenced a positive chest x-ray and a pulmonary function study to support his diagnosis of clinical pneumoconiosis in his 2004 report, but did not attach them to his report. Claimant's Exhibit 4.

[7] Moreover, the administrative law judge found Dr. Baker's diagnosis of clinical pneumoconiosis, contained in his treatment notes, unreasoned because it was based on non-conforming pulmonary function studies, which lacked a statement of claimant's cooperation and comprehension, and because Dr. Baker failed to clearly explain the bases for his opinion. Decision and Order at 12-13; Claimant's Exhibit 5. While objective studies, in and of themselves, are not diagnostic of the non-existence of pneumoconiosis, *see Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983), they can indicate the absence of any disease process, and by implication, the absence of any disease arising out of coal mine employment, *i.e.*, pneumoconiosis. *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984). An administrative law judge may reject a medical opinion where he finds that the doctor failed to adequately explain his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we affirm the administrative law judge's finding that Dr. Baker's diagnosis of clinical pneumoconiosis, contained in his treatment notes, is unreasoned.

(1987).

Claimant lastly contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). In the instant case, claimant selected Dr. Hussain to perform his Department of Labor (DOL)-sponsored pulmonary evaluation. Director's Exhibit 9. In a report dated August 22, 2001, Dr. Hussain diagnosed pneumoconiosis, and indicated that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibits 10, 11. Dr. Hussain performed a chest x-ray, pulmonary function and blood gas studies, and an electrocardiogram, but did not record claimant's coal mine employment history and inaccurately reported that claimant never smoked.

Claimant, citing the administrative law judge's Decision and Order at 12, 15, argues that the Director failed to provide him with a credible pulmonary evaluation because the administrative law judge found Dr. Hussain's report unreasoned with respect to the issue of total disability, as Dr. Hussain failed to note claimant's smoking history.[8] The Director agrees that Dr. Hussain's opinion does not constitute a complete pulmonary evaluation, but asserts that a remand is not necessary if the Board affirms the administrative law judge's finding that pneumoconiosis is not established. Because we have affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), we agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-87; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* Order), that we need not remand this case for a full pulmonary evaluation

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

[8] More accurately, the administrative law judge gave less weight to Dr. Hussain's opinion that claimant has pneumoconiosis because the non-existent smoking history recorded by Dr. Hussain was inconsistent with claimant's testimony that he smoked five pack years. Decision and Order at 12. However, the administrative law judge found that Dr. Hussain's opinion, that claimant is totally disabled, was unreasoned because it was based on nonqualifying objective studies and because Dr. Hussain failed to explain how his physical findings and symptomatology were supportive of a finding of total disability. Decision and Order at 15.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I agree with my colleagues' decision to affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), based on the newly submitted evidence of record. However, I disagree with my colleagues' decision to affirm the finding that the existence of pneumoconiosis has not been established on the merits. The finding that pneumoconiosis was not established in claimant's prior claim was an initial determination made by a district director, along with findings that claimant did not establish that his pneumoconiosis arose out of his coal mine employment or that he was totally disabled by it. Director's Exhibit 34-7 of Director's Exhibit 1. Claimant's prior claim includes evidence supportive of a finding of pneumoconiosis at Section 718.202(a), and that evidence has not been considered by an administrative law judge. *See* Director's Exhibits 14, 15, 24, 34-18, 56 of Director's Exhibit 1. Therefore, I would not affirm the finding that the existence of pneumoconiosis has not been established on the merits. Consequently, I also disagree with my colleagues' decision not to remand this case for a complete, credible pulmonary evaluation. As the Director asserts, Dr. Hussain's opinion does not constitute a complete pulmonary evaluation as to the issue of total disability. Director's Brief at 2. Claimant is entitled to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) based on any element of entitlement, since all elements of entitlement were previously adjudicated against him. Therefore, claimant is entitled to a credible opinion on the issue of total disability. Thus, I believe a remand for a full pulmonary evaluation is warranted in this case.

I would further hold that following the further development of the record on remand, claimant is entitled to reconsideration of the issue of a change in an applicable condition of

entitlement at Section 725.309(d) and, if reached, the merits of entitlement based on all the evidence of record. Consequently, I would vacate the administrative law judge's denial of benefits and remand the case to the district director to allow for a complete pulmonary evaluation, and for reconsideration of the claim.

BETTY JEAN HALL
Administrative Appeals Judge