BRB No. 07-0140 BLA

D.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/24/2007
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (05-BLA-5356) of Administrative Law Judge Daniel L. Leland, 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] The administrative law judge

[1] Claimant filed his first claim for benefits on August 27, 2001. Director's Exhibit 1. The district director issued a Proposed Decision and Order denying benefits on May 15, 2002, because claimant failed to establish any element of entitlement. *Id.* No further

concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), the elements of entitlement previously adjudicated against claimant. The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (4), and 718.204(b).[2] Employer responds, and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response unless specifically requested to do so.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

When 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 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., Inc.*, 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.

---

action was taken on the initial claim. Claimant filed this subsequent claim on June 6, 2003. Director's Exhibit 2.

[2] By letter dated August 28, 2007, an attorney from Rundle & Rundle, L.C., informed the Board that her office no longer represents claimant and attached a document indicating that claimant has released the firm as counsel. The Board will treat claimant as represented by counsel for the purposes of this appeal, as a brief was filed on claimant's behalf, to which employer has responded.

[3] The parties do not challenge the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), legal pneumoconiosis pursuant to Section 718.202(a)(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). These findings are, therefore, affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

§725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[4]

In this case, the newly submitted radiological evidence relevant to Section 718.202(a)(1) consisted of four x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists.[5] Dr. Patel interpreted the July 8, 2003 x-ray as positive for pneumoconiosis. Director's Exhibits 16, 17. Dr. Scatargie interpreted the July 8, 2003 x-ray as negative for pneumoconiosis, although he noted the presence of minimal bilateral hardened pleura that he opined probably represented extra-pleural hardened fat. Employer's Exhibit 4. Dr. Wheeler interpreted the June 9, 2004 x-ray as negative for pneumoconiosis, but noted that obesity contributed to the minimal hypo-inflation of claimant's lungs and other abnormalities, such as linear discoid atelectasis or scarring. Employer's Exhibit 2. Dr. Scott interpreted the December 14, 2005 x-ray as negative for pneumoconiosis, but observed an infiltrate in claimant's left lower lung that he opined was possible pneumonia. Employer's Exhibit 1.

The administrative law judge considered the conflicting interpretations of the July 8, 2003 x-ray rendered by two dually qualified physicians, and determined that the evidence was in equipoise. Decision and Order at 5. The administrative law judge found that, because the remaining two x-rays were interpreted as negative by dually qualified physicians, the preponderance of the x-ray evidence was negative for pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant asserts that the administrative law judge erred in finding that the newly submitted x-ray evidence did not support a finding of pneumoconiosis, as "employer's physicians admitted considerable markings on claimant's x-ray but did not classify them as pneumoconiosis." Claimant's Brief at 4-5 (unpaginated). Claimant's allegation of error is without merit. A review of the record reflects that employer's doctors provided ILO classifications of the x-rays that were negative for pneumoconiosis under Section

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment took place in West Virginia. Director's Exhibits 1-3; *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] Dr. Navani, a dually qualified physician, also read the x-ray dated July 8, 2003, for quality purposes only. Director's Exhibit 18.

718.202(a)(1).[6] Thus, the administrative law judge acted within his discretion as fact-finder in determining that the existence of pneumoconiosis was not established based on the preponderance of the negative readings by dually qualified physicians. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

The newly submitted medical opinions relevant to Section 718.202(a)(4) are set forth in reports submitted by Drs. Mullins and Zaldivar.[7] Director's Exhibit 11; Employer's Exhibit 8. Dr. Mullins examined claimant on July 8, 2003 and recorded a smoking history of one-half pack of cigarettes per day from 1986 until 2001, but also noted that claimant had resumed smoking six months prior to the date of the examination. Director's Exhibit 11. Dr. Mullins considered Dr. Patel's positive interpretation of the July 8, 2003 chest x-ray, and opined that the film was consistent with coal dust exposure. *Id*. Based on claimant's pulmonary function study, which produced qualifying results, Dr. Mullins diagnosed chronic obstructive pulmonary disease (COPD), and she attributed claimant's moderate ventilatory impairment to coal dust exposure and smoking.[8] *Id.*

Dr. Zaldivar first examined claimant on June 9, 2004. Employer's Exhibit 8. Dr. Zaldivar recorded a seventeen-year smoking history of one-half pack of cigarettes per day. *Id.* Dr. Zaldivar opined that there was no radiological evidence of pneumoconiosis,

---

[6] "The ILO-U/C classification system is a system for classifying the radiological appearances seen in all types of pneumoconiosis." *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis*, International Labour Office, p.v (Revised Ed. 1980); 20 C.F.R. §718.102(b)(2000). Pursuant to 20 C.F.R. §718.102, an x-ray must be designated as 1/0 or higher under the ILO system to constitute evidence of pneumoconiosis.

[7] The newly submitted medical opinion evidence also includes interpretations of two CT scans. Employer's Exhibits 3, 5. Dr. Scott concluded that the June 9, 2004 scan was negative for pneumoconiosis, and Dr. Scatargie provided a negative interpretation of the December 14, 2005 scan. *Id.* The administrative law judge considered the CT scans pursuant to Section 718.202(a)(4) and found that they did not establish the presence of pneumoconiosis. The parties do not challenge the administrative law judge's finding. Therefore, it is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[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 the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

and that claimant did not have any dust disease of the lungs. *Id.* Dr. Zaldivar noted that claimant's CT scan showed areas of ground glass appearance, which he opined were compatible with bronchitis caused by cigarette smoking. *Id.* The physician therefore attributed claimant's pulmonary abnormalities to smoking rather than to coal dust exposure. *Id.*

Dr. Zaldivar examined claimant again on December 14, 2005, and conducted additional clinical testing. Employer's Exhibit 8. Dr. Zaldivar explained in his report that, although pneumoconiosis causes an obstructive pulmonary impairment, there was still no evidence of airways obstruction based upon claimant's pulmonary function study results. Dr. Zaldivar considered medical records from other physicians and clinical test results, including those from Dr. Mullins, and reiterated his opinion that claimant does not have pneumoconiosis or any other lung disease related to coal dust exposure. *Id.*

The administrative law judge discredited Dr. Mullins's diagnosis of clinical pneumoconiosis because it was based upon Dr. Patel's positive x-ray interpretation, which was contrary to the weight of the x-ray evidence. Decision and Order at 5. The administrative law judge also found that Dr. Mullins's diagnosis of COPD caused, in part, by coal dust exposure, did not constitute a credible diagnosis of legal pneumoconiosis, because she relied upon pulmonary function studies that conflicted with the two more recent studies conducted by Dr. Zaldivar, which had "significantly higher values." *Id.* The administrative law judge determined that Dr. Zaldivar's conclusion, that claimant does not have pneumoconiosis or a lung disease related to coal dust exposure, was consistent with the preponderance of the radiographic evidence and the two most recent pulmonary function studies, both of which produced non-qualifying values. *Id.* The administrative law judge concluded, therefore, that the newly submitted medical opinion evidence did not establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

Claimant argues that it was error for the administrative law judge to "rely primarily on the negative x-ray reports introduced by employer as the basis for his conclusion that claimant did not suffer from pneumoconiosis." Claimant's Brief at 5 (unpaginated). Contrary to claimant's argument, a review of the record indicates that the administrative law judge permissibly accorded Dr. Mullins's diagnosis of clinical pneumoconiosis little weight because it was based on an x-ray interpretation that was contrary to the administrative law judge's finding that the preponderance of the radiological evidence was negative. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Because we have rejected claimant's specific allegation of error regarding the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant also argues that the administrative law judge did not weigh together all of the evidence relevant to the existence of pneumoconiosis in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-177 (4th Cir. 2000). We disagree. A review of the administrative law judge's Decision and Order reflects that, contrary to claimant's allegation, the administrative law judge properly considered together all of the relevant newly submitted evidence in determining that claimant failed to establish the existence of pneumoconiosis. This finding is rational and supported by substantial evidence. *Anderson*, 12 BLR at 1-112. We therefore affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

With respect to the issue of total disability, the newly submitted evidence relevant to Section 718.204(b)(2)(i) consists of the qualifying pulmonary function study conducted by Dr. Mullins on July 8, 2003, and the non-qualifying pulmonary function studies conducted by Dr. Zaldivar on June 9, 2004 and December 14, 2005. Director's Exhibit 12; Employer's Exhibit 6. The administrative law judge determined that the studies were insufficient to establish that claimant is totally disabled. Decision and Order at 6.

Claimant argues that the administrative law judge erred in his "mechanical reliance" on the more recent pulmonary function studies introduced by employer. However, a review of the record reveals that the administrative law judge rationally found that the newly submitted pulmonary function studies were insufficient to establish total disability, as the preponderance of the tests is non-qualifying. Decision and Order at 6. We therefore affirm the administrative law judge's finding under Section 718.204(b)(2)(i).

Regarding Section 718.204(b)(2)(iv), Drs. Mullins and Zaldivar submitted opinions in which they reached conflicting conclusions as to whether claimant is totally disabled. Dr. Mullins indicated that claimant's last coal mine job was as an electrician, and she opined, in July 2003, that the moderate ventilatory impairment revealed by pulmonary function testing would prevent claimant from performing his last coal mine employment. Director's Exhibits 12, 13. Based on the results of the pulmonary function studies obtained on June 9, 2004, Dr. Zaldivar diagnosed claimant as having a mild restriction of his total lung capacity, and a mild restriction of his vital capacity without any obstruction. *Id.* Dr. Zaldivar acknowledged that claimant last worked as an electrician, and noted that the position required heavy lifting, pulling, and carrying. *Id.* In light of these exertional requirements, Dr. Zaldivar opined that claimant was incapable of returning to his previous coal mine employment. *Id.* When Dr. Zaldivar examined claimant again on December 14, 2005, and conducted additional clinical tests, however, he stated that claimant's vital capacity had returned to normal. Employer's Exhibit 8. Dr. Zaldivar opined that claimant's lung irritation might have resolved due to a decrease

in claimant's smoking, thereby allowing his vital capacity to return to normal. *Id.* Dr. Zaldivar acknowledged that the arterial blood gas study values indicated an abnormal diffusion capacity, but opined that the results were not valid due to the high carbon monoxide level in claimant's blood. *Id.* Dr. Zaldivar described claimant's pulmonary function study values as normal and opined that the clinical testing indicated that claimant was fully capable of performing his usual coal mine employment. *Id.*

The administrative law judge concluded that Dr. Mullins's reliance on the earlier pulmonary function studies that she obtained, and her lack of awareness of the more recent studies obtained by Dr. Zaldivar, rendered her findings on disability "questionable." Decision and Order at 6. The administrative law judge further found that Dr. Zaldivar's opinion was well reasoned and consistent with the most recent objective tests. Thus, the administrative law judge credited the physician's opinion in finding that the newly submitted medical evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv). *Id.*

Claimant asserts that the administrative law judge misapplied the "later evidence rule" in that he "simply accepted" Dr. Zaldivar's conclusion that claimant could return to coal mine employment because the more recent pulmonary function studies showed a "slightly better" pulmonary performance than those conducted by Dr. Mullins. Claimant's Brief at 5 (unpaginated). Claimant also maintains that Dr. Mullins submitted the only reasoned and documented opinion of record on the issue of total disability. Contrary to claimant's assertions, the administrative law judge did not rely upon the later evidence rule to resolve the conflict between the medical opinions of Drs. Mullins and Zaldivar. Rather, the administrative law judge permissibly determined that the probative value of Dr. Mullins's opinion was diminished because she did not have a complete picture of claimant's pulmonary function study results. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-4**,** 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-2**,** 21 BLR 2-269, 2-275-6 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). In addition, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Zaldivar's opinion, that claimant is not totally disabled, is well reasoned and well documented, as supported by the objective evidence of record. *Id*.

Claimant also argues that the administrative law judge erred in failing to analyze the exertional requirements of claimant's last coal mine employment. This contention is without merit. The administrative law judge was not required to make the comparison urged by claimant in light of his permissible determination that Dr. Zaldivar's opinion, that claimant is not totally disabled, is well reasoned and well documented, and his rational decision to discredit Dr. Mullins's contrary opinion. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-2 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

Thus, we affirm the administrative law judge's determination that the newly submitted medical opinions were insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Because we have affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or total disability, we also affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge