BRB No. 07-0199 BLA

L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/16/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Jonathan L. Snare, Acting 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5232) of Administrative Law Judge Ralph A. Romano 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). This case involves a subsequent claim filed on October 2, 2003.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with eight years and nine months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that he suffers from a total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), and also erred in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). The Director responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. In addition, the Director contends that the Board should reject claimant's contention that he failed to provide claimant with a complete pulmonary evaluation, arguing that he has fulfilled his obligation to provide claimant

[1] Claimant's first application for benefits, filed with the Social Security Administration on April 17, 1973, was denied on November 3, 1977. Director's Exhibit 1 at 238, 281. Claimant filed an application for benefits with the Department of Labor (DOL) on August 19, 1975. Director's Exhibit 1 at 344. Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order on December 30, 1983, denying benefits, and on reconsideration, reaffirmed the denial of benefits in a Decision and Order dated February 9, 1984. Director's Exhibit 1 at 146, 155. By Decision and Order dated March 20, 1986, the Board dismissed claimant's appeal as untimely. *[L.B.] v. Director, OWCP*, BRB No. 84-0353 BLA (Mar. 20, 1986)(unpub.); Director's Exhibit 1 at 129. Claimant filed a second application for benefits with DOL on April 27, 2000, which was denied by Administrative Law Judge Thomas F. Phalen, Jr. on March 6, 2002, because claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1 at 37. On September 26, 2002, the Board affirmed the administrative law judge's denial of benefits. *[L.B] v. Director, OWCP*, BRB No. 02-0456 BLA (Sept. 26, 2002); Director's Exhibit 1 at 3. No further action was taken by claimant.

with the opportunity to substantiate his claim.[2] Director's Brief at 6.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If 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. §725.309(d)(2). Claimant's last claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

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[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 1, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The new x-ray evidence consists of two interpretations of one x-ray taken on December 11, 2003.[4] Director's Exhibits 11, 13. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that Dr. Baker, a B reader, read this x-ray as positive for pneumoconiosis; whereas Dr. Barrett, who is both a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Decision and Order at 4, 7-8; Director's Exhibits 11, 13.

Based upon this review, the administrative law judge acted within his discretion as fact-finder in according greater weight to the negative reading of Dr. Barrett, as it was performed by a physician with superior radiological credentials. Decision and Order at 8; 20 C.F.R. §718.202(a)(1); *see 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). Therefore, contrary to claimant's assertions, the record indicates that 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, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and may have selectively analyzed the readings, lack merit.[5] Claimant's Brief at 2-3; Decision and Order at 8. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as supported by substantial evidence. Moreover, because claimant does not otherwise challenge the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4), we affirm his finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Claimant also generally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant argues that in addressing the issue of total disability, an

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[4] An additional reading by Dr. Barrett was obtained solely to assess the quality of the December 11, 2003 x-ray. Director's Exhibit 12.

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

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, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American 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:

> It can be reasonably concluded that claimant's coal mining 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. The United States Court of Appeals for the Sixth Circuit has held that a physician's 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); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge rationally found that Dr. Baker's opinion does not support a finding of total disability, because Dr. Baker opined that claimant is capable, from a respiratory standpoint, of performing his usual coal mine employment.[6] Decision and Order at 9; Director's Exhibits 11, 19; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

We also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and a "considerable amount of time … has passed since the initial diagnosis…." Claimant's Brief at 5-6. An administrative law judge's findings on the issue of total disability must be based on the evidence of record, rather than general principles regarding the nature of pneumoconiosis. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm his finding that claimant has failed to establish a totally

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[6] In his report dated December 11, 2003, Dr. Baker diagnosed a minimal impairment. Director's Exhibit 11. In a supplemental report requested by the district director, Dr. Baker stated that claimant has a minimal impairment but he retains the respiratory capacity to perform the work of a coal miner or similar work in a dust free environment. Director's Exhibit 19.

disabling respiratory or pulmonary impairment. Decision and Order at 9; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

Because we affirm the administrative law judge's determination that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), claimant has failed to demonstrate that one of the applicable conditions of entitlement has changed since the denial of his prior claim, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Ross,* 42 F.3d at 997, 19 BLR at 2-18; *White,* 23 BLR at 1-7.

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant contends that the Director failed to fulfill his statutory obligation to provide him with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), because the administrative law judge concluded that "Dr. Baker's report was based merely upon an erroneous x-ray interpretation, and that his opinion was neither well-reasoned nor well-documented." Claimant's Brief at 4. The Director responds, arguing that the Board should reject claimant's contention that he failed to provide claimant with a complete pulmonary evaluation. The Director asserts that the statutory obligation requires that the Director must provide a medical opinion that addresses all elements of entitlement, and argues that he discharged this duty by providing the initial medical evaluation by Dr. Baker, as well as providing a supplementary opinion by Dr. Baker. Director's Brief at 6. Consequently, the Director contends that he has fulfilled his statutory obligation to provide claimant with the opportunity to substantiate his claim through a complete credible pulmonary evaluation.

As set forth by Section 413(b) of the Act, the Department of Labor (DOL) has a statutory obligation to provide each miner who files a claim for benefits with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Section 413(b) of the Act is implemented by 20 C.F.R. §725.406. Therein, DOL is charged with making arrangements for the miner to be given a complete pulmonary evaluation and for assessing the adequacy of the evaluation provided. *See* 20 C.F.R. §725.406.

In this case, the record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). In addition, pursuant to the district director's request to clarify the opinion contained in his DOL sponsored pulmonary evaluation, Dr. Baker

submitted a supplemental report stating that he diagnosed clinical pneumoconiosis, but found that claimant does not have a definite diagnosis of legal pneumoconiosis, as well as stating that claimant retains the capacity, from a respiratory standpoint, of performing his usual coal mine employment. Director's Exhibit 19. Consequently, the Director contends that he discharged the Department's statutory obligation. Director's Brief at 6; Director's Exhibits 11, 19. In addition, the Director argues that "[e]ven if the [administrative law judge] correctly found Dr. Baker's clinical pneumoconiosis diagnosis was not credible,[7] a remand would be futile because Dr. Baker's report finding no legal pneumoconiosis and no disabling respiratory impairment is ultimately unhelpful to claimant." Director Brief at 6.

As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director's duty to ensure the proper enforcement and fair administration of the Black Lung program. *See generally* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order); *Capers v. The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). We defer to the Director on the issue of whether the statutory obligation of DOL to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d 1166, 7 BLR 2-31; *Hodges*, 18 BLR at 1-89-90; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Based on the facts of this case, we agree with the position taken by the Director that a remand of the case is not warranted and, thus, decline to remand this case for a complete pulmonary evaluation.

[7] The administrative law judge reasonably found that Dr. Baker's diagnosis of clinical pneumoconiosis was based solely on his positive x-ray interpretation, which the administrative law judge found outweighed by a negative interpretation provided by a physician possessing superior radiological qualifications. Decision and Order at 8-9; Director's Exhibit 11, 19; *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003)*; Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). As a result, the administrative law judge characterized the report on this issue as being neither well-reasoned nor well-documented. Claimant did not challenge this finding.

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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JUDITH S. BOGGS
Administrative Appeals Judge