BRB No. 07-0261 BLA

P.F.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROSINI COAL COMPANY, INCORPORTED	)	
	)	
and	)	
	)	DATE ISSUED: 10/29/2007
LACKAWANNA CASUALTY COMPANY	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale, Gordon, Pennsylvania, for claimant.

Maureen E. Herron (Cipriani & Werner), Scranton, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5171) of Administrative Law Judge Robert D. Kaplan 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). Claimant filed his subsequent claim

on December 2, 2004.[1] After crediting claimant with thirty-four and one-quarter years of coal mine employment, the administrative law judge considered the new evidence, developed since the denial of claimant's prior claim, and found that it was insufficient to establish that claimant suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Consequently, the administrative law judge found that claimant failed to satisfy his burden to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding that he worked fifty-two years in coal mine employment. Claimant also contends that the administrative law judge erred in not crediting Dr. Simelaro's opinion that he is totally disabled due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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).

Where 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.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As noted by the administrative law judge, claimant's prior claims were denied because he failed to establish any of the requisite elements of

[1] Claimant filed a claim for benefits on June 28, 1973, which was denied on August 4, 1980 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on June 21, 1991, which was also denied by the district director on December 9, 1991 because the new evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis; and therefore claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 2. Claimant took no further action with respect to the denial of his June 21, 1991 duplicate claim until filing this subsequent claim on December 2, 2004. Director's Exhibit 3.

entitlement.[2] Decision and Order at 4; *see* Director's Exhibit 2. Therefore, as a threshold issue, claimant was required to submit new evidence to establish at least one of the applicable conditions of entitlement in order to proceed on the merits of his subsequent claim. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

The administrative law judge denied benefits because he found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Claimant asserts that the administrative law judge erred in not finding that he established the existence of pneumoconiosis based on the newly submitted x-rays and the medical opinion of Dr. Simeralo.[3] We disagree. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the newly submitted x-ray evidence consisted of ten readings of four x-rays dated February 2, 2004, May 5, 2004, February 3, 2005, and December 7, 2005. Decision and Order Denying Benefits (Decision and Order) at 6; Director's Exhibits 18, 19, 20, and 20A; Claimant's Exhibit 5, Employer's Exhibits 1-3. Because the February 2, 2004 and May 5, 2004 x-rays were each read once by Dr. Smith, a Board-certified radiologist and B reader, as positive for pneumoconiosis, and once by Dr. Wheeler, a Board-certified radiologist and B reader, as negative for pneumoconiosis, the administrative law judge properly considered these films to be in equipoise. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 7. He also correctly found that the February 3, 2005 x-ray was negative for pneumoconiosis since there are no positive

[2] In order to establish his entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[3] Claimant does not challenge the administrative law judge's finding that he is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because there is no biopsy evidence of record, nor does he challenge that administrative law judge's determination that he is ineligible for any of the presumptions described in 20 C.F.R. §718.202(a)(3) for establishing the existence of pneumoconiosis. *Id.* We therefore affirm the administrative law judge's findings pursuant to those subsections. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

readings of that film.[4] Decision and Order at 7. Lastly, the administrative law judge permissibly found that the December 7, 2005 x-ray was negative for pneumoconiosis, crediting two negative readings by Board-certified radiologists over the one positive reading by Dr. Smith. *Id*; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Claimant's Exhibit 5; Employer's Exhibits 1, 2.

Considering all of the x-ray evidence together, the administrative law judge properly concluded that, of the four newly submitted x-rays, there were two x-rays in equipoise, and two x-rays that were negative for pneumoconiosis. He thus found that claimant failed to satisfy his burden of proof. Decision and Order at 7. Because the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1) is supported by substantial evidence, it is affirmed. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*).

Claimant also contends that the administrative law judge erred in not crediting Dr. Simelaro's opinion that he has pneumoconiosis. Claimant's Brief at 6-7. Under Section 718.202(a)(4), the administrative law judge considered four medical opinions as to the existence of pneumoconiosis. Dr. Simelaro examined claimant on September 16, 2004 and he found no evidence of chronic obstructive pulmonary disease but opined that claimant suffered from "unquestionable anthracosilicosis due to coal mining" as demonstrated by the presence of fine "rales" on physical examination, x-ray findings, and his own observation of embedded coal in claimant's skin that formed "tattoos." Director's Exhibit 13. Dr. Stelmach examined claimant on March 17, 2005 at the request of the Department of Labor. He diagnosed coronary artery disease, by history, attributable to obesity and smoking. He found no evidence to support a diagnosis of pneumoconiosis. Director's Exhibit 14. Dr. Levinson examined claimant on December 7, 2005 at the request of employer. Employer's Exhibits 4-7. Dr. Levinson opined that claimant had no evidence of any form of industrial pulmonary disease. He attributed claimant's symptom of shortness of breath on exertion, and the results of claimant's qualifying arterial blood gas study to coronary vascular disease with congestive heart failure. Employer's Exhibits 4, 5, 7. Employer also submitted a consultative report from Dr. Hertz based on his review of the medical record. Dr. Hertz also opined that claimant did not have pneumoconiosis. Employer's Exhibit 6.

In weighing these conflicting opinions, the administrative law judge properly noted that Dr. Simelaro based his diagnosis of pneumoconiosis, in part, on the physical

[4] The February 3, 2005 x-ray was read for quality purposes only by Dr. Navani, as negative for pneumoconiosis by Dr. Wheeler, and as negative for pneumoconiosis by Dr. Bohri. Director's Exhibits 20, 20A; Employer's Exhibit 3.

finding of inspiratory rales. Decision and Order at 9. Although Dr. Simelaro observed that the presence of "rales" could indicate either fluid in the lungs, as a result of congestive heart failure, or a pulmonary fibrosis consistent with anthracosilicosis, he opined that claimant's physical finding of rales was attributable to fibrosis caused by coal dust exposure as he found no evidence indicating that claimant was in congestive heart failure. Claimant's Exhibit 1. However, as noted by the administrative law judge, Dr. Simelaro's diagnosis is contradicted by hospitalization records from the Veterans Administration showing that claimant was, in fact, treated for congestive heart failure in March 2004, prior to Dr. Simelaro's examination, and again in March 2005, after his report was issued. Decision and Order at 9-10; Claimant's Exhibit 6. Because the administrative law judge reasonably questioned whether Dr. Simelaro's opinion, that claimant's physical finding of rales was due to coal dust exposure had adequately accounted for claimant's documented history of congestive heart failure, the administrative law judge permissibly considered Dr. Simelaro's opinion less reliable as to the existence of pneumoconiosis. He therefore permissibly assigned Dr. Simelaro's diagnosis of pneumoconiosis diminished weight under Section 718.202(a)(4).

In contrast to Dr. Simelaro, the administrative law judge determined that the opinions of Drs. Stelmach, Levinson, and Hertz, that claimant did not have pneumoconiosis, were well-reasoned. Decision and Order at 10-11. The administrative law judge noted in particular that Dr. Levinson, unlike Dr. Simelaro, relied on claimant's hospitalization records in rendering his diagnosis, and that the records supported his conclusion that claimant did not have a respiratory condition:

> Dr. Levinson reviewed additional records in a report dated May 22, 2006. (EX 7). He considered records from the Veterans Administration Hospital from August 2002 through March 2006. He noted that [c]laimant was seen for a substantial cardiac condition and [was] treated with oxygen therapy. There was no treatment for chronic obstruction [sic] pulmonary disease or anything due to coal mine employment.

Id. The administrative law judge also accorded great weight to Dr. Hertz's opinion, since he found that Dr. Hertz reviewed "a broader base of data than any of the other physicians considered," in concluding that claimant did not suffer from pneumoconiosis. Decision and Order at 11; *see Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Because the credibility of the medical experts is a matter of discretion within the purview of the trier-of-fact, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we affirm the administrative law judge's decision to assign controlling weight to the opinions of Drs. Stelmach, Levinson, and Hertz. Thus, we

affirm, as supported by substantial evidence, his finding that claimant failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5]

As to the issue of total respiratory or pulmonary disability, the administrative law judge initially found that both of claimant's newly submitted arterial blood gas studies were qualifying pursuant to 20 C.F.R. §718.204(b)(2)(ii).[6] Decision and Order at 12. Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions provided by Drs. Simelaro, Stelmach, Levinson, and Hertz. Decision and Order at 13-14. Dr. Simelaro concluded that claimant was totally disabled from performing coal mine employment, Director's Exhibit 13; Claimant's Exhibit 1, while Drs. Levinson and Hertz opined that claimant had no respiratory or pulmonary impairment that would prevent him from returning to his usual coal mine work, Employer's Exhibits 4-6. Dr. Stelmach did not address the issue of disability. Director's Exhibit 14. In weighing the conflicting medical opinion evidence, the administrative law judge assigned controlling weight to the opinions of Drs. Levinson and Hertz over Dr. Simelaro. Decision and Order at 14. Claimant does not specifically challenge the weight accorded to Drs. Levinson and Hertz. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, claimant argues that, contrary to the administrative law judge's finding,

[5] Claimant asserts that, contrary to the administrative law judge's finding of thirty-four and one-quarter years of coal mine employment, he worked a total of fifty-two years as a coal miner. Claimant's Brief at 4. He also contends that the administrative law judge erred in giving Dr. Simelaro's opinion less weight because he found that the doctor relied on an "exaggerated" coal mine history of fifty-three years (one year more than alleged by claimant). Even assuming that the administrative law judge erred in calculating claimant's total years of coal mine employment, because he permissibly rejected Dr. Simelaro's opinion on the alternative ground that the doctor failed to consider relevant medical records pertaining to claimant's heart condition, we consider any error committed by the administrative law judge, with respect to his finding on the length of claimant's coal mine employment, and its bearing on Dr. Simelaro's opinion, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[6] The administrative law judge found that none of the three newly submitted pulmonary function studies was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that there was no evidence of record to establish that claimant had cor pulmonale, which would allow claimant to establish his total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 12. We affirm these findings as they are unchallenged by the parties on appeal. *Skrack*, 6 BLR at 1-711.

Dr. Simelaro's report constitutes sufficient evidence to establish that he is totally disabled. Claimant's Brief at 8-9.

Contrary to claimant's argument, the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the credibility of the medical experts is within the discretion of the administrative law judge, we affirm his determination that the opinions of Drs. Levinson and Hertz, that claimant is not totally disabled, better explain the etiology of claimant's symptoms and the objective evidence of record. We specifically affirm the administrative law judge's determination to credit Dr. Levinson's opinion at Section 718.204(b)(2)(iv) as he found that it was "well supported by the underlying evidence including the non-qualifying pulmonary function study and [c]laimant's history of significant heart and coronary artery disease that explain his hypoxemia." Decision and Order at 13-14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we affirm the administrative law judge's determination that claimant failed to establish, by a preponderance of the evidence, that he is totally disabled under Section 718.204(b)(2)(iv).

In addition, in weighing all of the newly submitted evidence relevant to the issue of total disability together, the administrative law judge, within his discretion, found that the credible medical opinions and the nonqualifying pulmonary function studies are "more probative of [c]laimant's pulmonary status than the arterial blood gas studies." Decision and Order at 14. Thus, we affirm the administrative law judge's overall finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Collins*, 21 BLR at 1-191; *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

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

Accordingly, the administrative law judge's Decision and Order Denying 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