BRB No. 05-0399 BLA

JESSIE C. CUPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/22/2005
	)	
RB COAL COMPANY, INCORPORATED	)	
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 – Denying Benefits (03-BLA-5751) of Administrative Law Judge Edward Terhune Miller 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 instant case involves a subsequent claim filed on June 1, 2001.[1] 20 C.F.R. §725.309. After crediting claimant with nineteen years of coal mine employment, the administrative law judge found that the newly submitted medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant's 1993 claim. Accordingly, the administrative law judge denied benefits pursuant to 20 C.F.R. §725.309(d).

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends 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 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 credible pulmonary evaluation.[2]

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

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[1] Claimant filed his initial claim for benefits on March 12, 1993. Director's Exhibit 1. By Decision and Order dated January 11, 1995, Administrative Law Judge Bernard J. Gilday, Jr. denied benefits based on his determination that claimant failed to establish the existence of pneumoconiosis. *Id.* Judge Gilday did not address the issue of total disability. *Id.* There is no indication that claimant took any further action on his 1995 claim. Claimant filed a second application for benefits on September 21, 2000. Director's Exhibit 2. By Order dated March 19, 2001, the district director granted claimant's motion to withdraw that claim. *Id.*

[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has nineteen years of coal mine employment, and did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. *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*).

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., 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 prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element 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).[3]

In challenging the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These contentions lack merit. The administrative law judge acted within his discretion as fact-finder in determining that the newly submitted x-ray evidence did not support a finding of pneumoconiosis, as the preponderance of readings by physicians who are Board-certified radiologists and/or B readers was negative for pneumoconiosis.[4] Decision and Order at 4, 7; Director's

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

[4] The record contains six readings of three chest x-ray films, of which two readings, by Drs. Baker and Hussain, were positive for pneumoconiosis. Director's Exhibits 11-14. The administrative law judge noted that the positive reading by Dr Baker, who was not a B reader at the time of x-ray reading, was countered by the negative reading of Dr. Halbert, a Board-certified radiologist and B-reader. Decision and Order at 7; Director's Exhibit 14. Similarly, he found that the positive reading by Dr. Hussain, who possesses no special radiological qualifications, was countered by a

Exhibits 11-14; *Staton v. Norfolk & Western Railroad 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). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant next contends that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4). We reject this argument. The administrative law judge permissibly found that Dr. Baker's diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was re-read as negative by a physician with "superior" radiological qualifications. Decision and Order at 7, 8; Director's Exhibit 11; *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). In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to otherwise explain his conclusion that claimant suffers from pneumoconiosis. Decision and Order at 8; Director's Exhibit 11; *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 (1987).

As claimant does not put forth any additional assertions of error by the administrative law judge with respect to Section 718.202(a)(4), or his weighing of the conflicting medical opinions therein, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), as supported by substantial evidence.

Claimant argues further that because the administrative law judge found that Dr. Hussain's opinion, on the existence of pneumoconiosis, was conclusory and disclosed no rationale, the Director has failed to provide the claimant with a credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act. Claimant's Brief at 5. The Director responds that the administrative law judge merely found Dr. Hussain's diagnosis of pneumoconiosis less credible because it was called into question by other, more probative evidence and, thus, "[u]nder these circumstances, there is no violation of the Director's duty to provide claimant with a credible examination." Director's Brief at 2.

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negative reading of Dr. Halbert. Decision and Order at 7; Director's Exhibit 13. Finally, the administrative law judge noted that Dr. Dahhan, a B-reader, and Dr. Wiot, a Board-certified radiologist and B reader, read a September 18, 2001 x-ray as negative for pneumoconiosis. *Id.*

The record reflects that Dr. Hussain conducted a physical examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 12. However, the administrative law judge found that because Dr. Hussain failed to extend his rationale for diagnosing the existence of pneumoconiosis beyond his x-ray reading and exposure history, the opinion was merely an interpretation of an x-ray. Decision and Order at 8. As such, the administrative law judge permissibly found that to the extent Dr. Hussain diagnosed pneumoconiosis based upon the April 22, 2001, x-ray that was reread as negative by dually-qualified physicians, Dr. Hussain's diagnosis was against the weight of the evidence. *See Williams*, 338 F.3d at 514, 22 BLR at 2-648-49. He also found Dr. Dahhan's opinion better documented and reasoned. Because Dr. Hussain's report was merely found outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a credible pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Because the administrative law judge's finding that the newly submitted evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) is supported by substantial evidence and in accordance with law, claimant has failed to establish the element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18. Consequently, we affirm the denial of benefits in this subsequent claim and we need not address claimant's other arguments regarding total disability.

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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JUDITH S. BOGGS
Administrative Appeals Judge