BRB No. 05-0619 BLA

JUNIOR S. FYFFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINTOP RESTORATION, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/30/2005
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Junior S. Fyffe, Red Bush, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (03-BLA-6062) of Administrative Law Judge Thomas F. Phalen, Jr. 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 current claim

is claimant's third. Claimant's first application for benefits, filed on September 14, 1992, was informally denied on February 22, 1993 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Claimant took no further action on the claim, and it became finally denied on May 5, 1993. Director's Exhibit 1. Claimant's second claim for benefits, filed on March 2, 2000, was denied by reason of abandonment on April 24, 2000.[1] Director's Exhibit 2. On May 2, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order dated March 16, 2005, the administrative law judge credited the miner with at least sixteen years of coal mine employment,[2] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

---

[1] By letter dated March 8, 2000, an Office of Workers' Compensation claims examiner acknowledged claimant's claim and requested additional evidence be submitted within fourteen days. Claimant did not respond, and by letter dated April 10, 2000, the Office renewed its request for additional evidence and granted claimant another fourteen days to submit the requested materials. The Office informed claimant that if he did not respond accordingly, his claim would be denied. When claimant did not respond, on April 24, 2000 the Office issued an Order to Show Cause why the claim should not be denied by reason of abandonment. The Order informed claimant that if he did not respond, the Order to Show Cause would serve as the final notice of denial. Director's Exhibit 2. Claimant did not respond to the Office's Order and the claim became finally denied. Director's Exhibit 2. For the purposes of 20 C.F.R. §725.309, a denial by reason of abandonment shall be deemed a finding that claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c).

[2] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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). 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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these two elements. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

In finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of six readings of four x-rays.[3] Decision and Order at 5, 10. A June 15, 2001 x-ray was permissibly found to be negative based on the uncontroverted negative readings by Drs. Wicker and Baek, both B readers. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Director's Exhibit 17; Employer's Exhibit 3; Decision and Order at 10. A July 23, 2002 x-ray was read once as negative by Dr. Wiot,

[3] The June 15, 2001 x-ray was also read for quality only (Quality 1) by Dr. Sargent, a Board-certified radiologist and B reader. Director's Exhibit 17.

a B reader and Board-certified radiologist, and was read once as positive by Dr. Sundaram, an A reader. Director's Exhibit 25; Employer's Exhibit 4. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 10. Finally, x-rays dated August 2, 2003 and September 26, 2003 were also permissibly found to be negative based on the uncontroverted negative B readings by Dr. Dahhan and Dr. Fino, respectively. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Employer's Exhibits 1, 2; Decision and Order at 10. The administrative law judge then found that the preponderance of the chest x-ray evidence does not establish the presence of pneumoconiosis. Decision and Order at 10. As the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly concluded based on the weight of the negative x-ray readings that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence, *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 10, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 11.

Finally, the administrative law judge considered the medical reports of Drs. Sundaram, Wicker, Dahhan and Fino pursuant to 20 C.F.R. §718.202(a)(4). Review of the record indicates that in a report dated July 23, 2002, Dr. Sundaram diagnosed clinical coal workers' pneumoconiosis, and indicated that claimant also suffered from legal pneumoconiosis. Director's Exhibit 25; Decision and Order at 6, 11. By contrast, in reports dated June 15, 2001, August 2, 2003 and October 6, 2003, Drs. Wicker, Dahhan and Fino, respectively, opined that that claimant does not suffer from either clinical coal workers' pneumoconiosis or any coal dust related lung disease. Director's Exhibit 17; Employer's Exhibits 1, 2; Decision and Order at 6-7, 12.

The administrative law judge permissibly found that the opinions of Drs. Wicker, Dahhan and Fino were well-reasoned and well-documented, and that therefore, claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibits 17, 25; Employer's Exhibits 1, 2; Decision and Order at 11-12. As the administrative law judge permissibly analyzed the medical opinions of record based on the physicians' reasoning and the underlying bases of their diagnoses, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-

88-89 and n.4 (1993), we affirm his finding that the newly developed evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We further affirm the administrative law judge's finding that claimant failed to establish a total pulmonary or respiratory disability at 20 C.F.R. §718.204(b). Considering the new pulmonary function and blood gas study evidence of record, the administrative law judge properly found that as all of the pulmonary function and blood gas studies are non-qualifying,[4] claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); Director's Exhibits 17, 25; Employer's Exhibits 1, 2; Decision and Order at 5-6, 13. In addition, the record contains no medical evidence that shows that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13. Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Finally, the administrative law judge properly found that the only medical opinion of record supportive of a finding of total disability is that of Dr. Sundaram. Decision and Order at 5, 8. The administrative law judge permissibly found the opinion of Dr. Sundaram, that claimant is totally disabled due to a class III respiratory impairment due entirely to coal dust exposure, to be outweighed by the better reasoned and documented opinions of Drs. Whicker, Dahhan and Fino, whose opinions, that claimant does not suffer from a totally disabling pulmonary or respiratory impairment, the administrative law judge found to be more consistent with the credible, objective medical data, including the non-qualifying pulmonary function and blood gas studies. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89 and n.4; Director's Exhibits 17, 25; Employer's Exhibits 1, 2; Decision and Order at 14. Based on the foregoing, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective

[4] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments, we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is that he is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Therefore, claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge