BRB No. 06-0201 BLA

JAMES B. RICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/15/2006
	)	
and	)	
	)	
JAMES RIVER COAL 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.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6095) of Administrative Law Judge Thomas F. Phalen, Jr. 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 January 16, 2003.[1] 20 C.F.R. §725.309. Based on a stipulation of the parties, the administrative law judge credited claimant with twenty-seven years 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 did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found that the new evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant's 1998 claim. Additionally, the administrative law judge found that remand to the district director was not necessary because the evidence of record was sufficient to allow the administrative law judge to reach a conclusion on the requisite elements of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (a)(4). 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 will not address the allegations of error regarding the administrative law judge's weighing of the medical evidence on the merits of entitlement. However, the Director urges the Board to reject claimant's contention that the Department of Labor failed to provide claimant with a complete and credible pulmonary evaluation, as without merit.[2]

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[1] Claimant filed his initial application for benefits on April 6, 1998, which was denied by the district director on July 29, 1998, for failure to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1.

[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has twenty-seven years of coal mine employment, that employer is the properly named responsible operator, and that the new evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), or total

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. *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.*, 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 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).[3]

Pursuant to Section 718.202(a)(1), the administrative law judge considered six

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disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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. Decision and Order at 3; Director's Exhibit 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

readings of the four new x-rays in light of the readers' radiological qualifications.[4] Dr. Baker, a B-reader, read the January 25, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 16. The administrative law judge noted, however, that Dr. Scott, who is both a B-reader and Board-certified radiologist, read the January 25, 2003 x-ray as negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 17. Because Dr. Scott "possesses qualifications for x-ray interpretation that are greater than Dr. Baker's," the administrative law judge found the January 25, 2003 x-ray to be negative for pneumoconiosis. *Id*. Similarly, when the administrative law judge considered that Dr. Simpao, who lacks radiological qualifications, read the April 25, 2003 x-ray as positive for pneumoconiosis, and that Dr. Scott read this film as negative, the administrative law judge found the April 25, 2003 x-ray negative for pneumoconiosis, based on Dr. Scott's "superior credentials." Decision and Order at 11; Director's Exhibits 14, 31. Because the two remaining x-rays, taken on August 11, 2003 and June 17, 2004, Director's Exhibit 32; Employer's Exhibit 2, received only negative readings, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the x-ray evidence. Decision and Order at 12.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. Decision and Order at 11-12; s*ee 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, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White* 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed"' the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered four medical opinions submitted since the prior denial. Drs. Simpao and Baker diagnosed claimant with pneumoconiosis, while Drs. Broudy and Rosenberg concluded that claimant does not have pneumoconiosis. Director's Exhibits 14, 16, 32; Employer's Exhibits 1, 2, 3. The administrative law judge held all four opinions to be well-documented, but he found the opinions of Drs. Broudy and Rosenberg to be better reasoned. Specifically, the administrative law judge found that Drs. Baker and Simpao erroneously relied upon their positive x-ray readings and that the underlying objective and clinical evidence did not support their diagnoses. Decision and Order at 12. Rather, the administrative law judge found that this evidence supports the opinions of Drs. Broudy and Rosenberg. *Id*. Moreover, the administrative law judge stated that he gave less weight to the opinions of Drs. Simpao and Baker because these physicians based

[4] An additional reading by Dr. Barrett was obtained solely to assess the quality of the April 25, 2003 x-ray. Decision and Order at 11; Director's Exhibit 15.

their conclusions on the miner's x-ray and length of coal mine employment without providing any other basis for their diagnoses. Decision and Order at 12-13; Director's Exhibits 14, 16.

Claimant contends that Dr. Baker's opinion was documented and reasoned, and that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of pneumoconiosis. Claimant's Brief at 4-5. We reject this argument. Contrary to claimant's contention, the administrative law judge reasonably discounted Dr. Baker's diagnosis of "Coal Workers' Pneumoconiosis, category 1/0," since it was based on Dr. Baker's positive reading of the January 25, 2003 x-ray, which the administrative law judge found outweighed by the negative reading of a physician with greater qualifications. *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). Moreover, claimant's contention that Dr. Baker's opinion was documented and reasoned and thus should not have been discredited is essentially requesting a reweighing of the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Substantial evidence supports the administrative law judge's permissible determination that Dr. Baker's opinion was not as well-reasoned as the contrary opinions of Drs. Broudy and Rosenberg. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 (1993). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Simpao, Broudy, and Rosenberg. The administrative law judge found that Dr. Baker's opinion was not a diagnosis of total disability, because Dr. Baker merely advised against a return to a dusty environment. Decision and Order at 14; Director's Exhibit 16. Additionally, he found that Dr. Simpao's opinion was not entitled to any weight since the physician did not expound on his diagnosis of a mild impairment or provide an opinion on whether claimant was able to return to his usual coal mine employment. Decision and Order at 14; Director's Exhibit 14. Finding the opinions of Drs. Broudy and Rosenberg well-reasoned and documented because these opinions are supported by the objective as well as clinical evidence, the administrative law judge determined that the new medical opinions did not establish that claimant is totally disabled. Decision and Order at 15.

Claimant initially asserts that in addressing the issue of total disability, the 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 8, 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:

> The claimant's usual coal mine work included being a dozer operator. It can be reasonably concluded that such 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, as well as the medical opinion of Dr. Baker, 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 8. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, 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.[5] *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). Because the administrative law judge rationally found that Dr. Baker did not diagnose a disabling respiratory or pulmonary impairment, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a dozer operator to Dr. Baker's medical opinion. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

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[5] Moreover, with respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment with the FEV1 and vital capacity greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 16. Dr. Baker then stated that:

> With the presence of pneumoconiosis, he does have an impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 16. However, the *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class I impairment as involving no impairment to the whole person.

Claimant further alleges that the administrative law judge erred in according less weight to Dr. Baker's diagnosis because he relied upon nonconforming and/or non-qualifying objective studies. We disagree. As indicated above, the administrative law judge did not accord less weight to Dr. Baker's opinion because it was not adequately documented, but rather found that Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment and, therefore, his opinion was not supportive of claimant's burden. Director's Exhibit 16. As claimant does not otherwise challenge the administrative law judge's weighing of Dr. Baker's opinion, we affirm the administrative law judge's finding that Dr. Baker's opinion did not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Because an administrative law judge's findings must be based solely on the medical evidence of record, we also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. *White* 23 BLR at 1-7 n.8. Moreover, 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 the finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 14-15; *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*); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's April 25, 2003 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that a remand to permit Dr. Simpao to clarify his opinion regarding the issue of total disability, the element of entitlement on which the administrative law judge did not credit Dr. Simpao's opinion, would serve no purpose, because the administrative law judge rationally found the record contains solid evidence in the form of medical opinions supported by objective studies demonstrating that claimant has no pulmonary or respiratory impairment. Director's Brief at 2-3.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lack credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-

102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Contrary to claimant's contention, on the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's opinion was well-documented but that his diagnosis of "CWP 1/2" was based largely on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 12-13; Director's Exhibit 14. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge ultimately determined that the specific medical data underlying Dr. Simpao's diagnosis was outweighed. *Id*. Additionally, the administrative law judge found that the contrary opinions of Drs. Broudy and Rosenberg were entitled to the greatest weight. Decision and Order at 12-13; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Moreover, review of the record as a whole, including the evidence submitted with claimant's prior claim, reveals no medical evidence supportive of a finding of the existence of pneumoconiosis. Director's Exhibit 1. Because Dr. Simpao's opinion regarding the existence of pneumoconiosis was well-documented and the administrative law judge did not find that it lacked credibility, and this record as a whole contains no evidence supportive of a finding of the existence of pneumoconiosis, we affirm the administrative law judge's finding that remand to the district director is not required. Decision and Order at 16; *see Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528 (6th Cir. 2003)(unpublished); *Hodges*, 18 BLR at 1-88 n.3.

Because the administrative law judge properly found that the newly submitted evidence was insufficient to establish any of the applicable elements of entitlement adjudicated against claimant in the prior denial pursuant to Section 725.309, we affirm this finding and the denial of benefits. *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge