BRB No. 06-0286 BLA

JOHN R. COUCH, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INC.	)	
	)	DATE ISSUED: 09/22/2006
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.

Denise Kirk Ash, Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-6459) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge found approximately sixteen years of coal mine employment. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] In considering this subsequent claim, the administrative law judge

[1]Claimant filed his first claim for benefits on July 28, 1999. It was denied by Initial Determination on November 16, 1999 for failure to establish any elements of entitlement. Claimant was instructed that if he did not submit any additional evidence or

concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §§718.202(a) and 718.204(b), finding that these were elements of entitlement previously adjudicated against claimant.[2] The administrative law judge determined that claimant failed to establish a change in any applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability at 20 C.F.R. §718.204(b)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

Under Section 725.309(d), the instant subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement" has changed since the final denial of the prior claim. 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The prior claim was denied by reason of abandonment, which constitutes a finding that the claimant has not established any applicable condition of entitlement. *See* 20 C.F.R. §725.409(c). Claimant must,

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request a hearing before the Office of the Administrative Law Judges within 60 days of the initial determination, his claim would be considered abandoned and the denial would become final. Director's Exhibit 1. Claimant took no further action on the claim. Claimant filed this subsequent claim on August 6, 2001. Director's Exhibit 2. In a Proposed Decision and Order dated May 9, 2003, the district director denied benefits for failure to establish any elements of entitlement. Director's Exhibit 27. Claimant requested a formal hearing on May 14, 2003. Director's Exhibit 28. A hearing was held on July 27, 2004.

[2]The prior claim was denied by reason of abandonment. Pursuant to 20 C.F.R. §725.409(c), if a claim has been denied by reason of abandonment, that determination shall constitute a finding that the claimant has not established any applicable condition of entitlement.

therefore, establish one applicable condition of entitlement, based on the newly submitted evidence, in order to have the instant subsequent claim considered on its merits. *See* 20 C.F.R. §725.309(d).

Claimant specifically contends that the administrative law judge erred in finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[3] Claimant argues that the administrative law judge "need not defer to a doctor with superior qualifications" and that the administrative law judge "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

Claimant's contentions lack merit. The new x-ray evidence consists of three readings[4] of two x-rays dated October 19, 2001 and December 3, 2001. Dr. Sargent read the x-ray dated October 19, 2001, for quality only. Director's Exhibit 17. As noted by the administrative law judge, Dr. Hussain's interpretation of the October 19, 2001 x-ray as 0/1, does not constitute evidence of pneumoconiosis under 20 C.F.R. §718.102(b). Director's Exhibit 16. Further, Dr. Dahhan, a B reader, read the December 3, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 12. Based on these uniformly negative readings, the administrative law judge rationally found that claimant has not established the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Ry. 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); Decision and Order at 7-8. Further, claimant provides no support for his contention that the administrative law judge selectively analyzed the x-ray evidence. *White v. New White Coal Co.,* 23 BLR 1-1, 1-5 (2004). Based on the foregoing, we affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by substantial evidence.

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[3]As claimant does not challenge the administrative law judge's findings that pneumoconiosis is not established based on the new evidence at 20 C.F.R. §718.202(a)(2) and (a)(3), we affirm them. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[4]The x-ray dated August 23, 1999, was taken before the final denial of the previous claim, and, therefore, the administrative law judge properly found that the x-ray should not be considered in the weighing of the new evidence. *See* 20 C.F.R. §725.309(d)(3). Decision and Order at 7, n. 4.

Claimant also alleges error in the administrative law judge's finding that the new medical opinions are sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains two new medical reports. By report dated October 19, 2001, Dr. Hussain diagnosed pneumoconiosis due to dust exposure. Director's Exhibit 13. Dr. Hussain specifically noted that claimant's occupational lung disease, which was caused by his coal mine employment, was based on "x-ray findings, history of exposure." *Id.* By report dated December 3, 2001, Dr. Dahhan found claimant "has no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure as demonstrated by the normal clinical examination of the chest, normal spirometry, normal blood gases and clear chest x-ray." Director's Exhibit 12.

Considering these new medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that although Dr. Hussain recorded claimant's complaints of wheezing, sputum production and dyspnea, he detected no abnormalities in the lungs. The administrative law judge further noted that Dr. Hussain had no special qualifications to read x-rays, while Dr. Dahhan was a B reader. The administrative law judge additionally relied on Dr. Dahhan's qualifications as a pulmonary specialist, and found that the opinion of Dr. Dahhan outweighs that of Dr. Hussain, as it is better reasoned and "more based on the objective medical evidence in the record." Decision and Order at 8.

Claimant specifically asserts that the administrative law judge "appears to have" substituted his opinion for that of a medical expert. Claimant's Brief at 4. We reject claimant's assertion that the administrative law judge substituted his opinion for that of a medical expert pursuant to 20 C.F.R. §718.202(a)(4), in the absence of any supporting evidence. The remainder of claimant's arguments at Section 718.202(a)(4) consist of statements of law, and contain no assertion of error on the part of the administrative law judge. Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's finding that the new evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

At 20 C.F.R. §718.204(b)(2)(iv),[5] claimant asserts that, taking into consideration his condition and the exertional requirements of his usual coal mine employment, "it is

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[5]We affirm the administrative law judge's finding that the new evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as unchallenged on appeal. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); Decision and Order at 9.

rational to conclude that claimant's condition prevents him from engaging in his usual coal mine employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 6. Claimant adds that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with assessment of disability." *See Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). *Id.*

The relevant evidence consists of the medical opinions of Drs. Hussain and Dahhan. While Dr. Hussain diagnosed a mild impairment, he opined that claimant has the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 13. Dr. Dahhan found no evidence of any pulmonary impairment or respiratory disability. Director's Exhibit 12.

Because Dr. Hussain explicitly found that claimant had the respiratory capacity to perform his job, and Dr. Dahhan also found no impairment or disability, a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) is precluded, notwithstanding the Sixth Circuit's holding in *Cornett, supra*. We therefore affirm the administrative law judge's finding that the new evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b).

Lastly, claimant states that pneumoconiosis is a progressive and irreversible disease, and asserts that "[i]t can therefore be concluded" that his condition has worsened because a "considerable amount of time" has passed since he was initially diagnosed with pneumoconiosis. Claimant's Brief at 6. This assertion by claimant is likewise unavailing; an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.,* 23 BLR 1-1, 1-7 n.8 (2004).

As the administrative law judge properly found that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), claimant has failed to establish a change in any applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits in the instant claim.

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

BETTY JEAN HALL
Administrative Appeals Judge