BRB No. 06-0418 BLA

GLENN D. HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAM HUBBARD	)	
	)	DATE ISSUED: 09/25/2006
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6127) of Administrative Law Judge Joseph E. Kane denying benefits 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). [1] This case involves a claim filed on January 15, 2002.[2] After crediting

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

claimant with eight years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), based on all of the relevant evidence of record.[3] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer has not filed a response brief. The Director responds in support of the

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to these regulations, unless otherwise noted, refer to the amended regulations.

[2]The administrative law judge noted that claimant's "previous claim was withdrawn." Decision and Order at 2. On his 2002 application for benefits, claimant indicated that he had withdrawn an earlier claim for benefits. Director's Exhibit 2. Although claimant's earlier claim is not in the record, the record contains Administrative Law Judge Thomas F. Phalen Jr.'s February 17, 1998 Decision and Order, wherein he denied a claim for benefits filed by claimant on June 21, 1994. *See* Director's Exhibit 22. Judge Phalen denied benefits because the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* By Decision and Order dated June 28, 2000, the Board affirmed Judge Phalen's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Hoskins v. William Hubbard Trucking*, BRB No. 99-1038 BLA (June 28, 2000) (unpublished). The Board, therefore, affirmed Judge Phalen's denial of benefits. *Id.* There is no evidence in the record supporting claimant's assertion that he withdrew his earlier claim.

[3]In light of his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge noted that the issue of whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 was moot. Decision and Order at 14. The administrative law judge also addressed whether the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Because the administrative law judge found that the opinions of Drs. Simpao and Baker were not well reasoned regarding the existence of pneumoconiosis, he found that claimant failed to establish total disability due to pneumoconiosis. *Id.*

administrative law judge's denial of benefits. The Director also argues that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of interpretations of three x-rays taken on April 25, 2002, June 15, 2002 and January 14, 2003. The administrative law judge considered whether each x-ray should be considered positive or negative for pneumoconiosis.

Specifically, the administrative law judge noted that while Dr. Simpao, a physician with no special radiological qualifications, interpreted claimant's April 25, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 9, Dr. Barrett, a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis.[5] Decision and Order at 11; Director's Exhibit 42. The administrative law judge, therefore, found that claimant's April 25, 2002 x-ray is negative for pneumoconiosis. Decision and Order at 11. The administrative law judge noted that while Dr. Simpao, a B reader, interpreted claimant's June 15, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 12, Dr. Barrett, a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 43. The administrative law judge, therefore, found that claimant's June 15, 2002 x-ray is negative for pneumoconiosis. Decision and Order at 11. Dr. Halbert, a B reader and Board-certified radiologist, interpreted claimant's January 14, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 13. Because there are no other interpretations of claimant's January 14, 2003 x-ray, the administrative law judge found that this x-ray is negative for pneumoconiosis. Decision and Order at 9.

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[4]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]Dr. Sargent interpreted claimant's April 25, 2002 x-ray for film quality only. Director's Exhibit 10.

In his consideration of the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[6] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge erred in finding Dr. Baker's opinion[7] insufficient to establish the existence of pneumoconiosis. We disagree. The administrative law judge permissibly discredited Dr. Baker's diagnosis of coal workers' pneumoconiosis because he found that it was not sufficiently reasoned, noting that the diagnosis was based only on a positive x-ray interpretation and a history of coal dust exposure.[8] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 12-13; Director's Exhibit 8.

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[6]We reject claimant's assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence" as claimant has provided no support for his assertion. Claimant's Brief at 3.

[7]In a report dated June 15, 2002, Dr. Baker diagnosed "Coal Workers' Pneumoconiosis, Category 1/0, on the basis of 1980 ILO Classification – based on abnormal x-ray and significant history of coal dust exposure." Director's Exhibit 12.

[8]Dr. Baker also diagnosed obstructive airway disease and chronic bronchitis. Director's Exhibit 12. Because Dr. Baker did not expressly list an etiology for these diseases, the administrative law judge properly found that these diagnoses are insufficient to constitute a finding of "legal" pneumoconiosis. 20 C.F.R. §718.201(a)(2); Decision and Order at 13.

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See 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).

In light of the our afirmance of the administrative law judge's findings on the merits that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[9] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9]As previously noted, the administrative law judge failed to recognize that claimant's 2002 claim is a subsequent claim. Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1994 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. *Id.* In affirming Judge Phalen's denial of benefits in claimant's 1994 claim, the Board affirmed his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Hoskins v. William Hubbard Trucking*, BRB No. 99-1038 BLA (June 28, 2000) (unpublished). Thus, in order to establish that an applicable condition of entitlement has changed, the newly submitted evidence must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

In light of our affirmance of the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we hold that the evidence is insufficient to establish that an applicable condition of entitlement has changed. 20 C.F.R. §725.309. Consequently, the administrative law judge's failure to adjudicate claimant's 2002 claim as a "subsequent" claim constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10]Contrary to claimant's suggestion, the administrative law judge did not address whether the medical opinion evidence was sufficient to establish total disability pursuant

Claimant finally contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, claimant selected Dr. Simpao to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 8. Dr. Simpao examined claimant on April 25, 2002. In a report dated April 25, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/0.[11] Director's Exhibit 9. Dr. Simpao also opined that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.*

Dr. Simpao's diagnosis of clinical pneumoconiosis, based upon a positive x-ray, was neither unreasoned nor undocumented. Dr. Simpao's pulmonary evaluation was complete, documented, and inherently credible. The administrative law judge accorded Dr. Simpao's diagnosis of pneumoconiosis "little weight," finding that it was outweighed by Dr. Rosenberg's opinion that claimant does not suffer from pneumoconiosis. Decision and Order at 12-13. We, therefore, agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges*, *supra*; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

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to 20 C.F.R. §718.204(b)(2)(iv). Because the administrative law judge found that the opinions of Drs. Simpao and Baker are insufficient to establish the existence of pneumoconiosis, he merely noted that claimant could not establish that his total disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); Decision and Order at 14.

[11]On its face, Dr. Simpao's opinion is complete. Dr. Simpao conducted a physical examination, recorded claimant's symptoms as well as his employment, medical and social histories, obtained an x-ray, EKG, pulmonary function and arterial blood gas studies, and addressed all of the elements of entitlement. *See* Director's Exhibit 12.

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