

BRB No. 07-0165 BLA

K. O. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 PEABODY COAL COMPANY ) DATE ISSUED: 09/25/2007  
 )  
 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 John M. Vittone,  
Chief Administrative Law Judge, United States Department of Labor.

K. O., Kingman, Arizona, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (06-BLA-5021) of Chief Administrative Law Judge John M. Vittone 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).<sup>1</sup>

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<sup>1</sup> Claimant's initial claim, filed on August 3, 1993, was denied on October 28, 1993, because claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Claimant's next two claims, filed on February 24, 1997, and August 27, 2002, were denied on May 28, 1997 and May 21, 2003, respectively, by reason of abandonment. Director's Exhibits 2, 3. The regulations provide that a denial of

Claimant filed his claim for benefits on September 1, 2004. Director's Exhibit 5. The administrative law judge credited claimant with fourteen years of coal mine employment<sup>2</sup> pursuant to the parties' stipulation. 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. In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence did not establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). 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).

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). 20 C.F.R. §725.309(d). Claimant's most recent prior claim was denied as abandoned, and thus, claimant is deemed to have failed to establish any

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a claim by reason of abandonment is deemed a finding that claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c).

<sup>2</sup> The record indicates that claimant's last coal mine employment occurred in Illinois. Director's Exhibit 14. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

element of entitlement. 20 C.F.R. §725.409(c). Consequently, claimant had to submit new evidence establishing one of the elements of entitlement to proceed with this claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of three new x-rays.<sup>3</sup> Drs. Pfisterer and Wiot, both qualified as Board-certified radiologists and B readers, read the November 8, 2004 x-ray<sup>4</sup> as negative for pneumoconiosis. Director's Exhibits 15, 16. The administrative law judge also noted that Dr. Repsher, a B reader, and Dr. Wiot, read the November 4, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 2. The administrative law judge further noted that Dr. Schiefer, a B-reader, read the October 28, 2005 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. The administrative law judge noted, however, that Dr. Wiot read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Based on Dr. Wiot's superior qualifications, the administrative law judge found the October 28, 2005 x-ray negative for pneumoconiosis. Finally, the administrative law judge also noted that the two readings of the November 4, 2005 x-ray, an x-ray taken within a week of Dr. Schiefer's positive interpretation, were negative for pneumoconiosis. Employer's Exhibits 1, 2. Based on this qualitative analysis of the x-ray readings, the administrative law judge properly found that the new x-ray evidence did not establish the existence of pneumoconiosis. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899, --- BLR --- (7th Cir. 2003); *White*, 23 BLR at 1-4. Substantial evidence supports this finding. It is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), the administrative law judge accurately determined that there were no autopsy or biopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

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<sup>3</sup> The administrative law judge also considered Dr. Bouffard's 1996 x-ray, noting that pneumoconiosis was not mentioned. Decision and Order at 7; Claimant's Exhibit 4. However, that x-ray predates the last claim denial, and thus, is irrelevant to whether claimant has established a change in an applicable condition in this claim. *See* 20 C.F.R. §725.309(d)(3). The administrative law judge's consideration of the 1996 x-ray is harmless error, as the administrative law judge relied on negative readings of the new x-rays by qualified readers. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

<sup>4</sup> Dr. Navani read the November 8, 2004 x-ray for quality purposes only. Director's Exhibit 15.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered five new medical opinions of record. Dr. Evenson diagnosed claimant with pneumoconiosis and Dr. Houser diagnosed claimant with chronic bronchitis. Director's Exhibit 17; Claimant's Exhibits 4, 5. Drs. Hardy, Repsher, and Renn concluded that claimant does not have clinical or legal pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibits 1, 4. The administrative law judge permissibly accorded Dr. Evenson's opinion little probative value, as it included no supportive medical evidence, made "only vague references to records, tests and physical examinations," and failed to consider claimant's smoking history. Decision and Order at 12; *see Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also properly accorded Dr. Houser's diagnosis of chronic bronchitis little probative value, as the physician did not address the etiology of the bronchitis, and his recommendation that claimant visit a black lung clinic was not a sufficient medical diagnosis. *See* 20 C.F.R. §718.201(a)(2); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge additionally accorded the opinions of Drs. Evenson and Houser less weight, as their qualifications are not in the record. Substantial evidence supports the administrative law judge's findings regarding the opinions of Drs. Evenson and Houser.

Moreover, the administrative law judge permissibly determined that the remaining contrary opinions by Drs. Hardy, Repsher, and Renn were better-reasoned, better-documented, and supported by the physicians' qualifications. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155. Because substantial evidence supports the administrative law judge's finding that the existence of pneumoconiosis was not established by the new medical opinion evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Turning to the element of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii), the administrative law judge considered four new pulmonary function studies and two new blood gas studies, respectively. Claimant's Exhibit 1, Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge properly found that total disability was not established, as none of the pulmonary function or blood gas studies produced qualifying<sup>5</sup> values. Because substantial evidence supports the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii), the finding is affirmed.

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<sup>5</sup> A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(i), (ii).

Additionally, pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately noted that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. We therefore affirm the administrative law judge's finding that claimant did not establish total disability under this subsection.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered five new medical opinions of record. Drs. Evenson, Houser, and Hardy opined that claimant was totally disabled due to respiratory problems, while Drs. Repsher and Renn found that claimant was not totally disabled and was capable of performing his previous coal mine employment. Director's Exhibit 17; Claimant's Exhibits 4, 5; Employer's Exhibits 1, 4. The administrative law judge permissibly accorded less probative weight to Dr. Houser's opinion, as it was not supported by the objective evidence and he provided no rationale for his conclusions. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155. Similarly, the administrative law judge also permissibly accorded less probative weight to the opinion of Dr. Evenson, as he provided no documentation to support his conclusions. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. In addition, the administrative law judge permissibly accorded little weight to Dr. Hardy's opinion, because it was unsupported by the objective evidence and was contrary to the diagnoses "by more qualified physicians." Decision and Order at 18; *see Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. Substantial evidence supports the administrative law judge's findings regarding the opinions of Drs. Evenson, Houser, and Hardy. Moreover, the administrative law judge permissibly accorded the contrary opinions of Drs. Repsher and Renn greater weight, as better supported by the objective evidence, and based on the physicians' superior qualifications. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Because substantial evidence supports the administrative law judge's finding that total disability was not established by the medical opinion evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

As the administrative law judge properly found that the new evidence fails to establish the existence of pneumoconiosis or total disability pursuant 20 C.F.R. §§718.202(a) and 718.204(b)(2), claimant has failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits.

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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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge