BRB No. 08-0271 BLA

J. N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/16/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Administrative Law Judge Alice M. Craft, United States Department of Labor.

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

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Denying Benefits (2004-BLA-05201) of Administrative Law Judge Alice M. Craft, 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).[1] Director's Exhibit 3. The administrative law

[1] Claimant initially filed a claim for benefits on February 25, 2000, which was denied by the district director on May 31, 2000, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action with regard to the denial of his February 25, 2000 claim, until he filed this subsequent claim for benefits on April 14, 2004. Director's Exhibit 3.

judge found that claimant had seven years of coal mine employment, based on his Social Security records and the stipulation by the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Thus, she found 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 challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), and 718.204(b)(2)(iv).[2] Claimant further asserts that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim, as required by 20 C.F.R. §725.406. The Director has responded, urging the Board to affirm the administrative law judge's denial of benefits, and asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.[3]

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.[4] 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).

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[2] In asserting that the administrative law judge erred by not finding that he was totally disabled, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 4. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of seven years of coal mine employment, her determination that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and her determination that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

When 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). Because claimant's initial claim for benefits, filed on February 25, 2000, was denied for failure to establish any of the requisite elements of entitlement, claimant was required to prove, based on the newly submitted evidence, either that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment.

Pursuant to Section 718.202(a)(1), the administrative law judge considered that the only x-ray of record, taken on June 10, 2004, was read as positive for pneumoconiosis by Dr. Simpao, an A reader, and as negative for pneumoconiosis by Dr. Barrett, who is dually qualified as a Board-certified radiologist and B reader. Decision and Order at 8; Director's Exhibits 17, 18. Based on "Dr. Barrett's greater qualifications," the administrative law judge found that the x-ray was negative for the existence of pneumoconiosis. Decision and Order at 8.

Claimant asserts that the administrative law judge erred in his consideration of the newly submitted x-ray evidence because he "selectively analyzed" the evidence and improperly relied upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant's Brief at 3. Claimant's allegations of error have no merit. Section 718.202(a)(1) specifically provides that "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Contrary to claimant's allegation, the administrative law judge did not rely on the numerical superiority of the readings. She reasonably relied on the expertise of the readers to accord weight to the conflicting x-ray interpretations. Decision and Order at 8. We therefore reject claimant's assertion that the administrative law judge improperly relied on the qualifications of Dr. Barrett in finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), as supported by substantial evidence.

Regarding the issue of total disability, claimant contends that the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief

at 5, citing *Cornett v. Benham Coal,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.,* 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.,* 7 BLR 1-469 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a loader operator and head drive 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, 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 5. Claimant's argument is without merit. A miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP,* 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). In light of claimant's failure to raise any meritorious allegation of error in the administrative law judge's consideration of the newly submitted medical opinions of record at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability thereunder. [5] *Cox v. Benefits Review Board,* 791 F.2d 445, 9 BLR 2-46 (6th Cir.1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 10.

In light of the foregoing, we also affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2) and her determination that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d). *White*, 23 BLR at 1-3.

Claimant also contends that because the administrative law judge did not credit a diagnosis of clinical pneumoconiosis in Dr. Simpao's June 10, 2004 opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim, as required

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[5] We also reject claimant's assertion that, since pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988).

under the Act." Claimant's Brief at 4. The Director responds that he "is only required to provide each miner-claimant with a complete and credible examination, not a dispositive one." Director's Brief at 4.

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, lacks 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 Director correctly asserts that with respect to the existence of pneumoconiosis, Dr. Simpao provided an opinion on this element of entitlement and that the administrative law judge "did not wholly discredit that opinion, but rather found it outweighed by the contrary evidence." Director's Brief at 4; Director's Exhibit 16. The administrative law judge did not find that Dr. Simpao's report was incomplete. Rather, the administrative law judge determined that Dr. Simpao examined claimant on behalf of the Department of Labor on June 10, 2004, took occupational, social, family and medical histories and reported claimant's x-ray, EKG, blood gas studies and pulmonary function testing, as required by the regulation. Decision and Order at 6; Director's Exhibit 16; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of clinical pneumoconiosis, the administrative law judge found that although Dr. Simpao's diagnosis of coal workers' pneumoconiosis was based on a positive x-ray reading the weight accorded the x-ray evidence resulted in a finding that the x-ray was negative for the existence of pneumoconiosis. Decision and Order at 8. Because Dr. Simpao's report was complete and the administrative law judge merely found his diagnosis of clinical pneumoconiosis, based upon his positive x-ray reading, to be outweighed by the negative reading performed by the better qualified radiologist, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

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