

BRB Nos. 09-0237 BLA  
and 09-0237 BLA-A

L.L. )  
)  
Claimant-Petitioner )  
Cross-Respondent )  
)  
v. )  
)  
SHAMROCK COAL COMPANY, ) DATE ISSUED: 09/25/2009  
INCORPORATED )  
)  
Employer-Respondent )  
Cross-Petitioner )  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Daniel L. Solomon, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand Denying Benefits (03-BLA-5319) of Administrative Law Judge Daniel L. Solomon on a subsequent claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine

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<sup>1</sup> Claimant filed his first application for benefits on December 20, 1994. Director's Exhibit 1. On November 15, 1996, Administrative Law Judge Robert L.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Mollie W. Neal credited claimant with seventeen and one-half years of coal mine employment and, adjudicating this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718, found the new evidence insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, Judge Neal found the new evidence insufficient to establish a change in an applicable condition of entitlement pursuant 20 C.F.R. §725.309, and accordingly, denied benefits.

Claimant appealed the denial of benefits to the Board. Initially, the Board rejected claimant's assertion that the Director, Office Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim under the Act. 30 U.S.C. §923(b). Turning to Section 718.202(a), the Board affirmed Judge Neal's determination that the new x-ray evidence and the new medical opinions of Drs. Baker and Sundaram were insufficient to establish clinical pneumoconiosis under Section 718.202(a)(1) and (4).<sup>2</sup> The Board, however, vacated Judge Neal's determination that the new medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis<sup>3</sup> pursuant to Section 718.202(a)(4), because Judge Neal did not consider whether Dr. Baker diagnosed legal pneumoconiosis. The Board therefore vacated Judge Neal's finding that legal pneumoconiosis was not established at Section 718.202(a)(4) and remanded the case for further consideration thereunder. The Board additionally observed that the admissibility

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Hillyard issued a Decision and Order denying benefits, based on claimant's failure to establish the existence of pneumoconiosis and total disability. The Board affirmed Judge Hillyard's denial of benefits. [*L.L.*] *v. Shamrock Coal Co.*, BRB No. 97-0409 BLA (Nov. 17, 1997) (unpub.). Claimant did not pursue this claim. Claimant filed a second application for benefits on May 24, 2001, which is pending herein on appeal. Director's Exhibit 3.

<sup>2</sup> In addition, the Board affirmed Administrative Law Judge Mollie W. Neal's findings of seventeen and one-half years of coal mine employment, that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3), and that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings were unchallenged on appeal. [*L.L.*] *v. Shamrock Coal Co.*, BRB No. 04-0839 BLA (Jun. 27, 2005) (Hall, J., concurring) (unpub.).

<sup>3</sup> Legal pneumoconiosis is defined to include any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

of Dr. Dahhan's medical report regarding pneumoconiosis needed to be addressed, as it was based, in part, on Dr. Dahhan's negative interpretation of an October 23, 2001 x-ray that was not admitted into the record. Turning to Section 718.204(b)(2)(iv), the Board affirmed Judge Neal's discounting of Dr. Baker's disability assessment, but vacated her determination that the new medical opinion evidence was insufficient to demonstrate total respiratory disability because her rejection of Dr. Sundaram's opinion contained errors. Consequently, because of Judge Neal's errors in finding that the new evidence did not establish pneumoconiosis or total disability, elements previously adjudicated against claimant, the Board vacated Judge Neal's finding that the new evidence was insufficient to establish a change in an applicable condition of entitlement at Section 725.309 and remanded the case for further consideration. [*L.L.*] v. *Shamrock Coal Co.*, BRB No. 04-0839 BLA (Jun. 27, 2005) (Hall, J., concurring) (unpub.).

Employer subsequently filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* of the Board's decision. The Board granted employer's request for *en banc* reconsideration and modified its decision to reflect that the original x-ray interpretation by Dr. Dahhan of the October 23, 2001 x-ray was, in fact, contained in the record. The Board held, however, that inclusion of this x-ray interpretation by Dr. Dahhan would violate the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i), as it would result in the admission of three affirmative x-ray readings by employer. The Board, therefore, instructed the administrative law judge to address whether Dr. Dahhan's report should be excluded in light of his consideration of this x-ray. The Board rejected the other issues raised by employer and reaffirmed its Decision and Order in all other respects. [*L.L.*] v. *Shamrock Coal Co.*, BRB No. 04-0839 BLA (May 21, 2007) (unpub. Order) (*en banc*).

On remand, the case was reassigned to Administrative Law Judge Daniel L. Solomon (the administrative law judge), who initially denied employer's motion to amend the designation of its x-ray evidence, as the motion was untimely. Pursuant to the Board's remand instructions, the administrative law judge redacted those portions of Dr. Dahhan's report that referenced Dr. Dahhan's reading of the October 23, 2001 x-ray. The administrative law judge further found that because the redacted data was not critical to Dr. Dahhan's ultimate opinion, the redaction did not affect the weight accorded to his opinion. Next, the administrative law judge considered the diagnoses of legal pneumoconiosis of Drs. Baker and Sundaram under Section 718.202(a)(4) and found that Dr. Baker's opinion on the issue was ambiguous and equivocal, and therefore, entitled to little weight. The administrative law judge also found Dr. Sundaram's opinion on the issue entitled to little weight because it was cursory. Lastly, the administrative law judge addressed Dr. Sundaram's disability assessment and found that, since it was neither well-reasoned nor well-documented, it was entitled to little weight under Section 718.204(b)(2)(iv). Hence, based on his determinations that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) or total respiratory

disability at Section 718.204(b)(2)(iv), the administrative law judge concluded that claimant failed to establish a change in an applicable condition of entitlement under Section 725.309. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that the medical opinions of Drs. Baker and Sundaram established legal pneumoconiosis at Section 718.202(a)(4) and, thereby, a change in an applicable condition of entitlement at Section 725.309.<sup>4</sup> In response, employer urges affirmance of the denial of benefits. The Director has filed a letter indicating that he will not participate in the appeal.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge erred in finding that employer's motion to redesignate its x-ray interpretations was untimely. Employer avers that, in the event the Board affirms the denial, this error may be deemed harmless. Claimant has not filed a brief in response to employer's cross-appeal. The Director has filed a letter stating he will not participate in the cross-appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).<sup>5</sup>

In order to establish entitlement to benefits in a miner's claim filed 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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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<sup>4</sup> Claimant does not challenge the administrative law judge's finding that the new medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and thereby, a change in an applicable condition of entitlement at 20 C.F.R. §725.309 on that basis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Where a claimant 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). The applicable conditions of entitlement “shall be limited to those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). In this case, claimant’s prior claim was denied because he failed to establish pneumoconiosis or total disability.

In challenging the administrative law judge’s finding that legal pneumoconiosis was not established at Section 718.202(a)(4), claimant contends that the administrative law judge erred in failing to credit the medical opinions of Drs. Baker and Sundaram on the issue, as their opinions were based on a thorough physical examination of claimant, a review of claimant’s work history, the results of a pulmonary function study, the results of an arterial blood gas study, and a chest x-ray.

In a report dated May 23, 2001, Dr. Baker diagnosed chronic bronchitis not related to coal dust exposure. In the causation section of this report, however, Dr. Baker indicated that any pulmonary impairment is the result of coal dust exposure and stated that it is “possible” that claimant’s “bronchitis is related to the coal dust exposure to some extent.” Director’s Exhibit 12. In a subsequent report, dated July 23, 2001, Dr. Baker diagnosed chronic bronchitis. In the causation section of this report, Dr. Baker opined that the diagnosed disease is related to coal dust exposure. In addition, Dr. Baker opined that any pulmonary impairment is the result of coal dust exposure. Director’s Exhibit 13.

In assessing the credibility of Dr. Baker’s opinion on legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge cited specific factors that detracted from the probative value of both his May 23, 2001 and July 23, 2001 reports. With respect to the May 23, 2001 report, the administrative law judge, within a reasonable exercise of his discretion, found that Dr. Baker’s opinion, that it was “possible” that claimant’s “bronchitis is related to the coal dust exposure to some extent,” was ambiguous and equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order on Remand at 5; Director’s Exhibit 12. The administrative law judge also properly found that Dr. Baker’s diagnosis of legal pneumoconiosis was “internally inconsistent” inasmuch as Dr. Baker initially indicated that claimant’s chronic bronchitis was not related to coal dust exposure, but later suggested that claimant’s bronchitis was related to coal dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 5. In addition, the administrative law judge observed that the diagnostic studies associated with

Dr. Baker's May 23, 2001 examination and report did not support the opinion, as they were normal or revealed "little, if any" pulmonary or respiratory impairment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR -145, 1-147 n.2 (1984); Decision and Order on Remand at 5. Accordingly, the administrative law judge reasonably accorded diminished weight to the diagnosis of legal pneumoconiosis made by Dr. Baker in his May 23, 2001 report.

On reviewing Dr. Baker's July 23, 2001 report, the administrative law judge found that it was "internally consistent" and "not equivocal" because Dr. Baker indicated that claimant's chronic bronchitis was attributable to coal dust exposure and also concluded that any pulmonary impairment was the result of coal dust exposure. Decision and Order on Remand at 6; Director's Exhibit 13. Nevertheless, the administrative law judge rationally found that the diagnosis of legal pneumoconiosis made by Dr. Baker in his July 23, 2001 opinion was "problematic," because the normal physical findings and normal objective test results obtained during claimant's July 23, 2001 examination failed to demonstrate the presence of a pulmonary or respiratory impairment. Consequently, the administrative law judge found that the sole basis for Dr. Baker's diagnosis of legal pneumoconiosis was his reliance on a positive x-ray interpretation. Decision and Order on Remand at 6. Accordingly, the administrative law judge properly concluded that the diagnosis of legal pneumoconiosis made by Dr. Baker in his July 23, 2001 report was not persuasive. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-576, 22 BLR 2-107, 2-120 (6th Cir. 2000). In conclusion, therefore, the administrative law judge properly found that Dr. Baker's reports could not establish legal pneumoconiosis at Section 718.202(a)(4).

Turning to Dr. Sundaram's opinion, that claimant has a lung disease caused by coal mine employment, the administrative law judge properly accorded this opinion little weight because he found that the only rationale Dr. Sundaram provided for his conclusion was claimant's sixteen years of underground coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge found further that Dr. Sundaram's opinion was cursory as the doctor did not explain his findings. *See Clark*, 12 BLR at 1-155. The administrative law judge's finding that Dr. Sundaram's opinion cannot establish pneumoconiosis at Section 718.202(a)(4) is, therefore, affirmed.

Instead, the administrative law judge properly determined that the new opinions of Drs. Dahhan and Rosenberg, that claimant does not suffer from pneumoconiosis, outweighed the contrary opinions of Drs. Baker and Sundaram because the opinions of Drs. Dahhan and Rosenberg were more reliable, better documented, and better reasoned and, as such, were entitled to dispositive weight. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fields v. Island*

*Creek Coal Co.*, 10 BLR 1-19 (1987); Employer's Exhibits 4, 9, 10.

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of legal pneumoconiosis pursuant at Section 718.202(a)(4), as this finding is rational and supported by substantial evidence. Consequently, because the administrative law judge properly found that the new evidence did not establish pneumoconiosis, and claimant has not challenged the administrative law judge's finding that the new evidence does not establish total respiratory disability, the administrative law judge properly found that claimant failed to establish a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d). Claimant is not therefore entitled to benefits, *see White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-7(2004), and we need not address employer's argument on cross-appeal.

Accordingly, the Decision and Order on Remand Denying Benefits of the administrative law judge 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