BRB No. 09-0238 BLA

J.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THREE OAKS MINING, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 09/29/2009
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

John T. Chafin (Chafin Law Office, P.S.C.), Prestonsburg, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (07-BLA-5362) of Administrative Law Judge Larry S. Merck on a subsequent claim[1] 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 adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the parties' stipulation that claimant worked in qualifying coal mine employment for seventeen years. Next, the administrative law judge found that the new evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge concluded that claimant failed to establish that one of the applicable conditions of entitlement had changed since the denial of the prior claim pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the new x-ray and medical opinion evidence under Section 718.202(a)(1) and (4), and therefore erred in failing to find that a change in an applicable condition of entitlement was established at Section 725.309. In response to claimant's appeal, employer urges affirmance of the administrative law

[1] Claimant filed his first application for benefits on December 14, 1990. Director's Exhibit 1-1006. In a Decision and Order dated September 29, 1992, Administrative Law Judge Daniel L. Leland found that claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 1-749. Claimant appealed and the Board affirmed the denial. [*J. B.*] *v. Three Oaks Mining, Inc.*, BRB No. 94-2863 BLA (Mar. 29, 1996) (unpub.); Director's Exhibit 1-646. Thereafter, claimant filed a petition for modification and Administrative Law Judge Robert L. Hillyard denied modification based on claimant's failure to establish any element of entitlement on April 30, 1998. Director's Exhibit 1-686. Claimant appealed this decision, which was affirmed by the Board. [*J. B.*] *v. Three Oaks Mining Corp.*, BRB No. 98-1168 BLA (Sep. 30, 1999) (unpub.); Director's Exhibit 1-322. On December 28, 2000, claimant filed a third petition for modification that was denied by Administrative Law Judge Thomas M. Burke on March 9, 2004, based on claimant's failure to establish the existence of pneumoconiosis and total respiratory disability. This decision was affirmed by the Board on December 28, 2004. [*J. B.*] *v. Three Oaks Mining, Inc.*, BRB No. 04-0531 BLA (Dec. 28, 2004) (unpub.); Director's Exhibits 1-1, 1-31.

Claimant's second application for benefits, filed on March 6, 2006, is pending herein on appeal. Director's Exhibit 3.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter of non-participation in this appeal.[2]

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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[3]

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *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*).

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 failed to establish the existence of pneumoconiosis and total disability in his previous claim.

In challenging the administrative law judge's determination pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erroneously found that the x-ray evidence was in "equipoise" and failed therefore to establish pneumoconiosis. Claimant acknowledges that the administrative law judge correctly found that Dr.

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[2] We affirm the administrative law judge's determinations that claimant established seventeen years of coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 13-16.

[3] 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. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Dahhan, who interpreted an x-ray as negative, and Dr. Baker, who interpreted an x-ray as positive, were "the best qualified readers." Claimant's Brief at 8. However, claimant contends that the administrative law judge erred in failing to find that the additional positive reading of Dr. Hieronymus and the reading of quality "1" by Dr. Barrett of the April 10, 2006 x-ray "tipped the scales" in claimant's favor by establishing pneumoconiosis by a preponderance of the evidence. Claimant's Brief at 9.

With respect to Section 718.202(a)(1), the administrative law judge considered the three interpretations of the two new x-ray films dated April 10, 2006 and April 15, 2006. The administrative law judge properly found that the April 10, 2006 chest x-ray was positive for pneumoconiosis based on the "unanimous" positive readings of Dr. Baker, who is a B reader, and Dr. Hieronymus, who possesses no radiological qualifications.[4] Decision and Order at 7; Director's Exhibits 14, 26. On the contrary, the administrative law judge properly found that the April 15, 2006 x-ray was negative for pneumoconiosis because Dr. Dahhan, who is a B reader, provided the sole interpretation of this x-ray and read it as negative. Decision and Order at 7; Director's Exhibit 16. The administrative law judge properly concluded that because Drs. Baker and Dahhan, physicians who possess equal radiological expertise, rendered conflicting but equally probative x-ray interpretations, the x-ray evidence was in equipoise and, as such, was insufficient to establish the existence of pneumoconiosis. Decision and Order at 7; *see* 20 C.F.R. §718.202(a)(1).

Contrary to claimant's argument, the administrative law judge is not required to place substantial weight on the numerical superiority of the positive x-ray readings. Rather, the administrative law judge is required to consider the qualifications of the x-ray readers in evaluating the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. 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); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Consequently, the administrative law judge properly found, based on his consideration of the x-ray evidence and the qualifications of the x-ray readers, that the x-ray evidence failed to establish pneumoconiosis at Section 718.202(a)(1), and that finding is affirmed. *See generally Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995) (Section 7(c) of the Administrative Procedure Act requires that the burden of proof remain with claimant at all times), *citing Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994),

[4] As the administrative law judge found, Dr. Barrett's interpretation of the April 10, 2006 x-ray was for film quality only, and does not include an interpretation of either the presence or absence of pneumoconiosis. 20 C.F.R. §718.102; Decision and Order at 6-7; Director's Exhibit 15.

aff'g sub nom. Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant next challenges the administrative law judge's finding that the new medical opinion evidence failed to establish pneumoconiosis pursuant to Section 718.202(a)(4). Claimant contends that the administrative law judge should have credited the medical opinions of Drs. Hieronymus and Baker, who each found the existence of clinical and legal pneumoconiosis. In particular, claimant contends that the administrative law judge should have credited the opinion of Dr. Hieronymus because he was claimant's treating physician. Claimant further contends that the administrative law judge should have credited the opinion of Dr. Baker, as Dr. Baker was as well-qualified as Dr. Dahhan, who found that claimant did not have clinical or legal pneumoconiosis. Claimant contends therefore that, based on the opinions of Drs. Hieronymus and Baker, a preponderance of the new medical opinion evidence establishes both clinical and legal pneumoconiosis pursuant to Section 718.202(a)(4).

The administrative law judge found that the new medical opinion evidence did not establish either clinical or legal pneumoconiosis at Section 718.202(a)(4). While noting that Dr. Baker is Board-certified in Internal Medicine and Pulmonary Disease, the administrative law judge properly discounted his opinion finding clinical pneumoconiosis because it was based on only a positive x-ray and a history of coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge also properly discounted Dr. Baker's finding of legal pneumoconiosis because it was not sufficiently supported by its underlying documentation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Instead, the administrative law judge properly accorded greater weight to the opinion of Dr. Dahhan, who is also Board-certified in Internal Medicine and Pulmonary Disease, but found that claimant did not have clinical or legal pneumoconiosis, because his opinion was supported by the underlying documentation. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Clark*, 12 BLR at 1-155. Finally, the administrative law judge properly accorded less weight to the opinion of Dr. Hieronymus, claimant's treating physician, finding clinical and legal pneumoconiosis, because Dr. Hieronymus's finding of clinical and legal pneumoconiosis was based on his positive x-ray reading and he did not possess any particular radiological qualifications, and because he failed to explain how claimant's symptomotology, the physical examination findings and non-qualifying pulmonary function study supported his diagnosis. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993);

Clark, 12 BLR at 1-155; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic*, 8 BLR at 1-47; Decision and Order at 12; Director's Exhibit 26.

Based on the foregoing, we affirm the administrative law judge's determination that the new evidence fails to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Moreover, claimant does not challenge the administrative law judge's finding that the new medical evidence fails to establish total disability at Section 718.204(b). Consequently, because the administrative law judge found that the new evidence failed to establish pneumoconiosis or total disability, he properly found that a change in one of the applicable conditions of entitlement was not established pursuant to Section 725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Accordingly, the Decision and Order – Denial of 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