

BRB No. 06-0450 BLA

JOHN B. COLLETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	
)	
Employer-Respondent)	DATE ISSUED: 12/26/2006
)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5523) of Administrative Law Judge Joseph E. Kane rendered 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). The administrative law judge credited claimant with eleven years of coal mine employment,¹ and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's January 15, 2002 filing date. After determining that the instant claim was a subsequent claim pursuant to 20 C.F.R. §725.309(d),² the administrative law judge weighed the evidence submitted since the prior denial and found that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, he found that the new medical evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant's prior claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject claimant's argument that a remand is required based upon Section 413(b) of the

¹ The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² Claimant filed his initial claim for benefits on December 30, 1994. Director's Exhibit 1, unpaginated. By Decision and Order dated December 13, 1996, Administrative Law Judge Daniel J. Roketenetz denied benefits based on his determination that claimant failed to establish the existence of pneumoconiosis and also that claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Id.* There is no indication that claimant took any further action on his 1994 claim. Claimant filed a second application for benefits on February 16, 1999, which was denied by the district director on October 18, 1999, finding no element of entitlement was established. Director's Exhibit 1 at pp. 1, 122.

Act.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. 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).

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

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). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); see also *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of four x-rays in light of the readers' radiological qualifications. Decision and Order at 7, 13. The administrative law judge correctly found that the October 23, 2002 and January 24, 2005 x-rays were read as negative for pneumoconiosis by Drs. Dahhan

³ We affirm as unchallenged on appeal the administrative law judge's findings that claimant has eleven years of coal mine employment, and did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and Broudy, both of whom are B readers. Decision and Order at 13; Director's Exhibit 27; Employer's Exhibit 2. Further, because the March 3, 2001 x-ray was read as positive by Dr. Baker, who was not a B reader at the time of the reading, and as negative by Dr. Scott, a Board-certified radiologist and B-reader, the administrative law judge found this x-ray negative for pneumoconiosis. Decision and Order at 13; Director's Exhibits 14, 28. Similarly, because the March 6, 2002 x-ray was read as positive for pneumoconiosis by Dr. Hussain, who possesses no special radiological qualifications, and as negative by Dr. Wheeler, who is a Board-certified radiologist and B reader, the administrative law judge found this x-ray negative. Decision and Order at 13; Director's Exhibits 15, 28. Accordingly, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the new x-ray evidence.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and "may have" selectively analyzed the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Hussain and Baker diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Broudy concluded that he does not have pneumoconiosis. Director's Exhibits 14, 15, 27; Employer's Exhibits 1-3. The administrative law judge explained that he gave less weight to Dr. Hussain's diagnosis because it was based on Dr. Hussain's discredited x-ray reading and a reference to claimant's history of coal mine dust exposure.⁴ Decision and Order at 15; Director's Exhibit 15. In addition, the administrative law judge found that while Dr. Hussain performed other physical and objective testing, he failed to explain how this documentation impacted his diagnosis. Therefore, the administrative law judge found the opinion of Dr. Hussain on the issue of clinical and legal pneumoconiosis unreasoned. *Id.* Further, the administrative law judge gave less weight to Dr. Baker's diagnosis of Coal Workers' Pneumoconiosis, category 1/0 because Dr. Baker expressly relied on his own positive x-ray reading and claimant's coal dust exposure history, and did not explain how his other physical and objective testing contributed to his diagnosis. Decision and Order at 14; Director's Exhibit 14. The administrative law judge found the doctor's opinion did not constitute a reasoned

⁴ The administrative law judge noted that Dr. Hussain also diagnosed chronic obstructive pulmonary disease, but did not attribute it to coal dust exposure. Decision and Order at 15; Director's Exhibit 15.

diagnosis of legal pneumoconiosis. Decision and Order at 15. By contrast, the administrative law judge found that Drs. Dahhan and Broudy provided reasoned and documented opinions that claimant does not have pneumoconiosis, as their opinions are supported by the objective evidence of record. Decision and Order at 15-16. The administrative law judge therefore found that their “more complete, comprehensive and better supported” opinions outweighed those of Drs. Hussain and Baker. Decision and Order at 16.

Claimant contends that the administrative law judge erred in discounting Dr. Baker’s opinion as “merely an x-ray interpretation.” In addition, claimant contends that Dr. Baker’s opinion was documented and reasoned, and that the administrative law judge provided an invalid reason for discounting Dr. Baker’s diagnosis of pneumoconiosis. Claimant’s Brief at 4-5. We reject these arguments.

Contrary to claimant’s contention, the administrative law judge permissibly found that Dr. Baker’s diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was re-read as negative by a physician with superior radiological qualifications. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In addition, the administrative law judge properly discounted Dr. Baker’s opinion because Dr. Baker failed to otherwise explain his conclusion that claimant suffers from pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the administrative law judge found the medical opinion of Dr. Baker, as well as that of Dr. Hussain, outweighed by the contrary opinions of Drs. Dahhan and Broudy, which he rationally found were better reasoned and documented. Decision and Order at 15-16; Director’s Exhibits 14, 15, 27; Employer’s Exhibits 1-3. We therefore affirm the administrative law judge’s finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the new medical opinion of Dr. Baker, that claimant is totally disabled, and the opinions of Drs. Hussain, Dahhan, and Broudy, stating that claimant is capable from a respiratory standpoint of performing his usual coal mine employment.⁵ The administrative law judge

⁵ The administrative law judge noted that Dr. Hussain diagnosed a “moderate” impairment, but, nonetheless, opined that claimant retains the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Decision and Order at 19; Director’s Exhibit 15.

found that Dr. Baker's opinion was not a diagnosis of total disability, because Dr. Baker merely advised against a return to a dusty environment. Decision and Order at 19; Director's Exhibit 14. In addition, he accorded little weight to Dr. Baker's opinion because it was not supported by its underlying documentation. *Id.* Finding the opinions of Drs. Hussain, Dahhan, and Broudy to be supported by their underlying documentation and also the objective laboratory data, the administrative law judge found that these opinions were well reasoned and documented and outweighed the contrary opinion of Dr. Baker. Decision and Order at 19. Consequently, he determined that the new medical opinions did not establish that claimant is totally disabled.

Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 7-8, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

The claimant's usual coal mine work included being a motor operator and belt man. 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, as well as the medical opinions of Dr. Baker, 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 8. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). Moreover, the administrative law judge reasonably found the opinion of Dr. Baker entitled to little weight as the physician's conclusions were not supported by the underlying documentation. Decision and Order at 19; see *Minnich v. Pagnotti Enterprises*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

Furthermore, the administrative law judge permissibly chose to accord greater weight to better reasoned and documented opinions that claimant has no respiratory or pulmonary impairment. Decision and Order at 19-20; see *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Therefore, because the administrative law judge credited the medical reports concluding that claimant has no

impairment, it was unnecessary for him to compare the exertional requirements of claimant's job duties with the medical reports. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We therefore reject claimant's contention that the administrative law judge erred in his analysis of Dr. Baker's report.

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because the Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(b)(2)(iv), we affirm his determination that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2).

Claimant further contends that because the administrative law judge did not fully credit Dr. Hussain's March 6, 2002 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that while he disagrees with the administrative law judge's finding that Dr. Hussain's medical opinion was unreasoned at Section 718.202(a), a "remand for clarification or correction by Dr. Hussain on the issue of pneumoconiosis would not result in an award of benefits" because the administrative law judge properly found that Dr. Hussain's report and the medical evidence as a whole failed to establish total respiratory disability, a necessary element of entitlement. Director's Response Letter at 2.

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).

In the instant case, the administrative law judge found that Dr. Hussain's diagnosis of clinical pneumoconiosis was based solely on claimant's history of dust exposure and his positive x-ray reading, and the administrative law judge found that reading outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 13, 15. In addition, the administrative law judge found that Dr. Hussain diagnosed a chronic obstructive pulmonary disease, but did not opine that it is

related to claimant's coal dust exposure. Decision and Order at 15. The administrative law judge thus found that Dr. Hussain's opinion with respect to the diagnoses of clinical and legal pneumoconiosis was unreasoned. *Id.* The administrative law judge ultimately found, however, that a remand to the district director for the Director to provide a reasoned and documented opinion concerning the existence of pneumoconiosis would be futile because "Dr. Hussain failed to find the Claimant was totally disabled due to pneumoconiosis" and, as a result, claimant could not prevail on this claim. Decision and Order at 15 n.12.

In response to claimant's assertion that the case must be remanded, the Director agrees with the administrative law judge that remand of the case for another pulmonary evaluation is not required based on the facts of this case. The Director asserts that, even if Dr. Hussain were to clarify or correct his diagnosis of pneumoconiosis, Dr. Hussain's conclusion that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, would still stand because the administrative law judge did not find the opinion defective on this issue. Director's Response Letter at 2. Consequently, the Director submits that a more credible opinion on the issue of pneumoconiosis from Dr. Hussain, developed on remand, "would not result in an award of benefits" as the opinion does not establish total disability at Section 718.204(b), an essential element of entitlement at 20 C.F.R. Part 718. *Id.* Based on his assertion that the outcome of the case would not change as a result of a remand, the Director urges that remand for the Director to supplement the report provided pursuant to Section 413(b) is not necessary. *Id.*

We agree with the position taken by the Director that remand of this case is not warranted. As the record shows, Dr. Hussain opined that claimant has a moderate pulmonary impairment, but he retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, Director's Exhibit 15, an assessment on which the administrative law judge relied, in part, in finding the medical evidence insufficient to establish total disability pursuant to Section 718.204(b)(2). Decision and Order at 19-20. Consequently, because we affirm the administrative law judge's finding of no total disability at Section 718.204(b)(2), *see* discussion, *supra*, claimant could not prevail, even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of pneumoconiosis. Because it would be futile, we decline to order a remand of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because the administrative law judge's finding that the new evidence did not establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), is supported by substantial evidence and in accordance with law, claimant has not established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Ross*, 42

F.3d at 997, 19 BLR at 2-18. Consequently, we affirm the denial of benefits in this subsequent claim.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge