

BRB No. 06-0738 BLA

RICHARD L. SHARPNACK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/28/2007
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Daniel L. Chunko (Chunko, Pangburn, Francis & Gorman, LLC), Washington, Pennsylvania, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2005-BLA-5585) of Administrative Law Judge Richard A. Morgan 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). This case involves a subsequent claim filed

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<sup>1</sup> By letter dated February 20, 2007, claimant's attorney notified the Board of claimant's death.

on February 23, 2004.<sup>2</sup> 20 C.F.R. §725.309. Based on a stipulation of the parties, the administrative law judge credited claimant with seventeen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found that the evidence is insufficient to establish that claimant's total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge therefore found that claimant failed to meet his burden to establish a change in an applicable condition of entitlement since the denial of his 2000 claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in finding that “[c]laimant’s condition of pneumoconiosis did not arise out of coal mine employment, or that his total disability did not arise out of his coal mine employment.” Claimant’s Brief at 1. In addition, claimant contends that the administrative law judge should have given deference to the opinion of Dr. Setty because his opinion was more objective than the contrary evidence of record. In response, employer urges affirmance of the administrative law judge’s denial of benefits as supported by substantial evidence. The Director, Office of Workers’ Compensation Programs, has filed a letter indicating that he will not file a response in this case.<sup>3</sup>

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,

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<sup>2</sup> Claimant filed his initial application for benefits on March 17, 1986, which was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order issued on December 29, 1988. Director’s Exhibit 1. Claimant filed a duplicate claim on February 1, 2000. *Id.* By Decision and Order dated January 25, 2002, Administrative Law Judge Richard A. Morgan denied benefits on the grounds that claimant failed to establish the existence of pneumoconiosis. *Id.* On appeal, the Board affirmed the denial of benefits. *Sharpnack v. Consolidation Coal Co.*, BRB No. 02-0402 BLA (Feb. 10, 2003)(unpub.). *Id.* Claimant took no further action with respect to the denial of his duplicate claim until he filed the instant subsequent claim on February 23, 2004. Director’s Exhibit 3.

<sup>3</sup> No party challenges the administrative law judge’s decision to credit claimant with seventeen years of coal mine employment, or his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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., Inc.*, 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 the existence of pneumoconiosis. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995)(holding under former provision that claimant must establish one of the elements of entitlement that was previously adjudicated against him).<sup>4</sup>

In challenging the administrative law judge’s denial of benefits, claimant contends that the administrative law judge erred in finding that claimant’s condition of pneumoconiosis did not arise out of coal mine employment. Claimant’s Brief at 1. In addition, claimant contends that the administrative law judge erred in failing to “give deference to the opinion of Dr. Setty,” whose opinion claimant contends is more objective than employer’s experts. Claimant’s Brief at 2-3. These contentions lack merit.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Dr. Setty, that claimant has a coal dust related lung

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<sup>4</sup> The record supports the administrative law judge’s determination that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant’s coal mine employment took place in Pennsylvania. Decision and Order at 2 n.1; Director’s Exhibit 5; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

disease, and the contrary opinions of Drs. Renn and Altmeyer, that claimant does not suffer from a coal dust related lung disease. Decision and Order at 7-12, 17; Director's Exhibits 14, 24, 27, 29; Employer's Exhibits 1, 3, 4. The administrative law judge reasonably exercised his discretion as trier-of-fact, and determined that the opinions of Drs. Altmeyer and Renn are better supported by the objective evidence, and, thus, are more persuasive than the opinion of Dr. Setty. Decision and Order at 17; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge noted that Dr. Setty did not perform any objective tests to confirm that claimant was no longer smoking, and permissibly questioned whether Dr. Setty's opinion would change if he were aware of the results of the carboxyhemoglobin tests obtained by employer's experts, which suggested that claimant had a more significant smoking history than reported by Dr. Setty.<sup>5</sup> Decision and Order at 4, 17; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Claimant also asserts that the administrative law judge erred by failing to "give deference to the opinion of Dr. Setty," whose opinion claimant contends is more objective than the other physicians of record. Claimant's Brief at 2-3. There is no authority, however, for a requirement that the administrative law judge must give deference to the opinions of one party's physicians over those of the other. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Rather, the administrative law judge has a duty to independently evaluate all of the relevant evidence of record. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). The

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<sup>5</sup> The administrative law judge did not consider claimant's testimony to be credible with respect to his smoking history. Decision and Order at 4. Specifically, the administrative law judge noted claimant's conflicting statements as to the length of his smoking habit, including a four year history of smoking 3 to 4 cigarettes per day, Director's Exhibit 38; a history of one-half pack of cigarettes per day for seven years, as told to Dr. Renn, Director's Exhibit 27; a ten year smoking history ending in 1969, as set forth by Dr. Setty, Director's Exhibit 14; and, a twenty-two year smoking history ending in 1969, as told to Dr. Altmeyer, Employer's Exhibit 1. Decision and Order at 4. In addition, the administrative law judge noted that Drs. Renn and Altmeyer reported the results of a carboxyhemoglobin test administered as part of their examinations that revealed levels compatible with a current smoker of up to two packs of cigarettes per day. Decision and Order at 4; Director's Exhibit 27; Employer's Exhibit 1. Consequently, the administrative law judge concluded that claimant's smoking history was more significant than reported to Dr. Setty. *Id.*

regulations state only that, in appropriate cases, claimant's treating physician's opinion may receive deference, but there is no evidence in the record that Dr. Setty was claimant's treating physician. Hearing Transcript at 11; *see* 20 C.F.R. §718.104(d); *see also* *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Because claimant does not allege any specific examples of bias on the part of the physicians providing the medical opinions of record, we reject claimant's contention that the medical opinion evidence established the existence of pneumoconiosis.

As the administrative law judge has considered the relevant evidence and reasonably found the opinion of Dr. Setty, the only opinion supportive of claimant's burden, entitled to less weight than the contrary opinions of record, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm his finding that claimant, through the evidence submitted since the prior denial, has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) is supported by substantial evidence and is in accordance with law, claimant has not established a change in an applicable condition of entitlement.<sup>6</sup> *See* 20 C.F.R. §725.309(d); *Swarrow*, 72 F.3d at 308, 20 BLR at 2-76. Consequently, we affirm the denial of benefits in this subsequent claim.

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<sup>6</sup> We decline to address claimant's allegation of error with regard to the administrative law judge's finding that the evidence fails to establish total disability due to pneumoconiosis at Section 718.204 (c), as it is rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge