

BRB No. 04-0450 BLA

LENVILLE FIELDS )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DIAMOND MAY COAL COMPANY ) DATE ISSUED: 12/14/2004  
 )  
 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 Alice M. Craft,  
Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,  
Kentucky for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5374) of  
Administrative Law Judge Alice M. Craft 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). Claimant filed the instant subsequent claim on February 27,  
2001.<sup>1</sup> Director's Exhibit 3. After crediting claimant with at least ten years of coal mine

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<sup>1</sup> Claimant initially filed a claim for benefits on January 1, 1970, which was denied  
by the district director for failure to establish, 1) the existence of pneumoconiosis; 2) that  
the disease arose from coal mine employment; and 3) total disability due to  
pneumoconiosis. Director's Exhibit 1. Claimant filed a duplicate claim on March 14,  
1985. *Id.* The district director determined that claimant failed to establish a material

employment, the administrative law judge found that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b).<sup>2</sup> The administrative law judge thus determined that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. Claimant appeals, challenging the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b)(2)(iv).<sup>3</sup> Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case, claimant's prior claim was denied because he failed to establish all of the requisite elements of entitlement. *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a

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change in conditions and therefore denied benefits pursuant to the prior regulation at 20 C.F.R. §725.309(d) (2000). *Id.* Claimant filed another duplicate claim on June 13, 1994, which was denied by Administrative Law Judge Michael P. Lesniak on January 31, 1997. Director's Exhibit 1. Judge Lesniak determined that claimant failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. *Id.* The denial was affirmed by the Board, *Fields v. Diamond May Coal Company*, BRB No. 97-0679 BLA (Jan. 15, 1998) (unpub.). *Id.* Claimant took no further action with respect to that claim. The instant subsequent claim is dated February 27, 2001. Director's Exhibit 3.

<sup>2</sup> The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

<sup>3</sup> The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a)(2) and (a)(3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 9-11. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held, in a case involving the prior regulations, that in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.<sup>4</sup> See *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.* In this case, the administrative law judge properly considered, in accordance with 20 C.F.R. §725.309(d) and *Ross*, whether the new evidence was sufficient to establish the existence of pneumoconiosis or that claimant is totally disabled due to pneumoconiosis. See Decision and Order at 3.

Claimant generally argues that the administrative law judge erred in finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge correctly noted that the record contains two new x-rays dated May 26, 2001 and August 17, 2001, which were read as both positive and negative for pneumoconiosis. Decision and Order at 10. In light of the conflict in these readings, the administrative law judge properly considered the qualifications of the readers. See 20 C.F.R. §718.202(a)(1); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). She noted that the May 25, 2001 x-ray was read as positive by Dr. Hussain, who was neither a B-reader nor a radiologist, and negative by Dr. Poulos, who was dually qualified. Director's Exhibits 10, 13; Decision and Order at 10. The administrative law judge then permissibly assigned determinative weight to Dr. Poulos' negative reading of the May 25, 2001 x-ray based on his superior qualifications. See *Trent*, 11 BLR at 1-26; *Dixon*, 8 BLR at 1-344; Decision and Order at 10. With respect to the August 17, 2001 x-ray, the administrative law judge noted that the x-ray was read as positive by Dr. Alexander, a dually qualified physician, as negative by Dr. Poulos, a dually qualified physician, and as negative by Dr. Rosenberg, a B-reader. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 3; Decision and Order at 10. Based on the

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<sup>4</sup> Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

weight of the negative readings, the administrative law judge thus found that the August 17, 2001 x-ray was also negative for pneumoconiosis. Decision and Order at 10. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

With respect to whether claimant established the existence of pneumoconiosis based on the medical opinions at 20 C.F.R. §718.202(a)(4), claimant generally contends that the administrative law judge erred by not crediting Dr. Hussain's diagnosis of pneumoconiosis. Claimant's brief at 4-5. The administrative law judge, however, permissibly assigned less weight to Dr. Hussain's opinion at 20 C.F.R. §718.202(a)(4) because Dr. Hussain based his diagnosis of pneumoconiosis in part on his own positive reading of the May 25, 2001 x-ray, while the administrative law judge credited Dr. Poulos' negative reading of the May 25, 2001 x-ray because he was better qualified. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 11. Moreover, the administrative law judge was persuaded by the opinions of Drs. Rosenberg and Repsher, that claimant did not have legal or clinical pneumoconiosis, because she found their opinions to be better supported by claimant's medical history and the overall weight of the objective evidence when considered as a whole. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 11. The administrative law judge also specifically noted that Dr. Repsher had the opportunity to review "other medical evidence, including treatment records and medical opinions rendered in [c]laimant's other claims" prior to rendering his opinion that claimant did not have pneumoconiosis. Decision and Order at 11. Consequently, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We next address claimant's contention that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Again, the administrative law judge considered the medical opinions of Drs. Hussain, Rosenberg and Repsher. Decision and Order at 12. Contrary to claimant's contention, the administrative law judge properly considered claimant's testimony that he last worked in the coal mines as a cutting machine operator. Claimant's brief at 5-8; Decision and Order at 4. The administrative law judge further noted that, while Dr. Hussain opined that claimant was totally disabled by a pulmonary or respiratory impairment, Drs. Rosenberg and Repsher opined that claimant's mild respiratory impairment would not prevent him from performing his last coal mine job. Director's Exhibit 10; Employer's Exhibits 3, 4; Decision and Order at 12. In weighing the conflicting medical opinions, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Rosenberg and Repsher because she found them to be better supported by the objective

medical evidence, including the non-qualifying pulmonary function and arterial blood gas studies. *See King*, 8 BLR at 1-262; *Wetzel*, 8 BLR at 1-139; Decision and Order at 12. Consequently, because the administrative law judge gave a permissible reason for the weight she assigned the new medical opinion evidence relevant to total disability, we affirm her finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's determination, pursuant to 20 C.F.R. §725.309 and *Ross*, that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement since the prior denial of benefits. We therefore affirm the administrative law judge's denial of benefits.

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 S. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge