BRB No. 06-0116 BLA

EDGAR E. NEEDHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 02/28/2006
	)	
and	)	
	)	
ARCH MINERALS CORPORATION	)	
	)	
Employer/Carrier-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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Ralph D. Carter (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor of Labor, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-05846) of Administrative Law Judge William S. Colwell on a subsequent 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).[1] The administrative law judge considered the new evidence and found that claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. The administrative law judge thus found, pursuant to 20 C.F.R. §725.309, that claimant failed to establish a change in an applicable condition of entitlement since the denial of his prior claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the x-ray evidence at 20 C.F.R. §718.202(a)(1) relevant to whether he established the existence of pneumoconiosis. Claimant further asserts that, because the administrative law judge refused to assign probative weight to the opinion of the Department of Labor examining physician, Dr. Simpao, the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b).[2] Claimant further argues that the administrative law judge erred in resolving that he was not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, arguing that the Department of Labor satisfied its obligation to provide claimant was a complete, credible pulmonary evaluation. The Director takes no position on claimant's entitlement to benefits.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant first filed a claim for benefits on July 22, 1991, which was denied by the district director on December 19, 1991 because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on July 5, 1998, which was likewise denied for claimant's failure to establish the existence of pneumoconiosis, causal relationship, and total disability due pneumoconiosis. Director's Exhibit 2. The instant subsequent claim was filed on February 5, 2002. Director's Exhibit 4.

[2] Claimant cites to the administrative law judge's Decision and Order at page 17, concerning the administrative law judge's finding as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in the

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulation at 20 C.F.R. §725.309(d) provides that a 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 that, in a case involving the prior regulations, 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.[4] *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, claimant's prior claim was denied because he failed to establish that he had pneumoconiosis, that the disease arose out of coal mine employment, or that he was totally disabled due to pneumoconiosis. *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 2. After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Claimant asserts on appeal that the administrative law judge "may have" selectively analyzed the x-ray evidence at 20 C.F.R. §718.202(a)(1) to find that he failed to establish the existence of pneumoconiosis.[5] Claimant's Brief at 3. We disagree. The

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Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

[4] 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 1.

[5] Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 16. He also determined that claimant was unable

administrative law judge correctly noted that "the subsequent claim record contains the interpretations of two chest x-rays." Decision and Order at 15. The administrative law judge found that the first x-ray dated April 16, 2002 was read as positive by Dr. Simpao, and negative for pneumoconiosis, by Dr. Wiot. Director's Exhibits 12, 13; Employer's Exhibit 4. A second x-ray dated June 6, 2002 was also read as negative by Drs. Lockey and Wiot, but positive by Dr. Alexander. Employer's Exhibits 1, 2; Claimant's Exhibit 2.

In weighing these conflicting readings, the administrative law judge properly considered the relative qualifications of the readers, *see Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). With respect to the April 16, 2002 x-ray, the administrative law judge deferred to Dr. Wiot's negative reading since he was dually qualified as a Board-certified radiologist and B-reader, while Dr. Simpao had no radiological qualifications. Decision and Order at 15. The administrative law judge thus found that the April 16, 2002 x-ray was negative for pneumoconiosis. *Id*. The administrative law judge also credited Dr. Wiot's negative reading of the June 6, 2002 x-ray over Dr. Alexander's positive reading because the administrative law judge considered Dr. Wiot to be better qualified and more experienced than Dr. Alexander.[6] *Id*. Notwithstanding his crediting of Dr. Wiot's negative reading of this film, however, the administrative law judge also noted that, at best, the negative and positive readings of the June 6, 2002 x-ray would be equally probative. Decision and Order at 15; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Consequently, because substantial evidence supports the administrative law judge finding at 20 C.F.R. §718.202(a)(1) that either the weight of the x-ray evidence was negative for the existence of pneumoconiosis or equally probative as to the existence of the disease, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence.

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to avail himself of any of the presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id*. The administrative law judge's findings with respect to Section 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Even though both Drs. Alexander and Wiot were dually qualified, Board-certified, B-readers, the administrative law judge noted Dr. Wiot's more extensive academic experience, in addition to his radiological credentials, in according his negative reading greater weight. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Moreover, the administrative law judge found that this x-ray had also been read negative by Dr. Lockey, a B-reader. Decision and Order at 8, n.3; 15.

In relation to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), we reject claimant's assertion that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.405.[7] Claimant's Brief at 4. Contrary to claimant's contention, the Director's obligation to provide him with a complete and credible pulmonary evaluation is not tantamount to an obligation to provide claimant with an examining physician's opinion that is given controlling weight by the administrative law judge. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge found that Dr. Simpao's opinion on the existence of pneumoconiosis was outweighed by the countervailing opinion of Dr. Lockey that claimant did not suffer from any respiratory disease.[8] Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 3; Decision and Order at 16-17. We thus hold that the Director satisfied his obligation under the Act to provide claimant with a complete and credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

[7] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

[8] The administrative law judge weighed the conflicting opinions of Drs. Simpao and Lockey relevant to the existence of clinical and legal pneumoconiosis and decided to assign greatest probative weight to Dr. Lockey's opinion because he was Board-certified in internal medicine and pulmonary disease, while the curriculum vitae proffered by claimant on behalf of Dr. Simpao did not indicate that Dr. Simpao held any Board-certification. Decision and Order at 11, 12, 17. The administrative law judge also found Dr. Lockey's opinion that claimant did not have pneumoconiosis to be better supported by the objective evidence of record. Decision and Order at 17. The administrative law judge further noted that Dr. Simpao's diagnosis of pneumoconiosis was based on his own positive x-ray reading, which had been discredited by the administrative law judge in the analysis of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order at 16.

We note that claimant does not challenge the weight accorded Dr. Simpao's opinion at Section 718.202(a)(4) or otherwise assign error to the administrative law judge's weighing of the medical opinion evidence relevant to the existence of pneumoconiosis. Claimant's counsel only asserts that claimant is entitled to a new pulmonary examination based on the weight accorded the evidence. We therefore affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Additionally, we reject claimant's contention that the administrative law judge erred in finding that he was not totally disabled by a respiratory or pulmonary impairment. Claimant's Brief at 4-6. Claimant contends that the administrative law judge failed to consider the exertional requirements of his usual coal mine work in weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[9] Contrary to claimant's contention, the administrative law judge specifically considered that claimant's last coal mine job involved heavy manual labor as a roof bolter, and also credited Dr. Simpao's diagnosis of a "mild respiratory impairment" as supporting a finding that claimant was totally disabled form performing his usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 18. The administrative law judge, however, permissibly assigned controlling weight to Dr. Lockey's diagnosis that claimant was *not* totally disabled, since the administrative law judge found Dr. Lockey's opinion to be better supported by the objective evidence of record, including the non-qualifying pulmonary function and arterial blood gas studies. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 18. The administrative law judge noted that he was persuaded by Dr. Lockey's explanation as to why claimant's respiratory symptoms were not due to coal dust exposure. Decision and Order at 18. He also considered Dr. Lockey's medical conclusions regarding the issue of total disabilty "to be more adequately explained, especially when subjected to deposition questioning." *Id*.

We note that the credibility determinations rendered by the administrative law judge in this case were within his purview as the trier of fact. *See Clark*, 12 BLR at 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We therefore affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled, he failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309, and therefore, he is unable to establish his

[9] The administrative law judge found that the pulmonary function study and arterial blood gas study evidence was non-qualifying for total disabilty, and therefore, that claimant failed to establish his total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge further found that since there was no evidence of record that claimant suffered from cor pulmonale, claimant was unable to establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iii). We affirm the administrative law judge's findings with respect to Section 718.204(b)(2)(i)-(iii) as they are unchallenged by the parties on appeal. *See Skrack*, 6 BLR at 1-710.

entitlement to benefits. *See* 20 C.F.R. §725.309; *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is hereby 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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JUDITH S. BOGGS
Administrative Appeals Judge