BRB No. 12-0323 BLA

BOBBY L. DEAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/27/2013
	)	
HARLAN KENTUCKY-VIRGINIA COAL, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order awarding benefits (2011-BLA-5709) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim,[1] filed on June 9, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

[1] Claimant's initial claim, filed on December 20, 1993, was denied by the district director, because claimant did not establish any element of entitlement. Claimant thereafter requested reconsideration, which was denied. Director's Exhibit 1. There is no evidence that claimant took any further action in regard to his 1993 claim. Claimant filed a second claim on April 9, 2001, which was subsequently withdrawn. Director's Exhibit 37.

After crediting claimant with at least 20.36 years of coal mine employment,[2] of which at least five years were underground, the administrative law judge found that the new medical evidence established that claimant has clinical pneumoconiosis,[3] pursuant to 20 C.F.R. §718.202(a)(1).[4] Decision and Order at 5-6. The administrative law judge further found that the evidence established that claimant is totally disabled due to a respiratory impairment, and that clinical pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(b)(2), (c). As the administrative law judge found that claimant established each element of entitlement, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of clinical pneumoconiosis, and that claimant is totally disabled due to clinical pneumoconiosis.[5] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response 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

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4; Hearing Transcript at 27. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] The administrative law judge found that claimant was unable to invoke the presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish that the conditions in his surface coal mine employment were substantially similar to those in an underground mine. *See* 30 U.S.C. §921(c)(4); Decision and Order at 4-5.

[5] Because employer does not challenge the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 did not establish any element of entitlement. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his 1993 claim. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight interpretations of three x-rays dated May 10, 2010, August 20, 2010, and December 1, 2010, and considered the readers' radiological qualifications.[6] In weighing the x-ray evidence, the administrative law judge initially found that Dr. Meyer, a Board-certified radiologist and B reader, read each of the three x-rays as negative for pneumoconiosis. Decision and Order at 5. The administrative law judge discounted Dr. Meyer's negative x-ray readings, finding that Dr. Meyer's suggestion that the changes seen on the x-rays reflected past granulomatous disease, rather than pneumoconiosis, was speculative, as there was no evidence in the record that claimant was ever diagnosed with that disease. Decision and Order at 5. According greater weight to the definitive positive x-ray readings of Drs. Miller and Alexander, who are also Board-certified radiologists and B readers, the administrative law judge found that the preponderance of the evidence by the most highly qualified readers established the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1). *Id.* at 5-6.

[6] Dr. Miller, a Board-certified radiologist and B reader, interpreted the May 10, 2010 x-ray as positive for pneumoconiosis, while Dr. Meyer, also a dually-qualified physician, interpreted the x-ray as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Alexander, a dually-qualified physician, and Dr. Baker, who is a B reader, read the August 20, 2010 x-ray as positive for pneumoconiosis, while Dr. Meyer interpreted the x-ray as negative for pneumoconiosis. Finally, Dr. Miller interpreted the December 1, 2010 x-ray as positive for pneumoconiosis, while Dr. Meyer and Dr. Dahhan, a B reader, interpreted the x-ray as negative for the disease. Director's Exhibit 15; Employer's Exhibit 1; Claimant's Exhibit 2.

Employer contends that the administrative law judge failed to adequately explain how the x-ray interpretations of Drs. Miller and Alexander outweighed those of Dr. Meyer. Employer's Brief at 2-3. We disagree. Contrary to employer's contention, the administrative law judge permissibly discounted Dr. Meyer's negative x-ray readings as equivocal, because Dr. Meyer identified granulomatous disease as the cause of the opacities on claimant's x-rays, when there is no evidence in the record that the claimant was diagnosed with, or treated for, granulomatous disease. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 5. The administrative law judge further sufficiently explained why the positive readings by Drs. Miller and Alexander outweighed the contrary reading of Dr. Dahhan, based on the superior qualifications of Drs. Miller and Alexander. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). As the administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence, we reject employer's contention of error and affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1).[7]

Employer also challenges the administrative law judge's finding that claimant's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 3-5. In considering whether the evidence established that claimant is totally disabled due to pneumoconiosis, the administrative law judge addressed the medical opinions of Drs. Baker and Dahhan. Dr. Baker opined that claimant's clinical pneumoconiosis, in addition to his chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis, contributed to his totally disabling "moderate to severe respiratory impairment." Director's Exhibit 14. Dr. Baker further concluded that this impairment "is significantly due to [claimant's] coal dust exposure," though he also noted that claimant's smoking history is a contributing factor. *Id.* In contrast, Dr. Dahhan, while opining that claimant is totally disabled due to a "moderate, non-parenchymal, restrictive ventilatory disease," concluded that this impairment is not a result of claimant's exposure to coal mine dust. Director's Exhibit 15. In weighing the medical opinion evidence at 20 C.F.R. §718.204(c), the administrative law judge credited

[7] Because claimant established ten or more years of coal mine employment, the administrative law judge properly found that claimant was entitled to the rebuttable presumption that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order at 6. The administrative law judge further found that employer failed to rebut this presumption. *Id*. Because employer does not challenge these findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

Dr. Baker's opinion that claimant's clinical pneumoconiosis contributed to his totally disabling respiratory impairment. Decision and Order at 8. The administrative law judge accorded less weight to Dr. Dahhan's opinion, as the physician did not diagnose pneumoconiosis, contrary to the administrative law judge's finding.[8] *Id.*

Employer contends that the administrative law judge erred in his consideration of Dr. Baker's opinion. Initially, employer contends that Dr. Baker based his opinion solely upon the results of a non-qualifying pulmonary function study, and therefore, that his opinion is not well-reasoned or documented.[9] Employer's Brief at 3. We disagree. Contrary to employer's contention, test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician concludes that the results are indicative of diminished pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In this case, the administrative law judge noted that Dr. Baker interpreted claimant's non-qualifying August 20, 2010 pulmonary function study as revealing "a moderate ventilator defect on both the pre and post bronchodilators," and concluded that claimant has a totally disabling respiratory impairment. Decision and Order at 7; Director's Exhibit 14. Moreover, the administrative law judge correctly found that, in addition to the pulmonary function study results, Dr. Baker based his opinion on a physical examination of claimant, a blood gas study reflecting mild resting hypoxemia, and claimant's exposure histories. *Id.* We therefore reject employer's allegation of error.

There is also no merit to employer's argument that Dr. Baker based his opinion on generalities, and assumed "that coal mine dust exposure must always be a significant contributing factor to any pulmonary impairment." Employer's Brief at 3-4. A review of Dr. Baker's deposition testimony reveals that he agreed with the proposition that claimant's smoking history, by itself, would be sufficient to cause claimant's chronic bronchitis, obstructive lung disease, and hypoxemia. Employer's Exhibit 2 at 7. However, Dr. Baker further noted that "all the literature based on expert reviews of the subject suggests that coal dust and cigarette smoking are nearly equivalent in terms of

[8] Employer does not challenge the administrative law judge's decision to accord less weight to Dr. Dahhan's opinion. This finding is therefore affirmed. *Skrack*, 6 BLR at 1-711.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

their effects. And if one has both exposures you cannot just simply exclude coal [mine] dust because [the individual has] smoked." *Id.* at 9-10. Moreover, Dr. Baker specifically agreed with the proposition "that coal mine dust exposure will not always result in a pulmonary impairment." *Id.* at 12. Therefore, Dr. Baker did not opine that coal dust will always contribute to a smoking miner's pulmonary impairment. Thus, the administrative law judge permissibly credited Dr. Baker's opinion, finding that the physician took into account claimant's smoking and coal mine dust exposure histories, and explained his conclusion that claimant's pneumoconiosis and smoking history contributed to the development of a totally disabling respiratory impairment. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. Nov. 29, 2007) (unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 7-8; Director's Exhibit 14; Employer's Exhibit 2. Because employer raises no other contentions of error in regard to the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge