BRB No. 04-0626 BLA

THOMAS E. SWINEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 03/18/2005
HORIZON NATURAL RESOURCES	)	
	)	
Employer-Carrier	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas E. Swiney, Elkhorn City, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.[1]

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

PER CURIAM:

Claimant, without the assistance of counsel,[2] appeals the Decision and Order - Denial of Benefits (03-BLA-5632) of Administrative Law Judge Robert L. Hillyard

[1] After filing a response brief, employer's counsel withdrew from the case.

rendered on a subsequent claim[3] 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).

In the Decision and Order - Denying Benefits, the administrative law judge credited claimant with sixteen years of coal mine employment.[4] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

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[2] Susie Davis, president of the Kentucky Black Lung Coalminers and Widows Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[3] Claimant's initial application for benefits filed on November 4, 1994, was denied by Administrative Law Judge Paul H. Teitler because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed Judge Teitler's denial of benefits on February 25, 1997. *Swiney v. Old Ben Coal Co.*, BRB No. 96-1438 BLA (Feb. 25, 1997)(unpub.). On February 5, 2001, claimant filed his current application for benefits, which is considered a subsequent claim because it was filed more than one year after the final denial of the previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

[4] The record indicates that claimant's last coal mine employment occurred in West Virginia. Hearing Tr. at 13, 18. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary 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 Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

The administrative law judge found that claimant established sixteen years of coal mine employment based on documentary evidence reflecting his employment as a miner from 1976 to 1992. Substantial evidence supports the administrative law judge's finding. Director's Exhibits 4, 6, 8. It is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reviewed six readings of three new chest x-rays. There was one positive reading, four negative readings, and one reading addressing only the quality of a particular x-ray. Director's Exhibits 13-16; Employer's Exhibits 1, 5. Because the October 4, 2002 and August 31, 2001 x-rays received only negative readings, the administrative law judge found them negative for pneumoconiosis. The administrative law judge observed that Dr. Sundaram's positive reading of the July 18, 2002 x-ray was countered by the negative reading of Dr. Wiot, who is a Board-certified Radiologist and B-reader. Director's Exhibit 16; Employer's Exhibit 1. Noting accurately that Dr. Sundaram "present[ed] no specialty credentials in the interpretation of x-rays," the administrative law judge reasonably gave "greater weight to the dually certified reading of Dr. Wiot . . . ."

Decision and Order at 10; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). Substantial evidence supports the administrative law judge's finding that the new x-rays did not establish the existence of pneumoconiosis. We therefore affirm his finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the record contained five new medical opinions. Drs. Sundaram and Gibson diagnosed pneumoconiosis, Director's Exhibit 16, while Drs. Hussain, Dahhan, and Tuteur concluded that claimant does not have pneumoconiosis. Director's Exhibit 13; Employer's Exhibits 3, 5. The administrative law judge noted that Dr. Sundaram's and Dr. Gibson's qualifications were not of record, and reasonably accorded "substantial weight" to the opinions of Drs. Dahhan and Tuteur based on these physicians' "superior credentials" as Board-certified internists and pulmonologists. Decision and Order at 12, 13; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Additionally, the administrative law judge permissibly found the opinions of Drs. Dahhan and Tuteur well-reasoned and supported by their underlying documentation. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2- 31-32 (4th Cir. 1997). By contrast, the administrative law judge found that Drs. Sundaram and Gibson did not render well reasoned opinions because the July 18, 2002, positive x-ray reading upon which they relied "was refuted by the dually certified interpretation of Dr. Wiot." Decision and Order at 12, 13; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge also found, within his discretion, that Drs. Sundaram and Gibson did not adequately explain their diagnoses with reference to claimant's normal pulmonary function results or to Dr. Gibson's finding that claimant's lungs were normal on examination. *See Underwood*, 105 F.3d at 951, 21 BLR at 2- 31-32. A review of the record discloses substantial evidence to support the administrative law judge's findings. We therefore affirm his finding that the new medical opinions did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5]

[5] The administrative law judge did not discuss Dr. Hussain's opinion when weighing the opinions at 20 C.F.R. §718.202(a)(4), but Dr. Hussain's opinion that

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the three new pulmonary function studies and noted accurately that each study was non-qualifying.[6] Director's Exhibits 13, 16; Employer's Exhibit 5. Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted accurately that the October 14, 2002 and August 31, 2001 resting blood gas studies were non-qualifying. Director's Exhibit 13; Employer's Exhibit 5. He considered that the exercise portion of the August 31, 2001 blood gas study was qualifying, but reasonably took into account that "this reading was invalidated by Dr. Tuteur, a Board-certified Internist and Pulmonologist."[7] Decision and Order at 15; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997)(holding that an administrative law judge could rely on a physician's opinion that an exercise blood gas study was inaccurate). In claimant's brief to the Board filed without the assistance of counsel, he states that a blood gas study administered by Dr. Repsher was "low." Claimant's Brief at 2. Review of the record and the administrative law judge's decision reflects that employer did not proffer Dr. Repsher's medical report at the hearing and the report was not admitted into the record. Decision and Order at 3; Hearing Tr. at 6. Substantial evidence supports the administrative law judge's findings that the new pulmonary function and blood gas studies of record did not show that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii). Those findings are therefore affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge noted accurately that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. We therefore affirm his finding pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found Dr. Dahhan's and Dr. Tuteur's opinions that claimant has no respiratory or pulmonary impairment to be well-reasoned and permissibly accorded them greater weight based on

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claimant does not have pneumoconiosis could only have supported the administrative law judge's finding. Director's Exhibit 13 at 5.

[6] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The record reflects that Dr. Tuteur questioned the validity of the exercise results because the exercise pCO2 and pH values remained identical to their resting values, when, according to Dr. Tuteur, they should have fallen with exercise. Decision and Order at 7; Employer's Exhibit 3 at 4.

the physicians' "superior credentials." Decision and Order at 16, 17; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Dillon*, 11 BLR at 1-114. The administrative law judge found Dr. Hussain's opinion that claimant retains the respiratory capacity to perform his coal mine employment "consistent with the well-reasoned opinions," but deserving of less weight because it was unsupported by reasoning or medical credentials. Decision and Order at 16; *see Underwood*, 105 F.3d at 951, 21 BLR at 2- 31-32.

Additionally, the administrative law judge considered Dr. Sundaram's opinion that claimant is totally disabled by a respiratory or pulmonary impairment, but permissibly gave it "less weight," as not well-reasoned, because Dr. Sundaram did not "incorporate the normal pulmonary function readings into his disability diagnosis." Decision and Order at 16; *see Underwood*, 105 F.3d at 951, 21 BLR at 2- 31-32; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Finally, the administrative law judge noted that Dr. Gibson opined that claimant is totally disabled by back and hip problems, but found that Dr. Gibson did not address whether claimant has a total respiratory or pulmonary disability. The administrative law judge's analysis was flawed, because Dr. Gibson also indicated that claimant lacks the respiratory capacity to perform the work of a miner. Director's Exhibit 16 at 5. However, on this record as weighed by the administrative law judge, a remand is not required because the administrative law judge permissibly credited the opinions of Drs. Dahhan and Tuteur that claimant lacks any respiratory or pulmonary impairment based on the physicians' superior credentials, whereas the administrative law judge found that "no medical specialty credentials" were of record for Dr. Gibson. Decision and Order at 6, 12; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Dillon*, 11 BLR at 1-114; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because substantial evidence supports the administrative law judge's finding that the new medical opinions did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the finding is affirmed.

Based on the foregoing, we affirm the administrative law judge's findings that claimant did not establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), with the evidence developed since the prior claim denial. We therefore affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge