BRB No. 03-0204 BLA

LOWELL W. RANKIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/25/2003
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Thomas McK Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (00-BLA-0963) of Administrative Law Judge Daniel L. Leland 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).[1] The procedural history of this case is as follows: Claimant filed an initial claim on February 18, 1988. In an Order dated October 27, 1989, Administrative Law Judge Robert L. Hillyard dismissed this claim for claimant's failure to show cause why his claim should not be deemed abandoned in light of claimant's failure to appear at a scheduled hearing on October 18, 1989. Claimant filed subsequent applications for benefits on August 16, 1990 and November 27, 1991, which the district director treated as requests for modification. In a Decision and Order dated August 25, 1993, Administrative Law Judge Rudolf J. Jansen credited claimant with sixteen years of coal mine employment, and denied benefits upon determining that the evidence of record failed to establish the existence of pneumoconiosis and total disability. Claimant appealed. The Board affirmed Judge Jansen's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and, consequently, the Board affirmed the denial of benefits.[2] *Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Dec. 28, 1994)(unpublished).

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The Board noted that Administrative Law Judge Rudolf L. Jansen did not make a determination of whether claimant established a mistake in determination of fact pursuant to 20 C.F.R. §725.310 (2000), but that this omission constituted harmless error since Judge Jansen considered all of the evidence of record on the merits. *Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Dec. 28, 1994), slip op. at 3.

Claimant requested reconsideration before the Board and simultaneously filed an appeal with the United States Court of Appeals for the Sixth Circuit.[3] The Board granted claimant's request for reconsideration, but denied the relief requested. *Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Apr. 12, 1995)(unpublished Order on Motion for Reconsideration). The United States Court of Appeals for the Sixth Circuit dismissed claimant's appeal for lack of jurisdiction. *Rankin v. Peabody Coal Co.*, No. 95-3684 (6th Cir. Apr. 13, 1995)(unpublished Order). Claimant subsequently filed another appeal of the Board's affirmance of Judge Jansen's 1993 decision denying benefits, *see Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Apr. 12, 1995)(unpublished Order on Motion for Reconsideration), but the court dismissed the appeal as untimely. *Rankin v. Peabody Coal Co.*, No. 95-3684 (Oct. 10, 1995)(unpublished Order). Claimant meanwhile filed another claim for benefits on August 1, 1995. In a letter dated August 7, 1995, the district director informed claimant that his new application could not be considered a new claim because one year had not yet expired since the Board's most recent, April 12, 1995, Order denying reconsideration, *Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Apr. 12, 1995)(unpublished Order on Motion for Reconsideration), nor could it be accepted as a request for modification because no new evidence had been submitted. On January 2, 1996, claimant submitted a letter to the Board stating that he wished to appeal his case. In a letter dated March 25, 1996, the Board informed claimant that its April 12, 1995, Order denying reconsideration, *Rankin v. Peabody Coal Co.*, BRB No. 93-2458 BLA (Apr. 12, 1995)(unpublished Order on Motion for Reconsideration), had become final, and that it no longer had jurisdiction in the case. The Board notified claimant that his case was being forwarded to the district director for review.

The district director denied benefits for claimant's failure to establish a basis for modification, and the case was referred to the Office of Administrative Law Judges. In a Decision and Order dated October 3, 1997, Judge Jansen denied benefits upon finding all of the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Claimant's subsequent appeals to the Board and the United States Court of Appeals for the Sixth Circuit were deemed untimely. By letter dated April 21, 1999, claimant indicated that he wanted to renew his claim and that he had

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Ohio. *See Shupe v. Director,* OWCP, 12 BLR 1-200 (1989)(*en* banc); Director's Exhibit 2.

evidence to support his entitlement to benefits. The district director construed claimant's letter as a request for modification, and a formal hearing was held before Administrative Law Judge Daniel L. Leland (the administrative law judge) on February 27, 2001.

In a Decision and Order dated June 12, 2001, the administrative law judge credited claimant with sixteen years of coal mine employment based upon the stipulation of the parties. The administrative law judge considered the evidence submitted subsequent to Judge Jansen's October 3, 1997 Decision and Order, and found it insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4). The administrative law judge concluded that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and, consequently, denied benefits. Claimant appealed, without the assistance of counsel. The Board held that, as a preliminary matter, the administrative law judge erred in failing to consider whether employer waived the issue of whether claimant's most recent filing, his letter dated April 21, 1999, was a duplicate claim rather than a request for modification. *Rankin v. Peabody Coal Co.*, BRB No. 01-0789 BLA (Aug. 1, 2002)(unpublished)(Dolder, J., dissenting). The Board remanded the case for the administrative law judge to make a determination of whether employer waived the issue, and for the administrative law judge to consider claimant's most recent filing a duplicate claim in the event he were to find employer had not waived the issue. *Id.* The Board also vacated the administrative law judge's finding that Dr. Altmeyer's 1/0 reading of the x-ray taken on April 11, 2000 was negative for pneumoconiosis. *Id*. The Board instructed the administrative law judge to consider it as a positive reading on remand, and to consider, pursuant to 20 C.F.R. §718.203, Dr. Altmeyer's comments as to why he believed the opacities seen on the film were not indicative of pneumoconiosis. *Id*. The Board also remanded the case for the administrative law judge to consider whether the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Id*.

In his Decision and Order on Remand dated October 22, 2002, the administrative law judge concluded that employer had not waived the issue of whether claimant's most recent filing was a duplicate claim, and consequently, the administrative law judge considered the filing as a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge found Dr. Altmeyer's positive reading of the April 11, 2000 x-ray outweighed by the newly submitted negative x-ray interpretations, and thus found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge further found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and concluded that, therefore, claimant failed to establish a material change in conditions pursuant to section 725.309 (2000). Accordingly,

the administrative law judge denied benefits. On appeal, claimant contends that the Department of Labor failed to discharge its duty to provide him with a complete pulmonary evaluation. Claimant also contends that the administrative law judge erred in finding he did not establish the existence of pneumoconiosis without weighing all of the like and unlike evidence probative on the issue of pneumoconiosis together under Section 718.202(a)(1)-(4). Claimant further argues that the administrative law judge improperly credited Dr. Altmeyer's medical opinion, that claimant is not totally disabled from a pulmonary or respiratory standpoint, over Dr. Tipton's contrary opinion at Section 718.204(b)(2)(iv). Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter opposing claimant's argument that the Department of Labor failed to provide him with a complete, credible pulmonary evaluation. The Director agrees with claimant's contention, however, that the administrative law judge improperly determined that the evidence was insufficient to establish total disability under Section 718.204(b), and that the case should be remanded to the administrative law judge for reconsideration on the issue of total disability.

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

Claimant first argues that the Department of Labor failed to discharge its duty to provide him with a proper medical examination. We disagree. The Department of Labor is required by statute, regulation and case law to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, s*ee* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990). The Department of Labor is not required to provide an examination that establishes entitlement to benefits, however. Claimant bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In the instant case, the administrative law judge did not go so far as to reject Dr. Tipton's opinion as non-credible and entitled to no weight. Rather, the administrative law judge found that Dr. Tipton's opinion was outweighed by Dr. Altmeyer's opinion. Decision and Order on Remand at 4; Director's Exhibits 77, 89. Thus, we reject claimant's contention that the Department of Labor has abrogated its duty to provide him with a complete, credible pulmonary evaluation.

Claimant further argues, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that the administrative law judge erred in failing to consider on remand the newly submitted opinions of Drs. Lynn and Tipton, along with the newly submitted chest x-ray interpretations, before concluding ultimately that the new evidence was insufficient to establish the existence of pneumoconiosis. *See also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This contention lacks merit. The United States Court of Appeals for the Sixth Circuit has not adopted the holding of the court in *Williams.* We decline to extend the holding in *Williams* in this case, which arises within the jurisdiction of the Sixth Circuit. The Board has long held that Section 718.202(a)(1)-(4) provides four alternative means by which the existence of pneumoconiosis may be established. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). On remand, the administrative law judge adopted his consideration of the evidence under Section 718.202(a)(2)-(4) from his June 12, 2001 Decision and Order.[4] In that decision, the administrative law judge properly discounted Dr. Lynn's CT scan interpretation and the opinions of Drs. Lynn and Tipton, indicating that claimant suffers from pneumoconiosis, in favor of Dr. Altmeyer's contrary opinion because the qualifications of Drs. Lynn and Tipton are not of record, whereas Dr. Altmeyer is a Board-certified pulmonary specialist. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); 2001 Decision and Order at 7; Director's Exhibit 44. Furthermore, the administrative law judge, within a proper exercise of discretion, found that Dr. Altmeyer provided the best reasoned opinion of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); 2001 Decision and Order at 7; Director's Exhibit 89. We affirm, therefore, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(4).[5]

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[4]The majority in the Board's August 1, 2002 Decision and Order remanding this case did not address the administrative law judge's findings regarding the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2)-(4). *Rankin v. Peabody Coal Co.*, BRB No. 01-0789 BLA (August 1, 2002)(unpublished)(Dolder, J., dissenting). In her dissenting opinion, Judge Dolder indicated, however, that she would affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis thereunder. *Id*.

[5]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 3-4; 2001 Decision and Order at 7.

Finally, claimant argues that the administrative law judge erred in discounting the newly submitted opinion of Dr. Tipton, indicating that claimant is totally disabled, and improperly credited the newly submitted, contrary opinion of Dr. Altmeyer pursuant to Section 718.204(b)(2)(iv). The Director agrees, contending that the administrative law judge failed to weigh the two newly submitted pulmonary function studies, which are both qualifying, against Dr. Altmeyer's opinion that claimant is not totally disabled, and thus provided an inadequate analysis of the evidence probative of total disability. We disagree.

First, contrary to claimant's assertion, the administrative law judge did not unfairly discount Dr. Tipton's opinion as inadequately explained simply because it was submitted on a form report. Rather, the administrative law judge properly accorded greater weight to Dr. Altmeyer's contrary opinion on the basis that it is well-reasoned and documented. *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 4; Director's Exhibit 89. Specifically, the administrative law judge found Dr. Altmeyer's opinion of no total disability supported by the doctor's findings regarding the pulmonary function studies he administered. Decision and Order on Remand at 4; Director's Exhibit 89. Dr. Altmeyer stated that the pulmonary function study he administered in his examination on April 11, 2000 showed no airflow obstruction as the FVC/FEV1 ratio was normal. Director's Exhibit 89. Dr. Altmeyer further stated that the FVC value was moderately reduced, and the FEV1 value was mildly reduced, but the FVC/FEV1 ratio remained within normal limits. *Id*. Dr. Altmeyer further indicated that claimant's total lung capacity did not demonstrate a restrictive impairment, and the diffusing capacity was normal. *Id*. Dr. Altmeyer concluded that, for these reasons, claimant has no clinically significant impairment of lung function and is, therefore, not totally disabled. *Id*.

Claimant's contention that Dr. Altmeyer's interpretation of his pulmonary function study results should have been rejected by the administrative law judge, since the results are qualifying, amounts to a mere request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, had the administrative law judge made his own contrary interpretation of Dr. Altmeyer's pulmonary function study results, as claimant suggests he should have, he would have improperly substituted his own medical conclusions for those of an expert. *Casella v. Kaiser Steel Corp*. 9 BLR 1-131 (1986). The administrative law judge thus properly credited Dr. Altmeyer's opinion as well-reasoned and documented. *Clark*, 12 BLR at 1-155. Furthermore, the administrative law judge properly accorded greater weight to Dr. Altmeyer's opinion because Dr. Altmeyer is a Board-certified pulmonary specialist, a credential not possessed by Dr. Tipton. *Roberts*, 8 BLR at 1-213. Accordingly, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability

pursuant to Section 718.204(b)(2)(iv). We also affirm, as unchallenged on appeal, the administrative law judge's findings that, while the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii), the medical opinion evidence regarding total disability at Section 718.204(b)(2)(iv) outweighs the unlike probative evidence of total disability under Section 718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 3-4.

Because we have affirmed the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a) and total disability under Section 718.204(b), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is 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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BETTY JEAN HALL
Administrative Appeals Judge