

BRB No. 09-0386 BLA

OSCAR MIDDLETON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTOVER MINING COMPANY, c/o)	
DUKE POWER COMPANY)	
)	
and)	
)	
SELF-INSURED THRU EASTOVER)	DATE ISSUED: 11/25/2009
MINING COMPANY, c/o)	
UNDERWRITERS SAFETY & CLAIMS)	
)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan , Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (07-BLA-5756) of Administrative Law Judge Larry S. Merck (the administrative law judge) on a subsequent

claim¹ 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). The administrative law judge found that the miner had 8.07 years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the new evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established by the newly submitted x-ray and medical opinion evidence under Section 718.202(a)(1) and (4) and further erred in finding that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iv).² Employer responds, urging affirmance of the administrative law judge's Decision and Order, as based on substantial evidence and because claimant has failed to identify a specific error made by the administrative law judge in his total disability finding at Section 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed his first claim for benefits on August 18, 1988. That claim was finally denied by the district director on January 4, 1989, for failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Claimant filed his second claim on September 10, 1990. That claim was also denied by the district director on February 5, 1991, for failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 2. Claimant filed a third claim on October 11, 2001. That claim was denied by reason of abandonment on March 8, 2002. Director's Exhibit 3. Claimant filed the subsequent claim, herein, on August 26, 2006. Director's Exhibit 5.

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

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 previous claims were denied because he failed to establish the presence of pneumoconiosis and total disability. Director's Exhibits 1, 2, 3. Consequently, in order to show a change in an applicable condition of entitlement, claimant has to submit new evidence showing the presence of pneumoconiosis or total disability at Sections 718.202(a) and 718.204(b).

In challenging the administrative law judge's finding that claimant failed to establish pneumoconiosis on the basis of new x-ray evidence at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the new negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those new x-ray interpretations. In weighing the newly submitted x-ray evidence, the administrative law judge properly found that the positive reading of the October 2, 2006 x-ray by Dr. Baker, a B reader, was outweighed by the negative reading of that x-ray by Dr. West, a B reader and Board-certified radiologist. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Director's Exhibits 13, 16; Decision and Order at 8. The administrative law judge also properly found that the x-ray of December 4, 2007 was negative because it was read as negative by both Dr. Rosenberg, a B reader, and Dr. Wheeler, a B reader and Board-certified radiologist. 20 C.F.R. §718.202(a)(1); Employer's Exhibits 2, 7; Decision and Order at 9. Further, claimant's contention, that the administrative law judge "may have selectively analyzed" the x-ray evidence, Claimant's Brief at 3, is rejected. Claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 7, 10.

and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White*, 23 BLR at 1-4. Accordingly, we affirm the administrative law judge's finding that the new x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant next argues that the administrative law judge erred in failing to find the existence of clinical or legal pneumoconiosis established pursuant to Section 718.204(a)(4), based on Dr. Baker's opinion, diagnosing coal workers' pneumoconiosis and a respiratory impairment arising out of coal mine employment. Claimant contends that the administrative law judge erroneously discredited Dr. Baker's opinion, diagnosing clinical pneumoconiosis, as based solely on a positive x-ray. In considering Dr. Baker's opinion, the administrative law judge found that Dr. Baker diagnosed coal workers' pneumoconiosis based on x-ray and claimant's history of coal dust exposure. The administrative law judge properly accorded little weight to Dr. Baker's diagnosis of clinical pneumoconiosis because it was based solely on an x-ray and claimant's history of coal dust exposure. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, the administrative law judge properly accorded little weight to Dr. Baker's diagnosis of legal pneumoconiosis, *i.e.*, that claimant "*may* have some degree of legal pneumoconiosis ... because coal dust exposure *may* have contributed to his moderate obstructive defect to some extent, ... probably in the range of 15 to 18%, which is borderline significant," Director's Exhibit 13 (emphasis added), because it was equivocal and vague. *See Justice v. Director, OWCP*, 11 BLR 1-91 (1988); Decision and Order at 15. The administrative law judge also properly found Dr. Baker's diagnosis of legal pneumoconiosis to be unreasoned because Dr. Baker failed to explain how his physical findings and claimant's symptomatology were supportive of his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge's rejection of Dr. Baker's opinion is, therefore, affirmed.

Claimant has made no other allegations of error regarding the administrative law judge's evaluation of the new medical opinion evidence at Section 718.202(a)(4). We, therefore, affirm the administrative law judge's decision to credit the opinions of Drs. Rosenberg and Vuskovich, who found that claimant did not have either clinical or legal pneumoconiosis, and his conclusion that the medical opinion evidence failed to establish pneumoconiosis at Section 718.202(a)(4).

Finally, claimant contends that the administrative law judge erred in finding that he did not establish total disability at Section 718.204(b)(2)(iv). Specifically, claimant contends:

The claimant's usual coal mine work included being a mechanic. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration

the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 6. Contrary to claimant's contention, however, evidence that claimant can no longer work in a dusty atmosphere is not sufficient to establish total disability at Section 718.204(b). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Nor, contrary to claimant's argument, is he entitled to a presumption of total disability because he was diagnosed with pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 534, 21 BLR 2-323, 2-337 (4th Cir. 1998); *White*, 23 BLR at 1-7 n.8. Moreover, as employer asserts, claimant has failed to allege any specific error made by the administrative law judge in his consideration of the new medical opinion evidence relevant to total disability. The administrative law judge's finding that the new medical opinion evidence fails to establish total disability must, therefore, be affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In conclusion, we affirm the administrative law judge's findings that the new evidence failed to establish pneumoconiosis or total disability at Sections 718.202(a) and 718.204(b). We must, therefore, affirm the administrative law judge's finding that claimant has failed to establish a change in an applicable condition of entitlement at Section 725.309(d).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge