

BRB No. 05-0831 BLA

EDDIE A. HENSLEY)
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 Claimant-Petitioner)
)
 v.)
)
 UNICORN MINING, INCORPORATED)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: 04/27/2006
 COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (04-BLA-5338) of Administrative Law Judge Daniel J. Roketenetz rendered 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 credited claimant with nineteen years of coal mine employment.² 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 contends that the administrative law judge erred in his analysis of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.³

¹ Claimant's initial application for benefits, filed on July 30, 1993, was denied on January 24, 1994 because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Decision and Order 4; Director's Exhibit 1. Claimant filed his current application for benefits on March 14, 2002. Director's Exhibit 3.

² The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 4, 6-7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ We affirm as unchallenged on appeal the administrative law judge's findings that claimant has nineteen years of coal mine employment, and that he did not establish the existence of pneumoconiosis or that he is totally disabled pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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.*, 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 Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of two new x-rays in light of the readers' radiological qualifications.⁴ The May 31, 2002 x-ray was read as positive for pneumoconiosis by Dr. Simpao, who lacks radiological qualifications, and as negative for pneumoconiosis by Dr. Wheeler, who is a Board-certified radiologist and B-reader. Director's Exhibit 12, Employer's Exhibit 1. Because the May 31, 2002 x-ray was read as negative "by the highest qualified physician," the administrative law judge found it to be negative for pneumoconiosis. Decision and Order at 7. The August 20, 2002 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, who is a B-reader. Director's Exhibit 13.

⁴ An additional reading in the record by Dr. Barrett addressed only the quality of the May 31, 2002 x-ray. Director's Exhibit 12.

Since both new x-rays were negative for pneumoconiosis, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the new x-ray evidence. The administrative law judge based his finding on a proper qualitative analysis of the x-rays. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered two new medical reports. Dr. Simpao, who examined claimant on behalf of the Department of Labor, performed a pulmonary function and blood gas study and concluded that claimant has a mild, disabling impairment due to pneumoconiosis. Director's Exhibit 12. Dr. Dahhan, on behalf of employer, noted that claimant's pulmonary function study and blood gas study were normal, and he opined that claimant does not have any impairment which has arisen from his coal mine employment and is not totally disabled. Director's Exhibit 13.

The administrative law judge discredited Dr. Simpao's opinion because "all of his objective medical testing was non-qualifying for total disability," and because "Dr. Simpao failed to clearly explain how his physical findings and symptomatology were supportive of a finding of total disability." Decision and Order at 12-13. The administrative law judge was within his discretion to assess the documentation and reasoning of Dr. Simpao's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge permissibly found Dr. Dahhan's opinion that there was no evidence of pulmonary impairment to be well-reasoned and well-documented. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Moreover, claimant does not specifically challenge any of these findings by the administrative law judge.

Instead, claimant argues that the administrative law judge did not compare his exertional job requirements with "a physician's assessment of claimant's respiratory impairment." Claimant's Brief at 5. The administrative law judge credited Dr. Dahhan's opinion that claimant has no impairment. Consequently, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a heavy equipment operator to the medical opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Furthermore, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).

Claimant further contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he is required to "provide each miner who files a claim for benefits with the opportunity to undergo a complete pulmonary evaluation," and he argues that "in practical effect, the [administrative law judge] merely found Dr. Simpao's diagnosis less credible . . . because it was called into question by other, more probative evidence" and that "there is no violation of the Director's duty to provide claimant with a credible examination." Director's Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101 (2000), 725.406 (2000). The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that on May 31, 2002, Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 12; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge discredited Dr. Simpao's diagnosis of "CWP 1/1" because it was based on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior credentials. Decision and Order at 9-10; Director's Exhibit 12 at 29. This was the sole

cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for the diagnosis to be outweighed. Consequently, there is no need to remand this case to the district director. *Cf. Hodges*, 18 BLR at 1-93.

Therefore, we affirm the administrative law judge's findings 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. Consequently, we affirm the administrative law judge's finding that claimant did not establish that one of the applicable conditions of entitlement changed since the denial of his prior claim, and we affirm the denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-7.

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