BRB No. 05-0959 BLA

FRANKLIN J. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ONEIDA COAL COMPANY	)	DATE ISSUED: 04/28/2006
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

John C. Artz (Polito & Smock), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6171) of Administrative Law Judge Gerald M. Tierney denying benefits 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] Claimant's prior application for benefits, filed on June 27, 1973, was finally denied on September 4, 1980 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's

[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Exhibit 1. On March 12, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order - Denying Benefits issued on August 4, 2005, the administrative law judge credited claimant with at least twenty-six years of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge determined that claimant met his burden to establish a change in one applicable condition of entitlement.[3] 20 C.F.R. §725.309(d); *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); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004); Decision and Order at 4. Considering the merits of the claim, the administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

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[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibits 5, 33. 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*).

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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).

[4] The administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, his findings that the evidence establishes a twenty-six year coal mine employment history and a ten pack-year smoking history, and his findings at 20 C.F.R. §§725.309(d) and 718.202(a)(2)-(3), are affirmed as unchallenged on appeal. *See Coen*

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 a finding of 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).

Claimant initially challenges the administrative law judge's evaluation of the x-ray evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), specifically asserting that the administrative law judge failed to resolve the conflicting positive and negative readings of record. Claimant's Brief at 7. Claimant's contention lacks merit.

The administrative law judge properly noted that the record contains one positive and one negative reading of an August 7, 1973 x-ray, five readings of an October 18, 2001 x-ray, and two readings of a December 10, 2003 x-ray. Claimant's Exhibits 2-4; Director's Exhibits 1, 22, 23; Employer's Exhibits 2, 3, 5; Decision and Order at 4. Permissibly focusing on the more recent 2001 and 2003 x-rays, the administrative law judge noted that the October 18, 2001 x-ray was read three times as positive, by readers dually qualified as Board-certified radiologists and B readers, and was read twice as negative, also by dually qualified readers.[5] Claimant's Exhibits 2, 3; Director's Exhibit 22; Employer's Exhibits 2, 5. Similarly, the December 10, 2003, x-ray was read once as negative and once as positive, by dually qualified readers. Claimant's Exhibit 4; Employer's Exhibit 3; Decision and Order at 4. Considering both the quantity of positive and negative x-ray readings, and that all the readings were by physicians who are dually qualified as Board-certified radiologists and B readers, the administrative law judge permissibly concluded that claimant failed to meet his burden of establishing the presence of pneumoconiosis by a preponderance of the chest x-ray evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and

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v. Director, OWCP, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[5] The record contains an additional reading, for quality only (Quality 2), by Dr. Gaziano, of the October 18, 2001 x-ray. Director's Exhibit 23.

Order at 4. Contrary to claimant's suggestion, the administrative law judge was not required to defer to the numerical superiority of the x-ray readings, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Because the administrative law judge properly conducted both a qualitative and quantitative review of the x-ray evidence by considering both the number of positive and negative x-ray readings, the radiological expertise of the readers, and the relative recency of the x-ray films, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Claimant further asserts that in evaluating the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in failing to accord greater weight the opinions of Drs. Cohen, Rasmussen and Trenbath, who diagnosed coal workers' pneumoconiosis and/or chronic obstructive lung disease due to coal dust exposure, than to the contrary opinion of Dr. Zaldivar, who diagnosed asthma, unrelated to coal dust exposure. We disagree.

Reviewing the more recent medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4),[6] the administrative law judge noted that Dr. Rasmussen had examined claimant on October 18, 2001 and had diagnosed the existence of clinical coal workers' pneumoconiosis, which he stated was based on an abnormal chest x-ray and history of coal dust exposure. The administrative law judge noted that Dr. Rasmussen also diagnosed chronic obstructive pulmonary disease (COPD), due to a combination of coal dust exposure and cigarette smoking. Dr. Rasmussen stated that this conclusion was based on the fact that smoking and coal dust were claimant's two "risk factors," and both coal dust and smoking cause the same degree and type of abnormality. Director's Exhibit 19; Decision and Order at 5. Contrary to claimant's arguments, the administrative law judge acted within his discretion in finding that, standing alone, Dr. Rasmussen's diagnoses are not well reasoned because other than identifying claimant's "risk factors" he failed to provide adequate rationale for his conclusions.[7] *Worhach v. Director,*

[6] The administrative law judge properly found that there was no medical opinion evidence associated with claimant's 1973 claim, and that the 1985 and 1992 state awards of occupational pneumoconiosis benefits did not include any documentation or rationale. *See Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); Director's Exhibit 16; Decision and Order at 5. In addition, the administrative law judge properly noted that claimant's early treatment records, dating from 1993 to 1997, did not focus on claimant's respiratory or pulmonary problems. Claimant's Exhibit 1; Decision and Order at 5.

[7] Regarding Dr. Rasmussen's coal workers' pneumoconiosis diagnosis, although the administrative law judge did not explicitly say this diagnosis was unreasoned, as the administrative law judge noted that it was based solely on x-ray and coal dust exposure, that can be inferred. Decision and Order at 5, 6. With respect to the chronic obstructive

OWCP, 17 BLR 1-105, 1-108 (1983)(a medical opinion of clinical pneumoconiosis which is merely a restatement of an x-ray opinion does not constitute a reasoned diagnosis); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985)(an administrative law judge may properly reject a physician's opinion as unreasoned where physician failed to explain the basis for his conclusions, even though the Department of Labor form did not require rationale); Director's Exhibit 19; Decision and Order at 6-7. The administrative law judge then noted that Dr. Trenbath's 2002 and 2003 office notes document claimant's treatment for ongoing pulmonary problems and contain diagnoses of COPD and severe emphysema, and further contain references to "black lung" and pneumoconiosis. Claimant's Exhibit 1; Decision and Order at 8. The administrative law judge permissibly found, however, that as some of the references to "black lung" and pneumoconiosis were penned by nurses or unknown authors, it was unclear whether some of the notations were histories or actual diagnoses. Decision and Order at 8 n. 2. The administrative law judge acted within his discretion in concluding that, as all of the references were unsupported by any documentation or rationale, Dr. Trenbath's treatment notes are insufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4). *Clark*, 12 BLR at 1-153; *McMath*, 12 BLR at 1-6. The administrative law judge further properly found that while Dr. Trenbath also diagnosed COPD and emphysema, as the physician did not causally relate either of these conditions to coal dust exposure, these diagnoses are insufficient to establish the existence of legal pneumoconiosis under the Act. 20 C.F.R. §718.201(a)(2); Claimant's Exhibit 1; Decision and Order at 8.

By contrast, the administrative law judge found that Dr. Cohen and Dr. Zaldivar, while offering contrary opinions as to the existence of pneumoconiosis, had both provided extensive documentation and reasoning for their diagnoses, and had fully explained how the physical examination findings, testing results, and medical literature supported their conclusions. Claimant's Exhibits 5, 6; Employer's Exhibits 1, 4; Decision and Order at 5-9. In addition, both physicians had reviewed the other's reports and had responded to the criticisms and questions raised therein. The administrative law judge noted that Dr. Cohen, who is a Board-certified pulmonary specialist and B reader, reviewed the medical evidence of record and diagnosed the existence of coal workers' pneumoconiosis and chronic obstructive lung disease due to coal dust exposure. Claimant's Exhibits 5, 6. The administrative law judge found that Dr. Cohen's conclusions are further supported by Dr. Rasmussen's diagnoses of coal workers'

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pulmonary disease diagnosis, the administrative law judge specifically found that Dr. Rasmussen had failed to explain how he determined, simply based on the presence of two risk factors, that coal dust was a significant contributing cause of claimant's respiratory condition. Decision and Order at 7.

pneumoconiosis and COPD due in part to coal dust exposure. Claimant's Exhibit 6; Director's Exhibit 19; Decision and Order at 8-9. The administrative law judge noted that Dr. Zaldivar, who is also a Board-certified pulmonary specialist and B reader, examined claimant, reviewed the relevant evidence of record and opined that claimant does not suffer from coal workers' pneumoconiosis, or any dust induced disease of the lung, but suffers from non-occupationally induced asthma. Employer's Exhibits 1, 4. Similarly, the administrative law judge found that Dr. Zaldivar's opinion is also supported by Dr. Rasmussen's notation that claimant had reported a history of childhood asthma, and by Dr. Trenbath's May 17, 2002 diagnosis of severe emphysema with "some component of asthma" and May 9, 2003 notation that claimant had come in for evaluation of his hypertension, asthma and COPD.[8] Claimant's Exhibit 1; Employer's Exhibits 1, 4; Decision and Order at 8-9.

Contrary to claimant's arguments, Dr. Zaldivar did not base his asthma diagnosis solely on claimant's history and reported symptoms, but, as noted by the administrative law judge, specifically discussed the aspects of the pulmonary function and blood gas study results that supported his diagnosis. Employer's Exhibits 1, 4; Claimant's Brief at 9; Decision and Order at 5-6. In addition, the administrative law judge did not substitute his own opinion for that of the medical experts in finding that Dr. Trenbath's treatment notes also supported Dr. Zaldivar's diagnosis of asthma, but, rather, accurately summarized the supporting portions of Dr. Trenbath's reports. Claimant's Brief at 12; Decision and Order at 8. Thus, contrary to claimant's argument, the administrative law judge permissibly concluded that because Drs. Cohen and Zaldivar possessed equal qualifications, both made valid points and both supplied evidence to support their conclusions, their reports are of equal probative value, and that, therefore, claimant failed

[8] Claimant asserts that Dr. Rasmussen's notation on his form report, that claimant had suffered childhood asthma, was a clerical error. Claimant points to the fact that Dr. Rasmussen also indicated by check mark that claimant had a history of cancer, which he has never had. Claimant's Brief at 9. Contrary to claimant's argument, however, the administrative law judge fully acknowledged that whether claimant had childhood asthma was a contested issue, noting claimant's testimony that he had never been diagnosed with, or treated for, asthma, as well as his denial of childhood asthma to Dr. Zaldivar. Decision and Order at 5, 7. The administrative law judge acted within his discretion, however, in finding that Dr. Rasmussen's form report notation was not in error, as it is supported by Dr. Rasmussen's accompanying narrative statement, in which the physician specifically stated that claimant reported having had asthma in childhood. Decision and Order at 7. In addition, contrary to claimant's assertion, Dr. Rasmussen's positive indication of claimant's cancer history is also supported by Dr. Rasmussen's narrative statement that claimant reported that his father had suffered from cancer. Director's Exhibit 19.

to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Ondecko*, 512 U.S. at 267, 18 BLR at 2A-1; Decision and Order at 9. The evaluation of the physicians' opinions is within the province of the administrative law judge. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). As the administrative law judge properly considered all of the relevant medical evidence, and as his analysis of that evidence is supported by substantial evidence in the record, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n. 10, 21 BLR 2-587, 2-603 n. 10 (4th Cir 1999).

The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge, *Mays*, 176 F.3d at 753, 21 BLR at 2-587. As the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence, it is hereby affirmed.

Accordingly, the administrative law judge's Decision and Order – 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