BRB No. 05-0977 BLA

DALLAS A. WHITED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 04/19/2006
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5335) of Administrative Law Judge Stephen L. Purcell 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 March 14,

[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.

2000, was finally denied on October 18, 2002 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. On October 29, 2003, 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 15, 2005, the administrative law judge credited claimant with at least twenty-six years of coal mine employment,[2] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, and weighing the chest x-rays and medical opinions together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). 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 relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). 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.[3]

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

[2] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 3. 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] The administrative law judge's finding of at least twenty-six years of coal mine employment and his finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(d), but did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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). The administrative law judge determined that 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. Consequently, claimant had to submit new evidence establishing one of these two elements. 20 C.F.R. §725.309(d)(2), (d)(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 the new evidence developed with the subsequent claim established that claimant is now totally disabled by a respiratory impairment from performing his usual coal mine work, thereby establishing a change in an applicable condition of entitlement.

Pursuant to Section 718.202(a)(1), claimant initially asserts, relying on *Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983), that the administrative law judge applied an incorrect legal standard in failing to resolve the x-ray evidence in favor of claimant. Claimant's Brief at 3. We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge initially noted that the x-ray readings submitted in support of claimant's prior claims were predominately negative but permissibly accorded greater probative value to the more recent x-ray evidence, associated with claimant's current claim, as more indicative of claimant's current condition given the progressive nature of pneumoconiosis. *See Eastern Associated Coal Corp. v. Sullivan*, 145 F.3d 1324, 1324 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004); Decision and Order at 10. The x-ray evidence submitted with

claimant's current claim consists of six readings of three x-rays.[4] A January 21, 2004 x-ray was read once as positive by Dr. Patel, a Board-certified radiologist and B reader, and once as negative by Dr. Wiot, also a dually qualified Board-certified radiologist and B reader, and, thus, was found to be in equipoise by the administrative law judge. Director's Exhibit 10; Employer's Exhibit 1; Decision and Order at 10. A July 2, 2004 x-ray was read twice as negative by Drs. Scatarige and Wheeler, both dually qualified Board-certified radiologists and B readers. Employer's Exhibits 2, 4. The administrative law judge properly found this x-ray to be negative based on the uncontradicted negative readings. Finally, a December 2, 2004 x-ray was read once as positive by Dr. Patel, and once as negative by Dr. Wiot, and, thus, was found to be in equipoise by the administrative law judge based on the readers' equal qualifications. Claimant's Exhibit 10; Employer's Exhibit 8; Decision and Order at 10. The administrative law judge concluded that as two of the three x-rays were in equipoise, and as the third x-ray was negative, claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 10. Contrary to claimant's arguments, the administrative law judge is not required to resolve conflicting, but equally probative evidence in favor of claimant. In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the Supreme Court held that the "true doubt" rule, which required an administrative law judge to find in favor of the claimant when the evidence was evenly balanced, is no longer valid and that claimants must establish entitlement by a preponderance of the evidence.[5] In addition, we reject claimant's assertion that the administrative law judge failed to consider the "possible bias" of employer's physicians, Drs. Scatarige and Wheeler. Claimant's Brief at 4. Claimant has not provided any support for his assertion that either Dr. Scatarige or Dr. Wheeler is biased, nor does a review of the record reveal any evidence of possible bias. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

It is the province of the administrative law judge to evaluate the physicians' opinions, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge. *Piney Mountain Coal*

[4] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the January 21, 2004 x-ray. Director's Exhibit 12.

[5] Claimant's reliance on *Gilson v. Price River Coal Co.*, 6 BLR 1096 (1983), is, therefore, misplaced, as that case was decided prior to the invalidation of the true doubt rule, and furthermore, involved rebuttal of the interim presumption of total disability pursuant to 20 C.F.R. §727.203, where the burden of proof rested with employer.

Co. v. Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge examined the x-ray evidence in light of the quantity of evidence and the relevant qualifications of the x-ray readers, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997), and explained why he found the x-ray evidence insufficient to establish the existence of pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998), we affirm the administrative law judge's finding that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(a)(1).

Because claimant raises no additional arguments with respect to the administrative law judge's findings, except those addressed and rejected herein, s*ee Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Therefore, a finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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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JUDITH S. BOGGS
Administrative Appeals Judge