

BRB No. 08-0540 BLA

S.R.)
)
 Claimant-Petitioner)
)
 v.)
)
 TRIPLE C&G COAL COMPANY)
)
 and)
)
 METLIFE INSURANCE COMPANY OF)
 CONNECTICUT, c/o TRAVELERS) DATE ISSUED: 04/16/2009
 INSURANCE)
)
 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 Denying Benefits of Administrative Law Judge Larry W. Price, United States Department of Labor.

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

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-5600) of Administrative Law Judge Larry W. Price, rendered 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). Director's Exhibit 3. The administrative law judge credited claimant with seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or that claimant is totally disabled pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(b)(2)(iv).² Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a

¹ Claimant filed a prior claim for benefits on January 11, 1993. Director's Exhibit 1. In a Decision and Order issued on July 3, 1996, Administrative Law Judge Gerald M. Tierney denied benefits on the grounds that claimant failed to establish the existence of pneumoconiosis and total disability. Claimant appealed and the Board affirmed the denial of benefits. [*S.R.*] *v. Triple C&G Coal Co.*, BRB No. 96-1346 BLA (Apr. 28, 1997) (unpub.). Claimant took no further action with regard to the denial of his claim until he filed this subsequent claim on October 4, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on October 24, 2003. Director's Exhibit 26. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges. On November 30, 2006, Administrative Law Judge Joseph E. Kane remanded the case to the district director in order to provide claimant with a complete pulmonary evaluation. Director's Exhibit 34. On remand, the district director obtained a January 17, 2007 clarification report from Dr. Simpao and the case was reassigned to Administrative Law Judge Larry W. Price (the administrative law judge). *Id.* A hearing was held on November 6, 2007. Thereafter, the administrative law judge issued his Decision and Order Denying Benefits on March 12, 2008, which is the subject of this appeal.

² Claimant asserts that the administrative law judge erred in finding that he is not totally disabled, citing 20 C.F.R. §718.204(c). Claimant's Brief at 4. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

complete and credible pulmonary evaluation to substantiate his claim, as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has also filed a letter brief, asserting that he has satisfied his burden to provide claimant with a complete pulmonary evaluation.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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When 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). Because claimant's initial claim for benefits, filed on January 11, 1993, was denied for failure to establish the existence of pneumoconiosis or total disability, claimant was required to prove, based on the newly submitted evidence, either that he has pneumoconiosis, or that he is totally disabled by a respiratory or pulmonary impairment, in order to have his claim reviewed on the merits.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Although claimant notes that the "x-ray evidence of record consists of four (4) interpretations of three (3) films, two of which were read as being positive for the existence of pneumoconiosis[,]" and further suggests that the administrative law judge "may have selectively analyzed the evidence," claimant has not identified with specificity any substantive error of law, or fact, in the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1). Claimant's Brief at 3.

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of seventeen years of coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

The Board, therefore, has no basis upon which to review the administrative law judge's findings with respect to the weight accorded the conflicting x-ray evidence. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'd* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant initially notes that the administrative law judge was required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 5, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant argues that because his usual coal mine work included being an electrician, a repairman and a fireman, "[i]t can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that "[t]aking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment." Claimant's Brief at 5. Claimant's assertions of error are without merit.

Contrary to claimant's contention, a miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Additionally, the administrative law judge properly considered the exertional requirements of claimant's usual coal mine work in finding that claimant is not totally disabled. The administrative law judge specifically acknowledged claimant's testimony that he worked "in numerous positions in coal mining including electrician, repairman and fireman." Decision and Order at 3. The administrative law judge also properly found that all of the record physicians opined that claimant was capable of performing his usual coal mine work from a respiratory or pulmonary standpoint.⁵ *Id.* Therefore, as substantial evidence supports the

⁵ Dr. Simpao examined claimant at the request of the Department of Labor and opined that he was not totally disabled from performing his usual coal mine work. Director's Exhibits 12, 34. Dr. Jarboe examined claimant and opined that he retained the respiratory capacity to perform the work of an underground coal miner or similar arduous manual labor. Director's Exhibit 14. Similarly, Dr. Dahhan reviewed claimant's medical records and employment history and diagnosed that claimant was not totally disabled from his previous coal mine work. Director's Exhibits 15, 16.

administrative law judge's determination that claimant failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that that the evidence overall is insufficient to establish that claimant is totally disabled.⁶ *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 13. Thus, we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309.

Finally, claimant contends that because the administrative law judge found that Dr. Simpao's opinion was not well-reasoned on the issue of the existence of pneumoconiosis, the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim. According to the Director, claimant misinterprets the Director's obligation under Section 725.406, as the Director is "only required to provide each miner-claimant with a credible and complete pulmonary evaluation, not a dispositive one." Director's Brief at 2. The Director maintains that claimant received a credible and complete pulmonary evaluation because Dr. Simpao addressed all of the requisite elements of entitlement in his report, and his opinion as to the existence of pneumoconiosis was determined to be outweighed by the contrary evidence. *Id.*

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(a), 725.406. 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).

⁶ Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 5. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge's findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

The record reflects that 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. *See* 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director’s Exhibit 12. In considering whether claimant established the existence of pneumoconiosis, the administrative law judge determined that Dr. Simpao’s opinion was “poorly reasoned” because Dr. Simpao did not adequately explain the basis for his diagnosis that claimant has a respiratory condition, or why he attributed that condition to coal dust exposure. Decision and Order at 11. Conversely, the administrative law judge credited the reasoned opinions of Drs. Dahhan and Jarboe that claimant does not have a respiratory condition. *Id.* Therefore, the administrative law judge assigned Dr. Simpao’s opinion “diminished weight” in comparison to the opinions of Drs. Dahhan and Jarboe, and found that claimant failed to satisfy his burden of proving the existence of pneumoconiosis under Section 718.202(a)(4). *Id.*; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Because Dr. Simpao addressed all of the requisite elements of claimant’s entitlement in his report, and the administrative law judge merely found Dr. Simpao’s opinion to be outweighed on the issue of whether claimant established the existence of pneumoconiosis, there is no merit to claimant’s argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003); *cf. Hodges*, 18 BLR at 1-93. Thus, we reject claimant’s request that the Board remand this case to the district director for further proceedings.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge