BRB No. 08-0110 BLA

C.C. Claimant-Petitioner v. SHAMROCK COAL COMPANY, INCORPORATED and SUN COAL COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/25/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Denying Benefits (05-BLA-5693) of Chief Administrative Law Judge John M. Vittone (the administrative law judge) on a subsequent claim[1] 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, as employer stipulated, that the miner had seventeen 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 contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by the new x-ray evidence under Section 718.202(a)(1) and in finding that the new medical opinion evidence did not establish total respiratory disability under Section 718.204(b)(2)(iv).[2] Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b), because the administrative law judge discredited the medical opinion of Dr. Simpao on pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director responds, arguing that he is only required to provide claimant with a complete, credible pulmonary evaluation, not a dispositive one. Thus, the Director contends that it does not follow that he failed to provide claimant with a complete, credible pulmonary evaluation because the administrative law judge accorded less weight to the opinion of Dr. Simpao, on the issue of pneumoconiosis, than to the opinions of other better-qualified physicians.

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

[1] Claimant filed his first claim for benefits on April 26, 2000, which was finally denied on August 23, 2000 for failure to establish pneumoconiosis or total disability. Director's Exhibit 1A. Claimant filed this subsequent claim on April 7, 2004. Director's Exhibit 2.

[2] The administrative law judge's findings that claimant failed to establish pneumoconiosis at 20 C.F.R. § 718.202(a)(2), (3), or total disability at 20 C.F.R. § 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

rational, and are consistent with the applicable law,[3] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 claim was denied because he failed to establish the presence of pneumoconiosis or total disability at Section 718.202(a) and Section 718.204(b). Director's Exhibit 1A. Consequently, in order to show a change in an applicable condition of entitlement, claimant has to submit new evidence of the presence of pneumoconiosis or total disability.

In challenging the administrative law judge's finding that claimant failed to establish pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative interpretations of the new x-rays and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of the x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the new x-ray evidence.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration *shall* be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge properly found that the positive reading of the May 13, 2007 x-ray by Dr. Simpao, who has no specialized qualifications in the

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

reading of x-rays, was outweighed by all of the negative readings of x-rays by Drs. Dahhan and Rosenberg, B-readers, and Dr. Scott, a B-reader and a Board-certified radiologist, based on the latter physicians' superior qualifications. Decision and Order at 4-5; 20 C.F.R. §718.202(a)(1); *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).

Further, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence, 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 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 claimant failed to establish the existence of pneumoconiosis by the new x-ray evidence pursuant to Section 718.202(a)(1).

Claimant next argues that he was not provided a complete, credible pulmonary evaluation on the issue of pneumoconiosis because the administrative law judge rejected Dr. Simpao's opinion on the issue at Section 718.202(a)(4). Claimant contends that the administrative law judge discredited Dr. Simpao's opinion as based on "an erroneous x-ray interpretation and that said physician was not a qualified physician." Claimant's Brief at 4.

Considering the new medical opinion evidence on the issue of pneumoconiosis, the administrative law judge properly accorded greater weight to the opinions of Drs. Rosenberg and Dahhan, that claimant did not have either clinical or legal pneumoconiosis, based upon their qualifications as pulmonary specialists. The administrative law judge accorded less weight to the opinion of Dr. Simpao because he did not have any special qualifications and because his opinion of pneumoconiosis was based on his own positive x-ray reading and claimant's history of coal mine employment. Decision and Order at 6-7. As the Director points out, the administrative law judge never characterized Dr. Simpao's x-ray interpretation as "erroneous." Rather, he properly found that Dr. Simpao's positive x-ray reading was outweighed by the negative x-ray readings of better-qualified physicians. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Similarly, the administrative law judge did not find that Dr. Simpao was not a "qualified physician." Instead, he properly accorded greater weight to the opinions of Drs. Dahhan and Rosenberg because they were better qualified. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). As the Director contends, just because the administrative law judge found that Dr. Simpao's opinion diagnosing pneumoconiosis was outweighed by other opinions on the issue, it does not follow that the Director failed to provide claimant with a complete, credible pulmonary evaluation. *See Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). As claimant

does not otherwise challenge the administrative law judge's finding according greater weight to the opinions of Drs. Rosenberg and Dahhan, that claimant does not have coal workers' pneumoconiosis or a pulmonary disease related to coal mine employment, that finding is affirmed. Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4).

Finally, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment as a roof bolter with the medical opinion evidence assessing disability. Claimant further contends that, considering the heavy concentrations of coal dust he was exposed to on a daily basis, his condition would preclude him from engaging in his usual employment which required exposure to dust on a daily basis.

In finding that the new medical opinions failed to establish total disability at Section 718.204(b)(2)(iv), the administrative law judge noted that all of the medical opinions of record found that claimant does not have a respiratory or pulmonary impairment. Director's Exhibits 10, 30, Employer's Exhibit 2. The administrative law judge found that these opinions were supported by non-qualifying blood gas study and pulmonary function study results at 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 8-9. Thus, contrary to claimant's argument, as there is no opinion of record finding a totally disabling respiratory or pulmonary impairment, there is no need to consider claimant's exertional requirements. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). Nor, contrary to claimant's argument, does a finding of pneumoconiosis provide a presumption that claimant is totally disabled. *See White*, 23 BLR at, 1-7 n.8.[4] Consequently, the administrative law judge properly found that total respiratory disability was not established based on the new medical opinion evidence at Section 718.204(b)(2)(iv), and that finding is affirmed.

In conclusion, as the administrative law judge found that the new evidence did not establish pneumoconiosis or total disability at Section 718.202(a)(1)-(4) and Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that claimant failed to establish a change in an applicable condition of entitlement at Section 725.309(d).

[4] We also note, contrary to claimant's argument, that an opinion advising claimant against further coal dust exposure cannot establish the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge 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