

BRB No. 06-0573 BLA

RALEIGH JOSEPH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LEECO, INCORPORATED)	DATE ISSUED: 12/28/2006
)	
and)	
)	
JAMES RIVER COAL COMPANY)	
)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5070) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) denying benefits 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 at least twenty-seven years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).³ Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

¹The relevant procedural history of this case is as follows: Claimant filed his first claim on August 27, 1992. Director's Exhibit 1. In a Decision and Order dated January 10, 1994, Administrative Law Judge Bernard J. Gilday found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Id.* Judge Gilday also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Gilday denied benefits. *Id.* By Decision and Order dated March 28, 1995, the Board affirmed Judge Gilday's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Joseph v. Leeco, Inc.*, BRB No. 94-0680 BLA (Mar. 28, 1995)(unpub.). The Board, therefore, affirmed Judge Gilday's denial of benefits. *Id.* In light of its affirmance of Judge Gilday's findings that claimant failed to establish total disability at 20 C.F.R. §718.204(c) (2000), the Board determined it did not need to address claimant's contentions regarding Judge Gilday's findings of no pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on September 3, 2002. Director's Exhibit 3.

²The 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, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

On appeal, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Claimant also challenges the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Further, claimant challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.⁴

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 rational, and are consistent with applicable law, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1992 claim was finally denied. 20 C.F.R. §725.309(d). Section 725.309(d) provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final.⁵ *Id.*

Administrative Law Judge Bernard J. Gilday, Jr. denied benefits on claimant's 1992 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 1. In affirming Judge Gilday's denial of benefits, however, the Board affirmed his findings that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). *Joseph v. Leeco, Inc.*, BRB No.

⁴Since the administrative law judge's length of coal mine employment finding and his findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d). The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2).

94-0680 BLA (Mar. 28, 1995)(unpub.). Thus, in order to establish that an applicable condition of entitlement has changed, the newly submitted evidence must establish total disability pursuant to 20 C.F.R. §718.204(b).⁶

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine job with Dr. Simpao's assessment of claimant's pulmonary condition. The newly submitted medical opinion evidence consists of the reports of Drs. Simpao, Rosenberg and Dahhan. Dr. Simpao diagnosed a mild pulmonary impairment and opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, based on a chest x-ray, symptoms and physical findings. Director's Exhibit 9. In contrast, Dr. Rosenberg opined that claimant does not have a pulmonary impairment. Employer's Exhibit 1. Further, Dr. Rosenberg opined that, from a pulmonary perspective, claimant could perform his previous coal mining job or other similar arduous types of labor. *Id.* Similarly, Dr. Dahhan opined that claimant does not have a pulmonary impairment or disability. *Id.* Dr. Dahhan also opined that, from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id.*

The administrative law judge properly accorded greater weight to the opinions of Drs. Rosenberg and Dahhan than to Dr. Simpao's contrary opinion, on the basis that their opinions are better reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge noted that while Dr. Simpao's disability opinion was based on a chest x-ray, symptoms and physical findings, x-rays are not relevant on the issue of disability. Further, the administrative law judge stated that "[w]hile the [c]laimant's

⁶As the Board affirmed only Judge Gilday's finding of no total disability pursuant to 20 C.F.R. §718.204(c) (2000), *Joseph v. Leeco, Inc.*, BRB No. 94-0680 BLA (Mar. 28, 1995)(unpub.), the denial of claimant's previous 1992 claim was not based upon a finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). We, therefore, need not address claimant's contention that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Even if the newly submitted evidence were sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), it would not assist claimant in establishing that an applicable condition of entitlement has changed since the date upon which the order denying the 1992 claim became final. *See* 20 C.F.R. §725.309(d)(2).

physical presentation and symptoms may have supported a finding of disability at the time of Dr. Simpao's examination, the later findings by Dr. Rosenberg (clear lungs) tend to establish that the earlier clinical findings were transient." Decision and Order at 15. In addition, the administrative law judge stated that "Dr. Simpao did not rely on [the pulmonary function study] or [the arterial blood gas study] that he administered in reaching his conclusion, most likely because they belie his finding." *Id.* However, the administrative law judge found that the opinions of Drs. Rosenberg and Dahhan are supported by the objective evidence.⁷ The administrative law judge stated that "[b]oth [the pulmonary function studies] and [the arterial blood gas studies] elicited normal results." *Id.* The administrative law judge also stated that "Dr. Rosenberg's examination was thorough." *Id.* Thus, since the administrative law judge reasonably found that Dr. Simpao failed to explain his opinion that claimant has a mild impairment in light of the normal underlying objective studies of record, we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine job with Dr. Simpao's assessment of claimant's pulmonary condition.

We also reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Further, as claimant raises no other argument at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence. Moreover, since the administrative law judge properly found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Further, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate his

⁷Dr. Rosenberg stated that the pulmonary function tests were normal and revealed no significant impairment. Employer's Exhibit 1. Similarly, Dr. Dahhan stated that the results of the pulmonary function tests and the arterial blood gas tests were normal. *Id.*

claim, as required by the Act. Specifically, claimant argues that “the ALJ concluded that Dr. Simpao’s report suffered from ‘shortcomings’ because it was based merely upon an erroneous x-ray interpretation, and because said physician failed to explain how his findings related to a diagnosis of pneumoconiosis.” Claimant’s Brief at 4. The Director, in the instant case, maintains that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled.

With regard to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Simpao, Rosenberg and Dahhan. Dr. Simpao diagnosed coal workers’ pneumoconiosis and an occupational lung disease caused by his coal mine employment. Director’s Exhibit 9. In contrast, Drs. Rosenberg and Dahhan opined that claimant does not have coal workers’ pneumoconiosis. Employer’s Exhibit 1. The administrative law judge properly discounted Dr. Simpao’s diagnoses because the x-ray Dr. Simpao relied upon to support his diagnoses was reread by a better qualified physician as negative for pneumoconiosis.⁸ *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). In addition, the administrative law judge properly discounted Dr. Simpao’s opinion because Dr. Simpao failed to explain his conclusion.⁹ *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Based on his discounting of Dr. Simpao’s opinion,¹⁰ the administrative law judge concluded that claimant failed to establish that the existence of pneumoconiosis at Section 718.202(a)(4).

As discussed previously, regarding Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Simpao, Rosenberg and Dahhan. Dr. Simpao opined that claimant suffers from a disabling respiratory impairment, while Drs. Rosenberg and Dahhan opined that claimant does not have a pulmonary impairment. The administrative law judge properly accorded greater weight to the opinions of Drs. Rosenberg and Dahhan than to Dr. Simpao’s contrary opinion, on the basis that their opinions are better reasoned and

⁸Although Dr. Simpao, who is not a B reader or a Board-certified radiologist, read the November 14, 2002 x-ray as positive for pneumoconiosis, Director’s Exhibit 9, Dr. Poulos, a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis, Employer’s Exhibit 1.

⁹The administrative law judge stated that Dr. Simpao’s diagnosis was based on a chest x-ray, symptoms and physical findings. The administrative law judge also stated that “Dr. Simpao did not explain, however, how the miner’s symptoms of a productive cough, wheezing, shortness of breath, and difficulty walking, climbing, and lifting were specific to pneumoconiosis.” Decision and Order at 13.

¹⁰The administrative law judge did not discredit Dr. Simpao’s opinion entirely. Rather, the administrative law judge merely found that Dr. Simpao’s opinion was outweighed by the contrary opinions of Drs. Rosenberg and Dahhan.

documented. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Thus, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

In response to claimant's assertion that the Director failed to provide him with a complete, credible pulmonary evaluation, the Director contends that the administrative law judge merely found that the opinions of Drs. Rosenberg and Dahhan outweighed Dr. Simpao's opinion with regard to the issues of pneumoconiosis and total disability. The Director specifically argues that "the ALJ 'discount[ed]' Dr. Simpao's coal workers' pneumoconiosis diagnosis because he relied on an inaccurate positive x-ray reading, and because Dr. Rosenberg stated that [claimant's] symptoms, on which Dr. Simpao relied, 'are not indicative of pneumoconiosis but more consistent with smoking.'" Director's Letter Brief at 2. Further, the Director argues that the administrative law judge discounted Dr. Simpao's total disability opinion because it was not well reasoned. The Director specifically states that "[t]he ALJ gave two reasons: (i) Dr. Rosenberg, who performed a later examination, failed to record the symptoms on which Dr. Simpao relied; and (ii) 'Dr. Simpao did not rely on the [pulmonary function test] or [arterial blood gas test] that he administered in reaching his conclusion, most likely because they belie his finding.'" *Id.* The Director additionally argues that "[t]he ALJ discounted Dr. Simpao's opinion, but did not find that it entirely lacked probative value." *Id.* The Director maintains that "the ALJ acted within his discretion in finding Dr. Simpao's opinion credible, albeit less credible than the opinions of Drs. Rosenberg and Dahhan." *Id.* Hence, the Director argues that "[s]ince the ALJ accorded Dr. Simpao's diagnosis some weight, and since Dr. Simpao provided a complete pulmonary evaluation, addressing each element of entitlement, the Director has satisfied [S]ection 413(b) of the Act." *Id.* We agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Therefore, we decline to remand this case on that basis.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge