BRB No. 07-0319 BLA

I.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEN NAN MER COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 12/14/2007
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5997) of Administrative Law Judge Larry W. Price 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 August 19, 1998, was finally denied on April 9, 1999 because claimant failed to establish a material change in condition, or any element of entitlement.[2] 20 C.F.R. §§718.202(a), 718.204(c), 725.309(d) (2000); Director's Exhibit 1. On September 4, 2002, 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 dated November 29, 2006, the administrative law judge credited claimant with at least eleven years of coal mine employment 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). Decision and Order at 3. Reviewing the entire record, and according greatest weight to the evidence developed in response to claimant's most recent application for benefits, 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). Decision and Order at 3, 5, 8. Accordingly, the administrative law judge denied benefits.

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 pursuant to 20 C.F.R. §718.202(a)(1) and (a)(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.[3]

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[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.

[2] This is claimant's third claim for benefits. Claimant's original claim, filed on June 6, 1988, was finally denied on August 23, 1995, because claimant failed to establish any element of entitlement. 20 C.F.R. §§718.202(a), 718.204(c) (2000); Director's Exhibit 1.

[3] The administrative law judge's finding of at least eleven years of coal mine employment and his findings 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) or (3), are

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'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 asserts that the administrative law judge erred in relying on the qualifications of the interpreting physicians in evaluating the x-ray evidence on the merits of entitlement pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 2. Claimant's assertion lacks merit.

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge permissibly found that the more probative evidence, developed in connection with the current claim, consists of seven readings of three x-rays.[4] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 3, 5. An October 24, 2002 x-ray was read once as positive by Dr. Baker, a B reader, and once as negative by Dr. West, who is a dually qualified B reader and Board-certified radiologist. The administrative law judge permissibly found this x-ray to be negative, based on Dr. West's superior qualifications. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 4; Director's Exhibit 8; Employer's Exhibit 4. In addition, a November 9, 2002 x-ray was read once as positive by Dr. Baker, a B reader, and twice as negative by Dr. Dahhan, a B reader, and by Dr. Wiot, a dually qualified B reader and Board-certified radiologist. Decision and Order at 4; Claimant's Exhibit 3; Employer's Exhibits 1, 7. The

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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).

[4] The record contains an additional reading for quality only (Quality 2), by Dr. Barrett, of the October 24, 2002 x-ray. Director's Exhibit 9.

administrative law judge permissibly found this x-ray to be negative, based on Dr. Wiot's superior qualifications readers. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 4. Finally, a March 4, 2003 x-ray was read once as negative by Dr. Vuskovich, a B-reader, and once as negative by Dr. Poulos, a dually qualified B reader and Board-certified radiologist. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Poulos' superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 4; Claimant's Exhibit 2; Employer's Exhibit 2. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of negative readings by the most highly qualified readers outweighs the positive x-ray readings of record. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 4. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

Claimant next contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), because he did not accord greatest weight to claimant's treating physician. Claimant's argument lacks merit.

In considering the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge again accorded more probative value to the opinions of Drs. Baker, Koura, Dahhan, and Fino that were developed in conjunction with claimant's most recent claim. *See Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27; Decision and Order at 5. The administrative law judge found that Dr. Baker, who is a Board-certified pulmonary specialist, and Dr. Koura, who is a Board-eligible pulmonary specialist and is claimant's treating physician, each opined that claimant suffers from clinical pneumoconiosis, as well as legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure. Decision and Order at 6; Director's Exhibit 8; Claimant's Exhibits 4, 6, 7, 11, 12, 14, 16. By contrast, Dr. Dahhan and Dr. Fino, both Board-certified pulmonary specialists, opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease. Decision and Order at 6-7; Employer's Exhibits 1, 5, 8, 9.

The administrative law judge recognized that Dr. Koura is claimant's treating physician, but found that both Dr. Koura and Dr. Baker had "simply concluded" that claimant's pulmonary condition was due in part to coal dust exposure, without providing sufficient rationale for their opinions. Decision and Order at 8. Thus, the administrative law judge permissibly found the opinions of Drs. Koura and Baker to be outweighed by the better reasoned opinions of Drs. Dahhan and Fino, who considered all of the other medical opinions and test results of record, and explained their conclusions that claimant

does not have clinical or legal pneumoconiosis, but suffers from COPD due entirely to smoking. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 8. Contrary to claimant's argument, an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade."[5] *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Nor is an administrative law judge required to accord less weight to the opinion of a physician who only examined claimant on one occasion. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27.

[5] In addition, we note that claimant's reliance on the opinion of the United States Court of Appeals for the Sixth Circuit in *Gray v. Peabody Coal Co.*, No. 01-3083 (6th Cir. Apr. 19, 2002) (unpub.), is misplaced. Unpublished decisions are not considered binding precedent in the Sixth Circuit. 6th Cir. R. 206(c) (Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.)

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