

BRB No. 06-0708 BLA

HARRISON PENNINGTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LEEEO, INCORPORATED)	DATE ISSUED: 02/27/2007
)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Jonathan L. Snare, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Denying Benefits (2004-BLA-5336) of Administrative Law Judge Rudolf L. Jansen (the administrative law judge) 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 found that the parties stipulated to a coal mine employment history of sixteen years and that the stipulation was supported by the record. Decision and Order at 4-6. The administrative law judge reviewed the newly developed evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 10-15. Consequently, the administrative law judge found that claimant did not establish that one of the applicable conditions of entitlement has changed since the denial of his prior claim, *see* 20 C.F.R. §725.309, and thus the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, urging that the Board reject claimant's argument that he was not provided with a complete and credible pulmonary evaluation.²

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 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 element of entitlement precludes an award of benefits.

¹ Claimant filed his first claim on January 28, 1994. This claim was denied by the district director on May 23, 1995 because the evidence did not establish any of the elements of entitlement. Director's Exhibit 1. No further action was taken until the filing of the instant claim on September 24, 2001.

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

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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant asserts that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that the administrative law judge improperly relied on the qualifications of the physicians interpreting the x-rays as negative and the numerical superiority of the negative x-ray interpretations. Contrary to claimant's assertion, the administrative law judge is to consider the qualifications of the physicians in weighing conflicting x-ray evidence and determining the weight to be assigned the x-ray interpretations.³

In considering the x-ray evidence, the administrative law judge found: Dr. Simpao, a physician with no particular expertise in interpreting x-rays, read the November 9, 2001 film as positive, Director's Exhibit 13; Dr. Sargent, a B reader and Board-certified radiologist,⁴ read the same film for quality only, Director's Exhibit 14; Dr. Poulos, a B reader and Board-certified radiologist, read the same film as negative. Director's Exhibit 15; Dr. Baker, a B reader, read the January 23, 2002 film as positive, Director's Exhibit 12; Dr. Poulos, read the same film as negative, Director's Exhibit 15; and Dr. Rosenberg, a B reader, read both the August 29, 2002 film and the February 18, 2004 film as negative for the existence of pneumoconiosis. Employer's Exhibit 4.

³ Section 718.202(a)(1) provides in pertinent part:

where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration **shall** be given to the radiological qualifications of the physicians interpreting such X-rays [emphasis added].

20 C.F.R. §718.202(a)(1).

⁴ A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

The administrative law judge rationally found that the x-ray evidence failed to affirmatively establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative for the disease. This was proper. Decision and Order at 6, 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).⁵

Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant also asserts that the administrative law judge erred in not finding that the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), based on the newly submitted opinion of Dr. Baker. Claimant's Brief at 4-5. In reviewing the newly submitted medical opinion evidence, the administrative law judge properly considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained.

The administrative law judge found the opinions of Drs. Rosenberg and Fino, who opined that claimant did not have pneumoconiosis to be the most convincing opinions of record as the opinions were the best reasoned and documented of the newly submitted evidence.⁶ This was proper. Decision and Order at 11-13; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-89 n. 4 (1993) (administrative law

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

⁶ The administrative law judge noted that Dr. Rosenberg based his opinion on the findings from two complete pulmonary examinations, while Dr. Fino based his opinion on a thorough review of the newly-submitted medical evidence. Decision and Order at 12.

judge must consider each report to determine if that report's underlying documentation supports its conclusion); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

The administrative law judge also acted within his discretion in concluding that while the opinion of Dr. Simpao, that claimant suffered from pneumoconiosis, was well-reasoned and well-documented, it was not as well supported as the opinions of Drs. Rosenberg and Fino. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 521-522, 22 BLR at 2-511; *Worhach*, 17 BLR at 1-108. Further, the administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Baker's opinion was poorly reasoned and documented and thus insufficient to support a finding of pneumoconiosis because Dr. Baker's diagnoses of coal worker's pneumoconiosis and chronic bronchitis by history, along with his statement that any pulmonary impairment is caused at least, in part, by coal dust exposure and cigarette smoking, were based solely upon claimant's self-reported history of coal mine employment and a positive x-ray reading. Decision and Order at 12; Director's Exhibit 12; 20 C.F.R. §718.104(d)(1)-(5); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Stephens* 298 F.3d at 521-522, 22 BLR at 2-511; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-888 n. 4 (1984). Accordingly, we affirm the administrative law judge's determination that the newly submitted medical opinion evidence did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

Regarding the administrative law judge's weighing of the new evidence relevant to 20 C.F.R. §718.204(b)(2)(iv), claimant asserts that, in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine employment in conjunction with the medical assessments of claimant's respiratory impairment. Claimant's Brief at 4-5. Specifically, claimant maintains that:

The claimant's usual coal mine work included being a heavy equipment operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the opinion of Dr. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 8. Claimant thus contends that Dr. Baker's opinion, Director's Exhibit 12, is well-reasoned and documented and supportive of a finding of total disability.

The administrative law judge found that Dr. Baker's conclusion that a return to a dusty environment would be medically contraindicated does not constitute an assessment of total respiratory disability. Decision and Order at 12. This was finding was proper. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

In addition, the administrative law judge permissibly found that the newly submitted opinion of Dr. Simpao, that claimant had a mild pulmonary impairment preventing a return to coal mine employment, Claimant's Exhibit 2, was not well-reasoned, as the physician failed to explain how his diagnosis of a mild impairment was consistent with normal/non-qualifying pulmonary function and blood gas studies and the doctor failed to discuss how the physical requirements of claimant's previous coal mine employment related to his diagnosis. Decision and Order at 14-15; *see Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 521-522, 22 BLR at 2-511; *see also Cornett*, 227 F.3d 569, 22 BLR 2-107.

In a permissible exercise of his discretion, the administrative law judge accorded superior weight to the opinions of Drs. Rosenberg and Fino, that claimant was not totally disabled, as Dr. Rosenberg based his opinion on the results of two complete pulmonary examinations while Dr. Fino based his opinion on a thorough review of claimant's medical records. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 5-6. These factors do not establish total respiratory disability. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988).

In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and, thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant, in this case, however, has not established that he has pneumoconiosis by way of medical evidence, or that it has worsened over time. We, therefore, decline to address this allegation further. *See White*, 23 BLR at 1-7 n.8. In light of the foregoing, we affirm the administrative law judge's finding that the newly

submitted medical opinion evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and we affirm the administrative law judge's finding that total respiratory disability has not been established. 20 C.F.R. §718.204(b)(2)(i)-(iv).

We next consider claimant's assertion that the Director has failed to fulfill his statutory obligation of providing claimant with a complete, credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). Specifically, claimant alleges that since, in evaluating the newly submitted evidence at Section 718.204(b)(2)(iv), the administrative law judge found Dr. Simpao's opinion poorly reasoned, the Director has not fulfilled his statutory duty. Claimant's Brief at 5-6. Contrary to claimant's assertion, however, the administrative law judge permissibly found Dr. Simpao's opinion to be outweighed by the better explained opinions of Drs. Fino and Rosenberg. Decision and Order at 14-15. This was a proper exercise of the administrative law judge's discretion. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 521-522, 22 BLR at 2-511; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-1-22. Thus, as the Director contends, claimant was provided with a complete, credible pulmonary evaluation. The administrative law judge, however, permissibly found that the opinion was not as probative on the issue of the existence of total disability as the other opinions of record. We, therefore, reject claimant's assertion that remand of this case for a complete, credible pulmonary evaluation is necessary. 30 U.S.C. §923(b); *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *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, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment is, therefore, affirmed, 20 C.F.R. §§718.202(a); 718.204(b)(2), and we affirm the administrative law judge's finding that claimant has not, therefore, established that an applicable condition of entitlement has changed since the denial of his prior claim pursuant to Section 725.309(d). 20 C.F.R. §725.309.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge