BRB No. 07-0482 BLA

J.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/28/2008
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-5210) of Administrative Law Judge Daniel L. Leland rendered 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). This case involves claimant's request for modification of the denial of a subsequent claim that was filed on October 4, 2001.[1]

[1] Claimant's first claim for benefits, filed on July 25, 1991, was denied by the district director on January 21, 1992, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on January 30, 1996, was denied by Administrative Law Judge Mollie W. Neal on August 27, 1997, because

Director's Exhibit 4. Initially, the administrative law judge denied the subsequent claim on December 3, 2004, because claimant did not establish the existence of pneumoconiosis, and therefore did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d).

Claimant appealed, but later requested modification while his appeal was pending before the Board. Accordingly, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. [*J.A.*] *v. Island Creek Coal Co.*, BRB No. 05-0307 BLA (May 25, 2005)(unpub. Order); *see* 20 C.F.R. §725.310. Subsequently, claimant's case was referred to the Office of Administrative Law Judges.

At the hearing, the administrative law judge found that claimant did not establish good cause to submit an x-ray reading in excess of the evidentiary limitations set forth at 20 C.F.R. §§725.414, 725.310(b). In his decision, the administrative law judge credited claimant with 36.64 years of coal mine employment.[2] The administrative law judge considered the evidence originally submitted in the subsequent claim plus the evidence submitted on modification, and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore found no change in conditions or mistake of fact to warrant modification of the determination that claimant did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d); 725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's exclusion of the additional x-ray reading. Further, claimant contends that the administrative law judge erred in his findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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claimant did not establish the existence of pneumoconiosis, or that his total disability was due to pneumoconiosis. Director's Exhibit 2. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*J.A.*] *v. Island Creek Coal Co.*, BRB No. 98-0102 BLA (Sept. 25, 1998)(unpub.). Claimant filed his current claim on October 4, 2001. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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).

Claimant argues that the administrative law judge erred by failing to find good cause to admit the additional x-ray reading proffered as Claimant's Exhibit 5. Claimant's Brief at 8. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*).

Proposed Claimant's Exhibit 5 was a positive reading of a March 18, 1996 x-ray by Dr. Bellotte, a B reader. At the hearing, employer objected that the reading exceeded the evidentiary limitations contained in 20 C.F.R. §§725.414, 725.310(b).[3] Claimant argued that good cause existed to exceed the limitations because he sought to admit Dr. Bellotte's positive reading of the March 18, 1996 x-ray to impeach Dr. Bellotte's negative reading of a March 8, 2002 x-ray submitted in the subsequent claim. Aug. 31, 2006 Hearing Transcript (Tr.) at 10. After considering the parties' arguments, the administrative law judge determined that claimant did not establish good cause to admit the additional x-ray reading. Tr. at 10-18.

The administrative law judge committed no abuse of discretion in finding that claimant did not establish good cause. *See Dempsey*, 23 BLR at 1-55. The record reflects that the March 18, 1996 x-ray predates the denial of claimant's prior claim, in which it was determined as of 1998 that claimant did not have pneumoconiosis. Director's Exhibit 2. In this claim, claimant must establish a change in an applicable condition of entitlement with new evidence. 20 C.F.R. §725.309(d)(3). Thus, Dr. Bellotte's positive reading of the March 18, 1996 x-ray is irrelevant under 20 C.F.R. §725.309(d). Further, admitting the positive reading of the March 18, 1996 x-ray to impeach the new x-ray evidence would be inconsistent with the 1998 factual

[3] Sections 725.414 and 725.310(b) apply to claims filed after January 19, 2001, and establish combined evidentiary limitations on modification. *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007); *see* 20 C.F.R. §§725.2(c), 725.414, 725.310(b). The applicable provisions permitted claimant to submit two x-ray readings in support of his affirmative case, pursuant to 20 C.F.R. §725.414(a)(2)(i), and one additional x-ray reading on modification, pursuant to 20 C.F.R. §725.310(b). A showing of "good cause" was required to exceed those limits. 20 C.F.R. §725.456(b)(1). On appeal, there is no dispute that claimant had already submitted his full complement of affirmative x-ray evidence allowed under 20 C.F.R. §§725.414 and 725.310(b) before he submitted Dr. Bellotte's positive reading of the March 18, 1996 x-ray.

determination that claimant did not have pneumoconiosis. Under 20 C.F.R. §725.309(d), that determination must be treated as both final and correct, thus negating any earlier evidence to the contrary. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616, 23 BLR 2-345, 2-361 (4th Cir. 2006). We therefore affirm the administrative law judge's finding that claimant did not establish good cause to admit the excess x-ray reading for impeachment purposes, pursuant to 20 C.F.R. §725.456(b)(1), and we turn to the administrative law judge's analysis of the medical evidence.

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. 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). The administrative law judge determined that claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(d)(3). In considering a request for modification of the denial of a subsequent claim, which was denied based upon a failure to establish a change in an applicable condition of entitlement, the administrative law judge must determine whether the evidence developed in the subsequent claim, including any evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reiterated his 2004 finding that "a preponderance of the [initial] x-ray evidence did not support a finding of pneumoconiosis, because two of the three board certified radiologists/B readers found no . . . pneumoconiosis and the two B readers were split on the question."[4]

[4] Initially submitted in the subsequent claim were six readings of two new x-rays dated March 8, 2002 and August 7, 2002. Director's Exhibit 69 at 3. Dr. Alexander, who is a Board-certified radiologist and B reader, read the March 8, 2002 x-ray as positive for both simple pneumoconiosis and Category A large opacities. Director's Exhibit 25. Dr. Wiot, who is also a Board-certified radiologist and B reader, and Dr. Bellotte, who is a B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 25, 41. Dr. Alexander read the August 7, 2002 x-ray as positive for both simple pneumoconiosis and Category A large opacities, and Dr. Zaldivar, who is a B

Decision and Order at 5. Turning to the two x-ray readings submitted on modification, the administrative law judge considered that Dr. Willis, who is a Board-certified radiologist and B reader, read a November 13, 2003 x-ray as positive for pneumoconiosis, and that Dr. Wheeler, who is also a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 82, 84. The administrative law judge found that, because two equally-qualified readers "reached opposite conclusions . . . the preponderance of the x-ray evidence is still negative for pneumoconiosis." Decision and Order at 5.

Claimant argues that the administrative law judge erred by simply counting to determine that "two of the three" Board-certified radiologists and B readers read the initially submitted x-rays as negative, thereby finding Dr. Alexander outnumbered by Drs. Wiot and Wheeler. Claimant's Brief at 5-7. Claimant contends that if the administrative law judge had properly considered the x-ray readings without counting the readers, he would have recognized that the x-ray evidence is "equally divided" and thus is "in equipoise," not negative. Claimant's Brief at 6, 7.

We agree with claimant that the administrative law judge improperly relied on a count of the dually qualified physicians who read the March 8, 2002 and August 7, 2002 x-rays as negative, instead of performing a qualitative comparison of the conflicting readings of each individual x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). However, the error is harmless, because claimant concedes that the x-ray evidence viewed in light of the readers' radiological credentials is in equipoise. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 82, 84; n.4, *supra*. Where the evidence is in equipoise, claimant fails to carry his burden. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). Thus, we affirm 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).[5]

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reader, read the same x-ray as positive for simple pneumoconiosis. Director's Exhibits 18, 41. Dr. Wheeler, who is a Board-certified radiologist and B reader, read the August 7, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 36.

[5] We need not address claimant's argument that the administrative law judge failed to consider that Dr. Alexander interpreted two x-rays on the same day, and thus had "the potential advantage of viewing both films at the same time." Claimant's Brief at 6. The record reflects that claimant did not raise this issue before the administrative law judge. *See Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Moreover, claimant cites no authority to support his argument that the administrative law judge had

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found no mistake in his prior finding that the initial medical opinion evidence did not establish the existence of pneumoconiosis. Decision and Order at 5. Specifically, the administrative law judge found that the diagnoses of clinical pneumoconiosis by Drs. Rasmussen and Zaldivar, based on x-ray readings, were "against the weight of the x-ray evidence." *Id*.; Director's Exhibits 16, 60. Further, the administrative law judge found that Dr. Zaldivar had not diagnosed legal pneumoconiosis. Additionally, the administrative law judge found Dr. Rasmussen's initial opinion, that it was "medically reasonable" to conclude that claimant has pneumoconiosis, to be equivocal. *Id*. The administrative law judge further found that the contrary opinions of Drs. Bellotte and Crisalli, that claimant did not have pneumoconiosis, were well documented and reasoned. *Id*.; Director's Exhibits 56, 64; Employer's Exhibits 1, 5.

The administrative law judge then turned to the two medical reports and four CT scan readings submitted on modification. Dr. Anton, whose qualifications are not of record, read a March 8, 2004 CT scan as positive for pneumoconiosis, and Dr. Wiot, who, as noted, is a Board-certified radiologist and B reader, read the same scan as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 2. Dr. Cruz, whose qualifications are not of record, read an August 18, 2005 CT scan as revealing fibrosis and emphysema, and Dr. Wiot read the same scan as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 2. Based on Dr. Wiot's qualifications, the administrative law judge found that the CT scan evidence did not support a finding of pneumoconiosis. In the two medical reports, Dr. Rosenberg opined that claimant does not have pneumoconiosis but suffers from respiratory impairments due to smoking and asthma, and Dr. Rasmussen opined that claimant has obstructive lung disease due to both smoking and coal dust exposure.[6] Employer's Exhibit 1; Claimant's Exhibits 4, 7. The administrative law judge found that Dr. Rosenberg submitted a well-reasoned and explained opinion, based on specific medical evidence in this case, that claimant does not have pneumoconiosis. By contrast, the administrative law judge found that Dr. Rasmussen's opinion was not well reasoned, in that Dr. Rasmussen essentially assumed that since medical studies establish that coal dust exposure can cause obstructive lung disease, it must have done so in this case.

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to consider this factor. Further, a review of the record discloses no medical evidence stating that Dr. Alexander had an advantage in viewing two x-rays at the same time.

[6] Dr. Rasmussen also diagnosed complicated pneumoconiosis. Claimant's Exhibit 4. The administrative law judge did not find complicated pneumoconiosis established, and claimant has not challenged that aspect of the administrative law judge's decision.

Claimant argues that the administrative law judge erred by discrediting the opinions that claimant has clinical pneumoconiosis, based on an incorrect assessment that the x-ray evidence was negative, rather than in equipoise, for pneumoconiosis. Contrary to claimant's contention, the administrative law judge rationally discounted the opinions of Drs. Rasmussen and Zaldivar, that claimant has clinical pneumoconiosis, because they were not supported by the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Claimant argues further that the administrative law judge erred by finding that Dr. Rasmussen's initial opinion was equivocal, and that his opinion on modification was not specific to the facts of this case. We disagree. The administrative law judge acted within his discretion to find that Dr. Rasmussen's opinion was equivocal in that Dr. Rasmussen stated that it was "medically reasonable" that claimant has pneumoconiosis. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-2-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Moreover, substantial evidence supports the administrative law judge's finding that Dr. Rasmussen's opinion on modification regarding the etiology of claimant's lung impairment was based on general medical studies and not on the particular facts of this case. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Additionally, claimant alleges that the opinions of Drs. Bellotte and Rosenberg were flawed and should not have been credited. We need not address these arguments, as the administrative law judge permissibly discounted the opinions that were supportive of claimant's burden to establish pneumoconiosis. *See Larioni*, 6 BLR at 1-1278. Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we affirm the finding that claimant did not establish the existence of pneumoconiosis, and therefore did not establish a change in conditions or mistake of fact to justify modifying the denial of his claim based on a failure to establish a change in an applicable condition of entitlement. *See Hess*, 21 BLR at 1-143; 20 C.F.R. §§725.309(d), 725.310.

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