BRB No. 07-0535 BLA

A.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L & A COAL COMPANY	)	DATE ISSUED: 02/29/2008
	)	
and	)	
	)	
AIU INSURANCE 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 Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Gregory F. Jacob, 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 (2006-BLA-5272) of Administrative Law Judge Ralph A. Romano 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 a subsequent claim filed on January 14, 2005.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with eighteen years of coal mine employment, based on the stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and that he failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence, submitted since the denial of his prior claim, insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), and also erred in finding the medical opinion evidence, submitted since the denial of the prior claim, insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation on the issue of pneumoconiosis pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, in a limited response, urges the Board to reject claimant's contention that the Director failed to provide a complete pulmonary evaluation on the issue of pneumoconiosis.[2]

[1] Claimant's first application for benefits, filed on October 31, 2002, was finally denied by the district director on November 12, 2003. Director's Exhibit 1. The district director found that claimant failed to establish the existence of pneumoconiosis, failed to establish that the disease was caused at least in part by coal mine employment and failed to show that he was totally disabled by the disease. *Id*. Claimant took no further action until he filed the instant claim for benefits on January 14, 2005. Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total respiratory or pulmonary disability pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iii). We also affirm, as unchallenged on appeal, the administrative law judge's findings that

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If 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., Inc.*, 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 last claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of the elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish pneumoconiosis pursuant to Section 718.202(a)(1). The newly submitted x-ray evidence consists of the interpretations of two x-rays taken on February 1, 2005 and August 15, 2005, respectively. Director's Exhibit 21; Employer's Exhibit 2. The readings of these x-rays were negative for pneumoconiosis. *Id.* Therefore, contrary to claimant's assertions, the administrative law judge correctly found the new x-ray evidence did not

---

pneumoconiosis did not arise out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and his finding that total disability was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1-83.

establish pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White,* 23 BLR at 1-4-5. We therefore affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant also contends that because the administrative law judge rejected Dr. Simpao's opinion on pneumoconiosis because it was 1) based on an erroneous x-ray interpretation,[4] 2) did not explain its findings or rationale, and 3) was outweighed by a better reasoned opinion, the Director failed to fulfill his statutory obligation of providing claimant with a complete, credible pulmonary evaluation on the issue of pneumoconiosis. Claimant's Brief at 4. In response, however, the Director contends that Dr. Simpao provided claimant with the required pulmonary evaluation on pneumoconiosis. The Director contends that the fact that the administrative law judge found Dr. Simpao's opinion to be worth less weight than a better reasoned opinion does not mean that the Director failed to provide claimant with the required pulmonary evaluation. We agree.

Dr. Simpao conducted an examination, performed a full range of testing, took claimant's symptoms and history and addressed each element of entitlement. Director's Exhibit 21; Claimant's Exhibit 2; 20 C.F.R. §§718.101(a), 718.104, 725.406(a); *Barnes v ICO Corp*., 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 919 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-225 (8th Cir. 1984) . The administrative law judge, however, rationally accorded the opinion less weight on the issue of pneumoconiosis as he found it outweighed by the contrary opinion of Dr. Westerfield, which he found to be better documented and reasoned.[5] As the Director argues, he was not required to provide claimant with a dispositive opinion on the issue of pneumoconiosis. Because Dr. Simpao provided

[4] It is unclear what claimant means when he contends that the administrative law judge rejected Dr. Simpao's opinion because Dr. Simpao relied on an "erroneous" x-ray interpretation. Claimant's Brief at 4. Dr. Simpao interpreted claimant's February 1, 2005 x-ray to be negative for pneumoconiosis. This is the same x-ray read by Dr. Westerfield, a B reader, as negative, which the administrative law judge credited. Dr. Simpao stated that he found clinical pneumoconiosis based on the results of claimant's blood gas and pulmonary function studies, physical findings and symptomatology. Director's Exhibit 21-18.

[5] The administrative law judge noted that each doctor's opinion was fully documented. He found, however, that Dr. Simpao failed to explain how the evidence he developed and reviewed supported his diagnosis, while Dr. Westerfield had. Decision and Order at 8.

claimant with a pulmonary evaluation addressing pneumoconiosis, which the administrative law judge found to be outweighed by a better reasoned opinion, the Director met his statutory burden. Claimant's argument is, therefore, rejected. *See Cline*, 919 F.2d at 11, 14 BLR at 2-105.

Finally, claimant contends that the administrative law judge erred in finding that the medical opinion evidence developed since the denial of his prior claim was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant argues that in determining whether claimant is totally disabled, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant goes on to argue that since claimant's usual coal mine work included being a shuttle car operator:

> [i]t 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, 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 5.

In finding that Dr. Simpao's opinion did not establish total disability at Section 718.204(b)(2)(iv), the administrative law judge properly found that Dr. Simpao's opinion, attributing claimant's total disability to both his respiratory impairment and cervical disc disease, was insufficient to establish a totally disabling respiratory impairment. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). Moreover, contrary to claimant's argument, the fact that further coal dust exposure is contraindicated does not establish total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

We also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and a "considerable amount of time … has passed since the initial diagnosis…." Claimant's Brief at 5-6. A finding of total respiratory disability must be based on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), we affirm his finding that claimant has failed to establish a totally disabling respiratory or

pulmonary impairment by medical opinion evidence thereunder. Further, we affirm the administrative law judge's finding that total respiratory disability has not been established at Section 718.204(b)(2), overall. Decision and Order at 12-13; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Because we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), that pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), that claimant was totally disabled by a respiratory impairment pursuant to Section 718.204(b), and that pneumoconiosis was totally disabling pursuant to Section 718.204(c), claimant has failed to demonstrate a change in one of the applicable conditions of entitlement since the denial of his prior claim pursuant to Section 725.309(d). Entitlement to benefits in this subsequent claim is, therefore, precluded. 20 C.F.R. §725.309(d).

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