

BRB No. 06-0142 BLA

WILLIE L. TAYLOR, JR.)
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 Claimant-Petitioner)
)
 v.)
)
 JIM WALTER RESOURCES,) DATE ISSUED: 07/26/2006
 INCORPORATED)
)
 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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whithead, P.C.), Birmingham,
Alabama, for employer.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5583) of
Administrative Law Judge Robert D. Kaplan 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). Claimant's prior application for benefits, filed on January

20, 1995, was finally denied on May 2, 1995 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(2000). Director's Exhibit 1. On May 12, 2003, 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 September 16, 2005, the administrative law judge credited the miner with twelve years and five months of coal mine employment,¹ as stipulated by the parties and supported by the record, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant is challenging the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). In support of his argument, claimant contends that all of the pulmonary function studies of record, including those administered by the Department of Labor physician, were improperly conducted, and, therefore, contends that he is entitled to have his case remanded so that he may be retested. Claimant further contends that the medical record before the administrative law judge was incomplete because it did not contain all of the medical evidence regarding his recently diagnosed prostate cancer. Finally, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to claimant's appeal, contending that there is no evidence in the record to support claimant's contention that his pulmonary function studies were not administered correctly.²

¹ The record indicates that claimant's coal mine employment occurred in Alabama. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² The administrative law judge's finding of twelve years and five months of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii)-(iv), are 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).

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).

When 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). 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 prior claim was denied because he failed to establish any of the elements of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the four elements: the existence of pneumoconiosis; that his pneumoconiosis arose out of coal mine employment; the existence of a totally disabling respiratory or pulmonary impairment; or that his total disability is due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *See U.S. Steel Mining Company, LLC v. Director, OWCP*, 386 F.3d 977, 990 (11th Cir. 2004).

Claimant initially asserts that all of the pulmonary function studies of record are invalid because claimant took bronchodilator medication at home, prior to the administration of the tests. Claimant's Brief at 2-3. Claimant notes that the applicable quality standards set forth in 20 C.F.R. §718.103(b)(8) require the physician to state whether a bronchodilator was administered and to report the test values obtained both before and after the medication. Claimant contends that none of the physicians reported any true pre-bronchodilator results (because claimant took bronchodilator medication at home prior to the administration of the tests), and that all of the pulmonary function tests of record are invalid.

The Director states that the quality standards at 20 C.F.R. §718.103 and Appendix B address only the administration of bronchodilator medication by the testing physician, and do not place any parameters on the administration or recording of pulmonary function tests when the miner has taken bronchodilator medication on his own. Thus, the Director contends that the pulmonary function studies of record, on their face, do not violate the quality standards set forth in the regulations. *See* 20 C.F.R. §718.103, Appendix B; Director's Brief at 1-2. Further, the Director points out that Dr. Khan, the Department of Labor physician, was aware that claimant took a bronchodilator prior to testing³ and did not invalidate the test results. Director's Brief at 2.

³ Dr. Khan specifically noted: "bronchodilator taken by patient prior to testing." Director's Exhibit 10.

The record reflects that Drs. Khan, Hays and Goldstein were all aware that claimant took bronchodilators and other breathing medicine on a daily basis and the record contains no evidence that the results of the pulmonary function testing were invalid for any reason. The administrative law judge, therefore, properly considered all of the pulmonary function studies of record to be valid.⁴ *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Inman v. Peabody Coal Co.*, 6 BLR 1-1249 (1984). Consequently, we affirm the administrative law judge's finding that as all of the pulmonary function studies of record were non-qualifying, claimant failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i).

We further reject claimant's argument that a remand of the case is required because the medical record before the administrative law judge did not contain all of the medical evidence regarding claimant's recently diagnosed prostate cancer. The Act provides "for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis (black lung disease)." 20 C.F.R. §725.1; *U.S. Steel Mining Company, LLC v. Director, OWCP*, 386 F.3d 977 (11th Cir. 2004). Thus, medical evidence pertaining to claimant's prostate cancer is not probative to the instant claim.

Finally, claimant challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), specifically asserting that the record contains evidence that he suffers from legal pneumoconiosis in the form of asthma, causally related to coal mine employment.

In considering the medical opinion evidence, the administrative law judge properly noted that Dr. Khan, Dr. Goldstein and Dr. Hays, claimant's treating physician, all diagnosed the presence of asthma. Reviewing Dr. Khan's June 25, 2003 report, the administrative law judge properly noted that, if credited, Dr. Khan's diagnosis of bronchial asthma, by history, which the physician stated was causally related to coal dust inhalation, constitutes a diagnosis of legal pneumoconiosis under the Act. Director's Exhibit 10; Decision and Order at 8. Contrary to claimant's arguments, however, the administrative law judge permissibly concluded that because Dr. Khan failed to reconcile his diagnosis with the negative chest x-ray, the non-qualifying objective study results, and his physical examination results, which showed no pulmonary abnormalities, Dr Khan's diagnosis was insufficiently reasoned to establish the existence of pneumoconiosis. See *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en

⁴ In addition, we note that there is no evidence in the record to support claimant's assertion that he became ill during Dr. Khan's pulmonary function testing and was administered bronchodilators by the physician. Claimant's Brief at 2.

banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 10; Decision and Order at 8.

Reviewing Dr. Goldstein's May 10, 2005 report, the administrative law judge properly found that while Dr. Goldstein also diagnosed asthma, as he stated that claimant's condition "is related to exposure to chemicals in the coal mine," specifically to a glue claimant used to stabilize the ceiling, and not to dust exposure, Dr. Goldstein's diagnosis is insufficient to establish the existence of legal pneumoconiosis under the Act. Employer's Exhibit 1; Decision and Order at 9. The Act defines "pneumoconiosis" as "a chronic *dust* disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b)(*emphasis added*). The revised regulation at 20 C.F.R. 718.201(a) provides that this definition includes both clinical and legal pneumoconiosis, and further defines "legal" pneumoconiosis as including "any chronic lung disease or impairment or its sequelae arising out of coal mine employment." The regulations define a disease "arising out of coal mine employment" as including only those chronic pulmonary diseases or respiratory or pulmonary impairments significantly related to or substantially aggravated by, *dust exposure* in coal mine employment." (*emphasis added*). 20 C.F.R. §718.201(2), (3). Thus, we affirm the administrative law judge's conclusion that Dr. Goldstein's diagnosis of asthma related to chemical exposure in the mines does not constitute a diagnosis of legal pneumoconiosis under the Act. *See also Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992).

Finally, the administrative law judge properly found that while Dr. Hays' treatment notes contain diagnoses of asthma, as the physician does not offer an opinion as to the cause of claimant's asthma, Dr. Hays' opinion is also insufficient to establish the existence of legal pneumoconiosis under the Act. 20 C.F.R. §718.201(a).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *See U.S. Steel Mining Company, LLC v. Director, OWCP*, 386 F.3d 977, 992 (11th Cir. 2004); *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989) ("We do not question the weight accorded to the evidence by the ALJ, for such is not within our scope of review."). Because the administrative law judge's findings are supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 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

JUDITH S. BOGGS
Administrative Appeals Judge