BRB No. 07-0493 BLA

W.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WARNER COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/28/2008
	)	
and	)	
	)	
OLD REPUBLIC 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

W.C., Evarts, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order Denying Benefits (2005-BLA-05903) of Administrative Law Judge Adele Higgins Odegard, 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). The administrative law judge found this case to be a subsequent claim filed on November 28, 2003.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with between 3.70 and 4.65 years of coal mine employment, and found that this subsequent claim was timely filed and that employer, Warner Coal Company, was the properly named responsible operator. Weighing the medical 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), 718.203. In addition, she found the newly submitted evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant failed to establish a change in one of the applicable conditions of entitlement pursuant to 20

[1] Claimant filed his first claims for benefits with the Social Security Administration on January 28, 1970 and December 22, 1972, which were denied on October 9, 1970 and June 8, 1979, respectively. Director's Exhibit 1. Claimant filed his initial claim for benefits with the Department of Labor (DOL) on March 14, 1979, which was denied on March 1, 1985. Director's Exhibit 1. No further action was taken on this claim. A second DOL claim was filed on January 14, 1994, and denied by the district director on March 15, 1995. Director's Exhibit 1. Following transfer of the claim to the Office of Administrative Law Judges, Administrative Law Judge Robert L. Hillyard denied benefits, finding that claimant failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. The denial was affirmed by the Board on October 18, 1999. [*W.C.*] *v. Coal Fuels, Inc.*, BRB No. 99-0179 BLA (Oct. 18, 1999)(unpub.); Director's Exhibit 1. On December 17, 1999, claimant filed a third application for benefits with DOL, which was accepted as a request for modification. Director's Exhibit 1. The request for modification was denied by the district director, and the case was again transferred to the Office of Administrative Law Judges. Finding that claimant failed to establish either a mistake in a determination of fact, or a change in conditions because the evidence failed to establish any of the elements of entitlement, Administrative Law Judge Donald W. Mosser denied benefits in a Decision and Order issued on March 30, 2001. Director's Exhibit 1. The Board affirmed Judge Mosser's denial of benefits. [*W.C.*] *v. Warner Coal Co.*, BRB No. 01-0587 BLA (Feb. 8, 2002)(unpub.); Director's Exhibit 1. No further action was taken until claimant filed his current claim on November 28, 2003. Director's Exhibit 3.

C.F.R. §725.309(d). Accordingly, benefits were denied. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[2] 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. *Trent*, 11 BLR at 1-27.

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 either the existence of pneumoconiosis or a totally disabling respiratory impairment.[3] Director's

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge also found that the newly submitted evidence was insufficient to that pneumoconiosis arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(c), and also insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). However, because these elements of entitlement were not conditions upon which the prior denial was based, the administrative law judge should not have adjudicated these issues. 20 C.F.R. §725.309(d); Director's Exhibit 1.

Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Initially, because the administrative law judge relied upon her finding regarding the length of claimant's coal mine employment in weighing the medical opinion evidence under Section 718.202(a)(4), we address her consideration of the evidence relevant to the number of years that claimant worked as a coal miner. The administrative law judge credited claimant with between 3.70 and 4.65 years of coal mine employment, rather than the fifteen years alleged by claimant. Decision and Order at 7-9; Director's Exhibit 3. The administrative law judge discussed claimant's hearing testimony, his work history forms, three affidavits submitted by co-workers, and claimant's Social Security Administration (SSA) records. Decision and Order at 3-5, 7-9. In weighing the relevant evidence, the administrative law judge found that claimant's oral testimony was "vague and uncertain" concerning the dates he worked for various employers. Decision and Order at 8. Consequently, she accorded little weight to claimant's testimony regarding the dates of employment, but rather, relied on the Social Security Administration earnings statements. *Id.*

Utilizing the method of computation set out in 20 C.F.R. §725.101(a)(32), the administrative law judge found that, based on the SSA records, claimant established 3.70 years of coal mine employment between 1963 and 1971.[4] Decision and Order at 8. Considering claimant's testimony and the other evidence of record, the administrative law judge credited claimant with an additional .95 years of possible coal mine employment during 1963. Decision and Order at 9. Consequently, taking into consideration the entirety of the relevant evidence, the administrative law judge credited claimant with between 3.70 and 4.65 years of coal mine employment. *Id.*

[4] The regulation applied by the administrative law judge provides a definition of "year," and further provides that:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). . . .

20 C.F.R. §725.101(a)(32)(iii).

It is well established that claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-68 (1996)(*en banc*); *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985). The Board has held that in considering the evidence submitted by claimant, the administrative law judge may use any reasonable method of calculation. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988). Because the administrative law judge considered all of the relevant evidence of record and set forth the bases for her conclusions, she permissibly applied the formula set forth at Section 725.101(a)(32) and, reasonably credited claimant with between 3.70 and 4.65 years of coal mine employment. 20 C.F.R. §725.101(a)(32); *see Croucher*, 20 BLR at 1-72; *Dawson*, 11 BLR at 1-60; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11. Consequently, we affirm her length of coal mine employment determination.

We will now address the administrative law judge's findings that the newly submitted evidence was insufficient to establish a change in one of the applicable conditions of entitlement at Section 725.309(d). Pursuant to Section 718.202(a)(1), the administrative law judge considered three readings of two x-rays, dated February 3, 2004 and August 11, 2004. Decision and Order at 13-14. Dr. Baker, a B reader, read the February 3, 2004 x-ray as positive for the existence pneumoconiosis. Director's Exhibit 13. Dr. Rosenberg, who indicated that he is a B reader, and Dr. Halbert, who is dually qualified as a B reader and Board-certified radiologist, read the August 11, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibits 2, 4.

Weighing the conflicting x-ray evidence, the administrative law judge permissibly accorded greatest weight to Dr. Halbert's negative interpretation of the August 11, 2004 x-ray than to Dr. Baker's positive reading of the February 3, 2004 x-ray, based on Dr. Halbert's status as a B reader and Board-certified radiologist.[5] Decision and Order at 14;

[5] The administrative law judge accorded little weight to Dr. Rosenberg's negative interpretation of the August 11, 2004 x-ray, finding that Dr. Rosenberg does not possess the specialized radiological qualifications that would "permit me to give increased weight to his conclusion." Decision and Order at 14. The administrative law judge found that while Dr. Rosenberg's curriculum vitae states that he is Board-certified in internal medicine, pulmonary diseases and occupational medicine, it does not include reference to any specialized radiological credentials. Decision and Order at 14 n.11; Director's Exhibit 17. However, it is noted that on the ILO classification form filled out by Dr. Rosenberg, he indicated that he is a B reader. Employer's Exhibit 2. Error, if any, by the administrative law judge in assessing Dr. Rosenberg's radiological qualifications is harmless, as the administrative law judge permissibly accorded greatest weight to Dr. Halbert's negative reading of the August 11, 2004 x-ray due to his dual qualifications as a

Director's Exhibit 13; Employer's Exhibit 4; 20 C.F.R. §718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, as the administrative law judge conducted an appropriate qualitative and quantitative analysis of the x-ray evidence, we affirm her finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 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); *White*, 23 BLR at 1-4-5; *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993).

In addition, the administrative law judge correctly found that the claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), as the record contains no biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not available to claimant.[6] Decision and Order at 15; *see* 20 C.F.R. §718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). This finding, therefore, is affirmed.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Rosenberg and Broudy. Decision and Order at 15-17. Drs. Rosenberg and Broudy, both of whom are Board-certified in internal medicine and pulmonary disease, opined that claimant does not suffer from pneumoconiosis. Employer's Exhibits 1, 3. Dr. Baker, Board-certified in internal medicine and pulmonary disease, opined that claimant suffers from coal workers' pneumoconiosis, chronic bronchitis and hypoxemia, all of which he concluded were caused by claimant's coal dust exposure. Director's Exhibit 13.

In weighing the conflicting medical opinion evidence, the administrative law judge rationally found that "[t]o the extent that Dr. Broudy based his conclusions on the evidence of record, I find his conclusions to be well-reasoned and I give them some weight." Decision and Order at 19; *see* Employer's Exhibit 3; *Clark v. Karst-Robbins*

B reader and Board-certified radiologist. Decision and Order at 14; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 3. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Coal Co., 12 BLR 1-149, 1-151 (1989)(*en banc*). In contrast, the administrative law judge permissibly accorded little weight to Dr. Baker's opinion, in which he diagnosed the existence of pneumoconiosis, because she found that Dr. Baker relied on "a highly inflated estimate of the [c]laimant's coal mine employment history." Decision and Order at 18; s*ee Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). In addition, she reasonably found that Dr. Baker did not adequately discuss the bases for his diagnoses; particularly, his finding that claimant's bronchitis was related to his coal mine employment. Decision and Order at 18; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge permissibly found Dr. Baker's opinion to be outweighed by Rosenberg's opinion, that claimant does not have pneumoconiosis,[7] as she determined that Dr. Rosenberg's opinion was well-reasoned and supported by its underlying documentation. Decision and Order at 18-19; Employer's Exhibit 1; *Clark*, 12 BLR at 1-151; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic*, 8 BLR at 1-47. Thus, we affirm her finding that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In addition, we affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish that claimant is totally disabled. Both of the newly submitted pulmonary function studies and both blood gas studies, yielded non-qualifying values,[8] Director's Exhibit 13; Employer's Exhibit 2, and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we affirm the administrative law judge's findings that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 20-22.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Rosenberg and Broudy.[9] Decision

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[7] The administrative law judge found that Dr. Rosenberg related his diagnosis to the findings on physical examination, as well as the results of the objective studies. Decision and Order at 18-19; Employer's Exhibits 1, 2.

[8] A "qualifying" objective study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

[9] The administrative law judge also set forth the opinion of Dr. Vuskovich, who reviewed claimant's February 3, 2004 pulmonary function study and stated that "presuming the test results were valid, the test showed that Claimant was not likely to be disabled, from a pulmonary standpoint, from working in the coal industry." Decision and Order at 22; Director's Exhibit 19. However, the administrative law judge accorded little

and Order at 22-23. Dr. Baker opined that claimant had a "mild/minimal impairment based on a decreased PO2, chronic bronchitis, and coal workers' pneumoconiosis, profusion 1/0." Director's Exhibit 13. Dr. Rosenberg opined that claimant showed no evidence of pulmonary impairment and that he was capable of performing his previous coal mine employment. Employer's Exhibit 1. Dr. Broudy stated that any impairment was "mild and certainly not disabling or expected to cause any significant symptoms which would prevent this gentleman from doing his work from a respiratory standpoint." Employer's Exhibit 3.

Weighing the relevant medical opinion evidence, the administrative law judge rationally found that the opinions of Drs. Baker, Rosenberg and Broudy were all well-reasoned because each physician "demonstrated at least some understanding of the exertional requirements of the Claimant's coal mine employment." Decision and Order at 22-23; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge acted within her discretion, as fact-finder, in concluding that none of the physicians opined that claimant is unable to perform his usual coal mine employment, based upon her consideration of the physicians' assessments in conjunction with their knowledge of the exertional requirement of claimant's usual coal mine employment. Decision and Order at 23; 20 C.F.R. §718.204(b)(2)(iv); *Cornett*, 227 F.3d at 578, 22 BLR at 2-at 2-123-24; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). We affirm, therefore, her finding that the newly submitted medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Accordingly, we also affirm her finding that the newly submitted evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). Decision and Order at 23; 20 C.F.R. §8718.204(b)(2); *see Fields*, 10 BLR at 1-21; *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 new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), claimant has failed to demonstrate that one of the applicable conditions of entitlement has changed since the denial of his prior claim, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

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weight to Dr. Vuskovich's opinion because she found that the physician did not take into consideration the exertional requirements of claimant's coal mine employment. Decision and Order at 19.

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