

BRB No. 06-0857 BLA

BILL KING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
COMPANY	)	
	)	DATE ISSUED: 05/31/2007
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Jeffrey S. Goldberg (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (05-BLA-5478) of Administrative Law Judge Joseph E. Kane rendered 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).<sup>1</sup> The administrative law judge credited claimant with eight years and eleven months of coal mine employment.<sup>2</sup> The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant's sole contention is that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly denied benefits and that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.<sup>3</sup>

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<sup>1</sup> Claimant's initial application for benefits, filed on October 29, 1984, was finally denied on January 21, 1985 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed a second claim for benefits on January 18, 1991, which was finally denied on November 30, 1994, on the same grounds. Claimant submitted a third application for benefits on September 7, 1996, which was denied by an administrative law judge in a Decision and Order issued on October 21, 1998. Claimant filed a request for modification on March 29, 1999. An administrative law judge denied the request for modification on March 30, 2001. The Board affirmed the denial of benefits in a Decision and Order issued on March 27, 2002. Claimant filed the present claim for benefits on December 15, 2003. Director's Exhibit 34.

<sup>2</sup> The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 15. Accordingly, this case arises within the jurisdiction 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*).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has eight years and eleven months of coal mine employment, that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(b)(2)(i)-(iii), and, therefore, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See 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).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis and an impairment related to pneumoconiosis contained in Dr. Baker's February 13, 2004 opinion provided by the Department of Labor, the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act. The Director responds that remand is not necessary in this case, as Dr. Baker's opinion regarding the existence of pneumoconiosis was documented and reasoned, but the administrative law judge reasonably found it outweighed by the contrary evidence. The Director also maintains that even if the administrative law judge had fully credited Dr. Baker's opinion regarding total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant could not have established total disability by a preponderance of the evidence.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director is not, however, required to provide an evaluation sufficient to establish claimant's entitlement to benefits. *Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges*, 18 BLR at 1-88 n.3; accord *Cline v. Director, OWCP*, 917 F.2d at 11, 14 BLR at 2-105; *Newman v. Director, OWCP*, 745 F.2d 1162 at 1166, 7 BLR at 2-31.

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form.<sup>4</sup> Director's Exhibit 9; 20 C.F.R. §§718.101(a),

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<sup>4</sup> Dr. Baker examined claimant on February 13, 2004 and obtained a chest x-ray, pulmonary function study, blood gas study, and EKG, in addition to claimant's employment and medical histories. Director's Exhibit 9. Dr. Baker diagnosed coal workers' pneumoconiosis 1/0, based on claimant's abnormal chest x-ray and history of coal dust exposure. *Id.* Dr. Baker also diagnosed chronic bronchitis by history, and ischemic heart disease by history. *Id.* Dr. Baker attributed claimant's coal workers'

718.104, 725.406(a). On the issue of the existence of pneumoconiosis, Dr. Baker identified the factors upon which he relied in diagnosing coal workers' pneumoconiosis and chronic bronchitis caused by coal dust exposure. Director's Exhibit 9. The administrative law judge ultimately determined that Dr. Baker's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, which were better supported by the evidence of record and were based upon a more comprehensive review of the medical evidence. Decision and Order at 11 (unpaginated); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other").

On the issue of total disability, the administrative law judge determined that because Dr. Baker did not state whether the minimal impairment that he diagnosed was totally disabling, it was entitled to little weight. Decision and Order at 12 (unpaginated). The administrative law judge further found that the opinions in which Drs. Dahhan and Rosenberg indicated that claimant is capable of performing his usual coal mine employment were consistent with the objective evidence of record and, therefore, well-reasoned and well-documented. *Id.* The Director contends that remand for a complete pulmonary evaluation is not necessary because even if Dr. Baker had determined that claimant's minimal impairment rendered him totally disabled, the evidence on this issue would be, at best, in equipoise and, therefore, insufficient to carry claimant's burden under Section 718.204(b)(2). We concur with the Director's position in light of the administrative law judge's determination that the opinions of Drs. Dahhan and Rosenberg were entitled to full weight based upon their documentation and reasoning and the physicians' qualifications as Board-certified pulmonologists.<sup>5</sup> Decision and order at 13 (unpaginated); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Because Dr. Baker's opinion was found outweighed on the issue of the existence of pneumoconiosis and because remand for a complete evaluation on the issue of total disability would not alter the result in this case, we reject claimant's contention that remand for a new pulmonary evaluation is required in this case. *Cf. Hodges*, 18 BLR at 1-93.

Based upon the administrative law judge's finding that claimant failed to establish the elements of entitlement that were previously adjudicated against him, namely the existence of pneumoconiosis or total disability due to pneumoconiosis, which claimant

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pneumoconiosis and chronic bronchitis to coal dust exposure and diagnosed a minimal impairment due to both conditions. *Id.*

<sup>5</sup> Dr. Baker's qualifications are not of record.

has not challenged on appeal, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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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JUDITH S. BOGGS  
Administrative Appeals Judge