BRB No. 07-0712 BLA

S. B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	DATE ISSUED: 05/28/2008
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 On Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits On Remand (03-BLA-5880) of Administrative Law Judge Paul H. Teitler 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).[1] This case has been before the

[1] Claimant filed his first claim for benefits on August 25, 1986, which was denied by Administrative Law Judge Ralph A. Romano in a Decision and Order dated January 8, 1989, for claimant's failure to establish any element of entitlement. Director's Exhibit 1. Claimant requested modification on February 21, 1989, which was denied by Administrative Law Judge Ainsworth H. Brown in a Decision and Order dated February

Board previously.[2] In its prior decision, [*S.B.*] *v. Reading Anthracite Co.*, BRB No. 04-0469 BLA (Apr. 29, 2005) (Hall, J., concurring) (unpub.), the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), but vacated the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis, and remanded the case for the administrative law judge to reconsider the new x-ray evidence based on an accurate analysis of the record. The Board also vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for the administrative law judge to reconsider the weight and credibility of the medical opinion evidence pursuant to 20 C.F.R. §718.104(d) and *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). Further, because the prior claim denial was based on claimant's failure to establish any element of entitlement, the Board instructed the administrative law judge to consider whether the new evidence established a change in any one of the applicable conditions of entitlement.[3] 20 C.F.R. §725.309(d).

Pursuant to employer's motion for reconsideration, the Board upheld its previous decision, but additionally instructed the administrative law judge to explain his rulings on the admission of evidence, particularly with regard to the admission and consideration of claimant's hospital records pursuant to 20 C.F.R. §725.414(a)(4).

21, 1991, based on claimant's failure to establish the existence of pneumoconiosis or total disability. *Id.* Claimant filed this claim on January 16, 2002. In a Decision and Order dated April 20, 2004, Administrative Law Judge Paul H. Teitler denied benefits, based on claimant's failure to establish the existence of pneumoconiosis with new evidence. Director's Exhibit 3.

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

[3] Judge Hall issued a separate concurring opinion, agreeing with the majority's opinion to vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), (a)(4), but indicating that she would instruct the administrative law judge to determine whether the statutory duty to provide claimant with a complete, credible pulmonary evaluation had been met by the Director, Office of Workers' Compensation Programs.

On remand, the administrative law judge determined that the newly submitted evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore 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 that he did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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).

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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 prior denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered six readings of two new x-rays. Dr. Rashid, a physician with no special radiological qualifications, and

Dr. Smith, a B reader and Board-certified radiologist, read the March 20, 2002[4] x-ray as positive for pneumoconiosis, while Dr. Duncan, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 19; Claimant's Exhibit 3; Employer's Exhibit 18. Dr. Scatarige, a B reader and Board-certified radiologist, read the March 13, 2003 x-ray as negative for pneumoconiosis, while Dr. Smith, also a B reader and Board-certified radiologist, read the same x-ray as positive for pneumoconiosis. Employer's Exhibit 25; Claimant's Exhibit 2. Giving consideration to the qualifications of the readers, the administrative law judge rationally found that the readings of the March 13, 2003 x-ray were in equipoise, as two equally qualified physicians reached opposite conclusions. Likewise, the administrative law judge rationally found the March 20, 2002 x-ray did not establish pneumoconiosis, as it was read by two equally qualified physicians who reached opposite conclusions. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Claimant argues that the administrative law judge "improperly discounted" the interpretation of Dr. Rashid, and asserts that Dr. Smith is a "more highly qualified" radiologist than Dr. Scatarige. Claimant's Brief at 2. The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. The administrative law judge properly considered the conflicting x-ray readings based on the readers' radiological qualifications, and substantial evidence supports his finding that the x-ray evidence did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *White*, 23 BLR at 1-4-5. We therefore reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to the Board's instructions, the administrative law judge reviewed the new medical opinion evidence at 20 C.F.R. §718.202(a)(4). Dr. Tavaria, who is Board-certified in Internal Medicine, diagnosed coal workers' pneumoconiosis and opined that claimant was totally and completely disabled by coal workers' pneumoconiosis. Claimant's Exhibits 8, 9. Dr. Rashid, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed heart disease, and opined that claimant had no significant pulmonary impairment due to his work in the coal mines. Director's Exhibit 13. Drs. Levinson and Fino, who are Board-certified in Internal Medicine and Pulmonary Disease, both concluded that claimant does not have coal workers' pneumoconiosis. Director's Exhibits 35, 37; Employer's Exhibit 29. Claimant contends that the administrative law judge failed to accord proper weight to Dr. Tavaria's opinion. Claimant's contention lacks merit.

[4] Dr. Barrett read the March 20, 2002 x-ray for quality purposes only. Director's Exhibit 20.

As instructed, the administrative law judge reconsidered Dr. Tavaria's opinion under 20 C.F.R. §718.104(d)[5] and pursuant to the standard enunciated in *Soubik.* The administrative law judge found that although Dr. Tavaria had seen claimant on more occasions than had the other physicians, and had treated claimant since 2002, his opinion was not well supported, as it was based on the most recent chest x-ray, which the administrative law judge found to be in equipoise. The administrative law judge further found that Dr. Tavaria had not reviewed the records of the other physicians, or explained his opinion. Decision and Order On Remand at 9. This was a proper analysis of the credibility of the doctor's opinion. *See* 20 C.F.R §718.104(d)(5); *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also properly noted that "Dr. Tavaria is not a pulmonary specialist and does not have a 'clinical expertise' in treating miners as the physician did in *Soubik*." *Id.* Thus, contrary to claimant's contention, the administrative law judge permissibly declined to accord the treating physician's opinion additional weight. *See Soubik*, 366 F.3d at 235, 23 BLR at 2-101.

Further, as instructed by the Board, the administrative law judge reconsidered Dr. Rashid's opinion. Dr. Rashid read an x-ray he took of claimant on March 20, 2002 as showing pneumoconiosis category 1/0. Director's Exhibit 19. In his report of September 24, 2002, however, Dr. Rashid opined that claimant had no significant pulmonary impairment due to his work in the coal mines and he did not mention the x-ray or pneumoconiosis. Thus, the administrative law judge rationally found Dr. Rashid's opinion "was not instructive" on the issue of the existence of pneumoconiosis. Decision and Order On Remand at 7, *see Hall v. Director, OWCP*, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989). The administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Levinson and Fino than to Dr. Tavaria, based on their superior qualifications, and because their opinions were better reasoned and documented. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Clark*, 12 BLR at 1-155. Thus, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We therefore affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as it is supported by substantial evidence.

[5] Thus, the administrative law judge considered the factors listed in 20 C.F.R. §718.104(d)(1)-(4) for assessing the opinion of a treating physician, specifically, the nature and duration of the treatment relationship, and the frequency and extent of treatment. *See* 20 C.F.R. §718.104(d)(1)-(4).

The administrative law judge considered the new pulmonary function studies, blood gas studies, and medical opinions relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order On Remand at 8. The administrative law judge found that: the February 22, 2001 pulmonary function study by Dr. Tavaria produced non-qualifying[6] values, Director's Exhibit 27; the July 18, 2002 pulmonary function study by Dr. Rashid, produced qualifying values but indicated only fair cooperation, Director's Exhibit 15; the November 16, 2002 pulmonary function study by Dr. Rashid produced qualifying values, but was invalidated by Dr. Levinson based on less-than-optimal effort, Director's Exhibits 17, 18; and that the pulmonary function studies dated October 7, 2003 and March 3, 2002 were non-qualifying. Employer's Exhibit 35. The administrative law judge also properly noted that the August 28, 2002 and March 13, 2002, blood gas studies produced "normal" rest and exercise values. Director's Exhibit 14; Employer's Exhibit 35. Decision and Order On Remand at 8. Claimant does not challenge these findings, which are therefore affirmed. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Dr. Tavaria opined that claimant is totally disabled, noting that "Patient had a pulmonary function study done in October 2003. This revealed severe obstructive lung disease with poor response to bronchodilator therapy." Claimant's Exhibit 8. The administrative law judge found that the opinions of Drs. Levinson and Fino were more instructive regarding disability, as Dr. Levinson stated, and Dr. Fino agreed, that the reversibility revealed by improvement on the pulmonary function studies after bronchodilators was not indicative of impairment related to coal mine employment. Both Drs. Levinson and Fino also found that the blood gas study was normal with an excellent response to exercise. Director's Exhibits 35, 37; Employer's Exhibit 29. The administrative law judge found that Dr. Fino concluded that claimant has no respiratory impairment, and that Dr. Levinson concluded that claimant's symptoms are due to coronary artery disease. The administrative law judge concluded that the testing and medical opinions did not establish total disability. *Id.* at 9. As claimant does not specifically challenge the administrative law judge's finding that total disability was not established by the new medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), we affirm it. *See Skrack,* 6 BLR at 1-711; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because the administrative law judge properly found that the new evidence did not establish the existence of pneumoconiosis or total disability at 20 C.F.R.§§718.202(a),

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

718.204(b)(2), we affirm his finding that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).

Accordingly, the administrative law judge's Decision and Order Denying Benefits On Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge