BRB No. 08-0183 BLA

W.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/23/2008
	)	
NATIONAL MINES CORPORATION	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (06-BLA-5205) of Administrative Law Judge Alan L. Bergstrom rendered on a subsequent claim[1] 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 credited claimant with eighteen years of coal mine employment.[2] The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2), based on the medical evidence developed since the denial of claimant's prior claim. The administrative law judge therefore determined that claimant did not 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 the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4), and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv).[3] Moreover, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The Director responds that he met his obligation to provide claimant with a complete pulmonary evaluation. Employer responds in support of the administrative law judge's denial of benefits, and asserts that claimant's request for a complete pulmonary evaluation should be denied.

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[1] Claimant's first claim for benefits, filed on May 21, 1990, was denied on June 17, 1992, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant's second claim, filed on July 17, 1996, was denied on June 17, 1999, because claimant did not establish total disability due to pneumoconiosis arising out of coal mine employment. Director's Exhibit 1. Claimant filed this subsequent claim on July 16, 2001. Director's Exhibit 3.

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

[3] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis and total disability based on the new evidence pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *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).

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). Claimant's prior claim was denied in a form letter from the district director stating that claimant failed to establish total disability due to pneumoconiosis caused at least in part by coal mine employment. Director's Exhibit 1. The administrative law judge inferred from the letter that claimant did not establish any element of entitlement. Decision and Order at 13. 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).

Pursuant to Section 718.202(a)(1), the administrative law judge found that six readings of four new x-rays did not establish the existence of pneumoconiosis. Dr. Baker, who lacked radiological qualifications,[4] interpreted the July 28, 2001 x-ray as positive for pneumoconiosis, while Dr. Halbert, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 12, 31 at 72. Based upon Dr. Halbert's superior radiological credentials, the administrative law judge permissibly accorded greater weight to Dr. Halbert's reading and found the July 28, 2001 x-ray to be negative for pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Further, the administrative law judge accurately noted that all three remaining x-rays were read as negative for

[4] The administrative law judge correctly noted that Dr. Baker was not a B reader at the time he read the July 28, 2001 x-ray. Decision and Order at 15; Director's Exhibit 12.

pneumoconiosis,[5] and he found that the x-ray evidence did not establish the existence of pneumoconiosis. The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5. Consequently, we reject claimant's arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that he "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the four new medical opinions did not establish the existence of pneumoconiosis. Drs. Baker and Hussain diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Fino concluded that claimant does not have pneumoconiosis but suffers from lung disease due to smoking. Director's Exhibits 12, 13, 31; Employer's Exhibits 2, 3. After considering the doctors' credentials and the documentation and reasoning of their opinions, the administrative law judge chose to accord "greater probative weight" to the opinions of Drs. Dahhan and Fino. Decision and Order at 16. He therefore found that the medical opinion evidence did not establish the existence of pneumoconiosis.

Claimant argues that the administrative law judge erred in discounting Dr. Baker's opinion because it was based, in part, on a positive x-ray. Claimant further asserts that Dr. Baker's opinion was well-reasoned, and that the administrative law judge "appears to have" interpreted medical data and substituted his own conclusion for that of Dr. Baker. Claimant's Brief at 4-5. Claimant's arguments lack merit.

The administrative law judge reasonably discounted Dr. Baker's diagnosis of pneumoconiosis based on a positive x-ray and claimant's history of dust exposure, because the x-ray on which Dr. Baker relied "was found negative by a better qualified interpreter." Decision and Order at 16; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). Further, the administrative law judge permissibly found that, despite Dr. Baker's status as claimant's treating physician, "conflicting proof in the record detracts from the credibility of his conclusion." Decision and Order at 16; *see* 20 C.F.R. §718.104(d)(5). The administrative law judge acted within his discretion to accord

[5] Dr. Hussain, who lacks radiological qualifications, and Dr. Binns, a Board-certified radiologist and B reader, interpreted the October 3, 2001 x-ray as negative for pneumoconiosis. Director's Exhibits 13, 31. Drs. Fino and Dahhan, both of whom are B readers, interpreted the September 25, 2003 and October 11, 2003 x-rays as negative for pneumoconiosis, respectively. Director's Exhibit 31 at 58, 44.

greater weight to the opinions of Drs. Dahhan and Fino, that claimant does not have clinical pneumoconiosis and that his impairments are due to smoking, because the opinions were well-explained, and persuasive because they were supported by the overall x-ray evidence, the doctors' clinical findings, and claimant's "extensive smoking history."[6] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As claimant raises no other arguments relevant to this issue, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the opinions of Drs. Baker, Dahhan, Fino, and Hussain did not establish total disability. The administrative law judge ultimately chose to accord "greater weight" to Dr. Dahhan's opinion that claimant retains the respiratory capacity to perform his coal mine work. Decision and Order at 19.

Claimant contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability and erred in failing to properly address the exertional requirements of claimant's usual coal mine employment in discussing the medical opinions at Section 718.202(b)(2)(iv). Claimant's Brief at 7-8. Claimant's contentions lack merit. In his July 28, 2001 report, Dr. Baker stated that claimant had an impairment based on a diagnosis of pneumoconiosis because persons with pneumoconiosis should limit further exposure to coal dust, and would be considered "100% occupationally disabled for work in the coal mining industry . . . ." Director's Exhibit 12 at 2. Dr. Baker also stated:

> Patient has a Class III impairment based on the FEV1 between 41% and 59% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Id.

In weighing Dr. Baker's opinion, the administrative law judge properly found that Dr. Baker's statement that claimant should not work in order to avoid further coal dust exposure does not support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 18. Additionally, because Dr. Baker did not discuss whether claimant was totally disabled from his usual coal mine work as a

[6] As summarized by the administrative law judge, claimant testified that he smoked one pack of cigarettes per day for approximately fifty years. Decision and Order at 4; Hearing Transcript at 10. Since claimant does not challenge the finding that he has an extensive smoking history, the finding is affirmed. *See Skrack*, 6 BLR at 1-711.

result of a "Class III" impairment, the administrative law judge reasonably determined that Dr. Baker's opinion was not sufficient to establish total disability.

Moreover, the administrative law judge credited the opinion of Dr. Dahhan, that claimant has no respiratory impairment that would preclude the performance of his usual coal mine duties.[7] *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Director's Exhibit 31; Employer's Exhibit 2. The record reflects that, in so opining, Dr. Dahhan indicated that he was aware of claimant's job as a preparation plant and tipple operator. Director's Exhibit 31. Because claimant does not allege error with respect to the weight accorded to the opinion of Dr. Dahhan, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987). We also affirm, as supported by substantial evidence, the administrative law judge's overall determination that claimant failed to prove total respiratory disability pursuant to Section 718.204(b).[8]

Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d).

Claimant lastly argues that, because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's report that was provided by the Department of Labor, the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 5-6. The Director responds that he met his duty to provide claimant with a complete pulmonary

[7] Apparently, because Dr. Dahhan's deposition was not designated as evidence by employer, the administrative law judge considered only Dr. Dahhan's written medical report. Decision and Order at 10 n.2. On appeal, no party challenges this aspect of the administrative law judge's decision.

[8] We reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

evaluation. The Director reasons that the administrative law judge did not reject Dr. Hussain's opinion, but merely found it outweighed by the contrary medical opinions. Director's Brief at 2.

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Hussain 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. Director's Exhibit 13; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Upon review of the administrative law judge's decision, we agree with the Director that, with respect to both the existence of pneumoconiosis and total disability, the administrative law judge permissibly found that Dr. Hussain's opinion was not as well-reasoned and documented as were the contrary opinions of record. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); Decision and Order at 17-19. The obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). In sum, we agree with the Director that he met his obligation, in this case, to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

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