BRB No. 06-0940 BLA

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| S.O. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| LEECO, INCORPORATED | ) | |
| | ) | DATE ISSUED: 08/17/2007 |
| 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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6373) of Administrative Law Judge Daniel A. Sarno, Jr. 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] Claimant filed his claim for benefits on October 28, 2002. Director's Exhibit 3. The administrative law judge credited claimant with fourteen years of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering the subsequent claim, the administrative law judge concluded that the newly submitted evidence did not establish any element of entitlement. The administrative law judge therefore determined 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 the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.[3]

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).

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[1] Claimant's two previous claims, dated February 24, 1988, and April 22, 1994, were finally denied and administratively closed. Director's Exhibit 1. The second claim was denied on January 28, 1997, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1 at 1, 27, 342.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. 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*).

[3] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis and total disability were not established at 20 C.F.R. §§718.202(a)(2)-(4), 718.204(b)(2)(i)-(iii), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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). 20 C.F.R. §725.309(d). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or that he was totally disabled. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to proceed with this claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of two new x-rays. Dr. Hussain, a physician with no special radiological qualifications, read the September 8, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 10. The administrative law judge noted further that the December 20, 2005 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, a B reader, and by Dr. Wiot, a B reader and Board-certified radiologist. Employer's Exhibits 1, 3. Based on the superior radiological qualifications of Drs. Dahhan and Wiot, the administrative law judge found that "the overwhelming preponderance of the x-ray evidence is negative for pneumoconiosis." Decision and Order at 5.

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 v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White,* 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed"' the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge discounted Dr. Simpao's diagnosis of a moderate impairment because Dr. Simpao did not explain the basis for his finding. Decision and Order at 8, 9. By contrast, the administrative law judge found that Dr. Dahhan's opinion that claimant is not totally disabled by a

respiratory impairment was well-reasoned, and well-documented by non-qualifying[4] pulmonary function and blood gas studies. *Id*. The administrative law judge therefore "credit[ed] Dr. Dahhan's opinion over that of Dr. Simpao." Decision and Order at 9.

Claimant contends that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5. As just discussed, however, the administrative law judge chose not to credit Dr. Simpao's assessment of a moderate impairment because he found that it was not adequately explained, and because Dr. Dahhan's opinion was better reasoned and documented. This finding was within the administrative law judge's discretion, and it is supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Since the administrative law judge permissibly declined to credit Dr. Simpao's moderate impairment rating, he did not need to compare the rating to claimant's job duties.

Additionally, claimant argues that, since pneumoconiosis is a progressive disease, it must have worsened, thus affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5. As discussed above, claimant did not establish that he has pneumoconiosis. Moreover, an administrative law judge's findings regarding total disability must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. We therefore reject claimant's argument and affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant further contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's September 8, 2003 medical 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." Claimant's Brief at 4. The Director responds that the "mere fact that the [administrative law judge] found Dr. Simpao's opinion on the presence of pneumoconiosis was not well reasoned and was outweighed by Dr. Dahhan's diagnosis of no pneumoconiosis does not mean that the Director failed to satisfy his statutory obligation." Director's Brief at 2.

[4] A "qualifying" objective study yields values 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). The record reflects that Dr. Dahhan interpreted claimant's pulmonary function and blood gas studies as "normal." Employer's Exhibit 1 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. The record reflects that Dr. Simpao 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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 10. The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was not well-reasoned because it was based on Dr. Simpao's positive x-ray reading, which the administrative law judge found outweighed by the negative x-ray readings by physicians with superior radiological credentials. Decision and Order at 8. The administrative law judge also found that Dr. Simpao failed to otherwise specify the rationale for his opinion. *Id.* Additionally, the administrative law judge chose to give greater weight to the better reasoned and documented opinion of Dr. Dahhan, that claimant does not suffer from pneumoconiosis. *Id.; see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "[administrative law judges] may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). We agree with the Director that the administrative law judge found Dr. Simpao's opinion outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

As the administrative law judge properly found that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(b)(2), claimant has failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits.

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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REGINA C. McGRANERY
Administrative Appeals Judge