BRB No. 14-0030 BLA

KENNETH E. ORR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/20/2014
	)	
and	)	
	)	
PEABODY INVESTMENTS INCORPORATED, c/o 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Kenneth Orr, Kingman, Arizona, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2011-BLA-06311) of Administrative Law Judge John P. Sellers, III, on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's second request for modification of the denial of a subsequent claim filed on September 1, 2004,[1] and is before the Board for the second time.[2]

The administrative law judge credited claimant with 14.8 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing. The administrative law judge found that the medical evidence developed since the denial of the prior claim was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment and, thus, did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c). The administrative law judge further found, therefore, that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. 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.

---

[1] The recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a claim filed before January 1, 2005. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

[2] Claimant's initial claim, filed on August 3, 1993, was denied by the district director on October 28, 1993, because claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Claimant's next two claims, filed on February 24, 1997, and August 27, 2002, were denied on May 28, 1997 and May 21, 2003, respectively, by reason of abandonment. Director's Exhibits 2, 3. Claimant filed his current claim for benefits on September 1, 2004. Director's Exhibit 5. In a Decision and Order dated September 29, 2006, Chief Administrative Law Judge John M. Vittone denied benefits, finding that claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 31. On appeal, the Board affirmed Judge Vittone's Decision and Order. *K.O.* [*Orr*] *v. Peabody Coal Co.*, BRB No. 07-0165 BLA (Sept. 25, 2007) (unpub.); Director's Exhibit 33. Claimant submitted new medical evidence on March 6, 2008, which the district director construed as a request for modification. Director's Exhibits 34, 35. On June 3, 2010, Administrative Law Judge Donald W. Mosser issued a Decision and Order - Denying Benefits, finding that the evidence submitted on modification was insufficient to establish the existence of pneumoconiosis or total disability. Director's Exhibit 56. Claimant filed the current request for modification on November 29, 2010. Director's Exhibit 57.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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.[3] 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 because claimant did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis or a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §725.309(d)(2), (3). Additionally, because claimant seeks modification of the denial of his subsequent claim under 20 C.F.R. §725.310, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the current subsequent claim, established a change in an applicable condition of entitlement. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

[3] The record indicates that claimant's last coal mine employment was in Illinois. Director's Exhibit 14. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In considering whether claimant established the prerequisites for modification, the administrative law judge stated that claimant was required to establish that he has pneumoconiosis, or is totally disabled, to demonstrate a mistake in a determination of fact or a change in conditions. Decision and Order at 21. Relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge acknowledged that the record contains three readings of three newly submitted x-rays.[4] *Id*. at 8, 22. Dr. Brown, whose radiological qualifications are not of record, interpreted an x-ray dated February 15, 2010 as negative for any disease. Employer's Exhibit 3-75. Dr. Mays, a Board-certified radiologist, read a November 3, 2010 film as showing no acute disease. Employer's Exhibit 3-9. Dr. Morrison, a Board-certified radiologist and B reader, read an x-ray dated April 11, 2011, as negative for pneumoconiosis. Director's Exhibit 66. The administrative law judge rationally found that the readings by Drs. Brown and Mays did not establish the existence of pneumoconiosis because neither physician referenced pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Decision and Order at 22. The administrative law judge also acted within his discretion in determining that the April 11, 2011 x-ray did not support claimant's burden, based on Dr. Morrison's negative reading for pneumoconiosis. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); Decision and Order at 22. Similarly, upon reviewing all of the evidence, the administrative law judge properly found that a mistake in a determination of fact was not made in the prior decisions denying benefits, as the preponderance of x-ray readings by physicians with special radiological qualifications was negative for clinical pneumoconiosis. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003); Decision and Order at 22-23; 33. We affirm, therefore, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), (3), the administrative law judge accurately determined that there were no biopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) is applicable in this living miner's claim filed after January 1, 1982, but before January 1, 2005, in which the record contained no evidence of complicated pneumoconiosis. Decision and Order at 23. Accordingly, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3).

[4] The administrative law judge observed that claimant's newly submitted treatment records contained the interpretation of a February 15, 2010 x-ray by Dr. Brown, and an interpretation of a November 3, 2010 x-ray by Dr. Mays, a Board-certified radiologist. Decision and Order at 8; *see* Employer's Exhibits 1, 3. The administrative law judge found that these x-ray interpretations were not designated as affirmative evidence by either party. Decision and Order at 8 n.3, 9 n.4. The administrative law judge further found that neither doctor mentioned pneumoconiosis. Decision and Order at 22.

At 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted CT scan evidence and the newly submitted medical opinions of Drs. Rose and Farney. The record contains one reading of a CT scan dated September 9, 2009, and two readings of a CT scan dated March 25, 2010.[5] The reading of the September 9, 2009 scan appears in claimant's newly submitted treatment records and was performed by Dr. Mays, a Board-certified radiologist. Employer's Exhibit 3-118. Dr. Mays observed apical scarring in the left upper lobe and emphysematous changes. *Id*. Dr. Hamzeh, a Board-certified pulmonologist, interpreted the March 25, 2010 CT scan as showing moderate centrilobular nodularity, mild to moderate expiratory air-trapping, milder upper lobe centrilobular emphysema, and small filling defects in the trachea. Director's Exhibit 57. Dr. Morrison, a Board-certified radiologist and B reader, interpreted the same scan as showing apical pleural thickening, small bullae at the right apex, and evidence of early centrilobular emphysema. Director's Exhibit 66.

The administrative law judge rationally found that, because Drs. Hamzeh and Morrison did not render diagnoses of pneumoconiosis, their CT scan interpretations were insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); Decision and Order at 24. The administrative law judge summarized Dr. Mays's CT scan reading, but did not make a finding as to whether it assisted claimant in satisfying his burden of proof. Decision and Order at 10. This omission does not require remand, however, as Dr. Mays also did not set forth a diagnosis of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to the newly submitted medical opinion evidence, Dr. Rose diagnosed clinical and legal pneumoconiosis,[6] while Dr. Farney diagnosed chronic

[5] The administrative law judge acknowledged that claimant referred to "two other interpretations of the CT scan, by Drs. Lynch and Rose," in the comments section of the Evidence Summary Form. Decision and Order at 9 n.8; Director's Exhibit 57. The administrative law judge acted within his discretion in finding that these interpretations were not admissible, as they exceed the evidentiary limitations, which permit the parties to submit one reading of each CT scan. 20 C.F.R. §§725.414, 725.310(b) (2013); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic

obstructive pulmonary disease, with chronic bronchitis and centrilobular emphysema, and concluded that claimant does not have either form of pneumoconiosis. Director's Exhibits 57, 66; Claimant's Exhibit 3; Employer's Exhibit 5. The administrative law judge permissibly assigned diminished weight to Dr. Rose's diagnosis of clinical pneumoconiosis, as he found that it was based on Dr. Rose's own inadmissible CT scan interpretation,[7] which was both equivocal and outweighed by Dr. Morrison's negative reading. *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 24. Moreover, the administrative law judge rationally found that Dr. Farney's contrary opinion was better supported by the weight of the x-ray and CT scan evidence. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155; Decision and Order at 24. Regarding legal pneumoconiosis, the administrative law judge acted within his discretion in giving little weight to Dr. Rose's diagnosis because she reviewed, but did not address, the pulmonary function study conducted by Dr. Farney, which showed no obstructive impairment.[8] *See Clark*, 12 BLR at 1-155; *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); Decision and Order at 30. The administrative law judge also rationally determined that Dr. Rose's reliance on an overstated coal mine employment history, and an understated smoking history, detracted from the probative value of her opinion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); Decision and Order at 30.

We affirm, therefore, the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We also affirm, as rational and supported by substantial evidence, the administrative law judge's finding that the prior decision denying benefits did not contain a mistake in a determination of fact on the issue of the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries*

---

lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] Dr. Rose stated that the CT scan findings "may be due to either coal workers' pneumoconiosis or to smoking." Director's Exhibit 57.

[8] Dr. Rose cited a nineteen-year coal mining history and a smoking history of between ten and fifteen pack-years. Director's Exhibit 57. The administrative law judge credited claimant with 14.8 years of coal mine employment and found that claimant's smoking history totaled between fifteen and twenty pack-years. Decision and Order at 7, 28.

[*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); Decision and Order at 32-34.

With respect to total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), the administrative law judge considered the new pulmonary function and blood gas studies. Decision and Order at 36; Director's Exhibits 57, 59, 66. The administrative law judge properly found that claimant did not establish total disability, as none of the pulmonary function or blood gas studies produced qualifying values.[9] Decision and Order at 36. Because substantial evidence supports the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), this finding is affirmed. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-6-9. Additionally, at 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately noted that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 37. We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability under this subsection.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Rose and Farney. Decision and Order at 37-38. Dr. Rose opined that claimant is totally disabled due to respiratory problems, while Dr. Farney found that claimant is not totally disabled from a respiratory standpoint. Director's Exhibit 66; Claimant's Exhibit 3. The administrative law judge permissibly found that Dr. Rose's opinion was not persuasive, as it was unsupported by the objective evidence and she provided no rationale for her diagnosis of a totally disabling respiratory impairment. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Clark*, 12 BLR at 1-155; Decision and Order at 38. The administrative law judge also acted within his discretion in according greater weight to the contrary opinion of Dr. Farney, as his conclusion was better supported by the objective evidence. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's findings that claimant did not establish total disability, based on the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Similarly, on review of the record, the administrative law judge rationally found that there was no mistake in a determination of fact on the issue of total disability in the prior decision denying benefits. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-6-9; Decision and Order at 39.

As the administrative law judge properly found that the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis at 20 C.F.R.

[9] 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)(i), (ii).

§718.202(a) or total disability at 20 C.F.R. §718.204(b)(2), we further affirm his finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). In addition, we affirm the administrative law judge's finding that the prior denial of benefits did not contain a mistake in a determination of fact on the issues of the existence of pneumoconiosis or total disability and, therefore, that claimant did not establish a basis for modification of the denial. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002); *Hess*, 21 BLR at 1-141.

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

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge