BRB Nos. 05-0496 BLA and
05-0496 BLA-A

VERNON LEE ALMON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/28/2006
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order–Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Vernon L. Almon, Dawson Springs, Kentucky, *pro se.*

Natalie A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor Of Labor, 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, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order – Denial of Benefits (03-BLA-6095) of Administrative Law

Judge Robert L. Hillyard 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] After crediting claimant with twenty-six years of coal mine employment,[2] the administrative law judge found that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment due pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2),(c). The administrative law judge therefore concluded that claimant failed to establish a "material change in conditions of any element previously adjudicated against him" pursuant to 20 C.F.R. §725.309(d). Decision and Order at 22. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds and requests that the Board vacate the denial of benefits and remand the case for further consideration because of the administrative law judge's failure to discuss alleged deficiencies in Dr. Jarvis's opinion. Employer, on cross-appeal, argues that the administrative law judge erred in excluding evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. Employer further asserts that the administrative law judge erred in giving no probative weight to hospitalization and medical treatment records, and erred in according less weight to Dr. Repsher's opinion that claimant does not have pneumoconiosis. The Director responds asserting that employer's arguments on cross-appeal lack merit. Employer has filed a reply brief reiterating its contentions.[3]

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[1] The administrative law judge found that claimant's initial application for benefits filed on February 16, 1999 was denied on March 27, 1999 because the evidence failed to establish any element of entitlement. Decision and Order at 3; Director's Exhibits 1, 2. The administrative law judge further found that claimant filed a timely request for modification that was denied by the district director on December 16, 1999. *Id.* Claimant filed his current application for benefits on March 5, 2001.

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 5, 16. 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 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's decision to credit claimant with twenty-six years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Mc Fall 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. 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 pursuant to 20 C.F.R. Part 718, claimant must establish 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). As the administrative law judge found, claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis, that he was totally disabled, or that his total disability was due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge considered five interpretations of four new x-rays in light of the readers' radiological credentials. The administrative law judge permissibly found that the July 15, 2002 x-ray was inconclusive because it was interpreted as negative by Dr. Wiot, a dually qualified Board-certified radiologist and B reader, and positive for pneumoconiosis by Dr. Brandon, also a dually qualified radiologist. Decision and Order at 13; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A1 (1984). The administrative law judge further considered that the November 12, 2002 x-ray was interpreted as negative by Dr. Repsher, a B reader. Decision and Order at 13; Employer's Exhibit 1. In addition, the administrative law judge considered that the July 10, 2001 x-ray was read as positive by

Dr. Baker and that the April 27, 2001 x-ray was read as negative by Dr. Jarvis, neither of whom had radiological credentials. Decision and Order at 13; Director's Exhibit 12, 13.

The administrative law judge reasonably gave more weight to Dr. Repsher's negative reading, based on Dr. Repsher's status as a B reader, and rationally found that Dr. Repsher's negative reading, coupled with that of Dr. Jarvis, outweighed the positive reading by Dr. Baker, who lacks radiological credentials in the record. Decision and Order at 13; *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); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-6, 1-7 (1999)(*en banc*). Because the administrative law judge conducted a proper qualitative analysis of the new x-ray evidence, and substantial evidence supports his finding, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (a)(3), the administrative law judge accurately noted that the record contains no biopsy evidence to be considered under subsection (a)(2), and correctly found that the presumptions under Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982 in which there was no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered five new medical opinions, three of which diagnosed claimant with pneumoconiosis. Dr. Taylor, who is Board-certified in Internal Medicine and Pulmonary Disease and is one of claimant's treating physicians, diagnosed claimant with chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Claimant's Exhibit 2. The administrative law judge, however, permissibly gave "limited weight" to Dr. Taylor's opinion because Dr. Taylor had been treating claimant for only three months, and based his opinion on limited objective data. Decision and Order at 17; *see* 20 C.F.R. §718.104(d)(2),(4),(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (2003). Substantial evidence supports the administrative law judge's finding. Claimant's Exhibit 2.

Dr. Holtzknecht, whose credentials are not of record and who has also treated claimant, diagnosed COPD for which coal dust was "one of several risk factors," but he indicated that he did "not feel qualified" to address the "degree of causation." Claimant's Exhibit 5. The administrative law judge acted within his discretion in finding that Dr. Holtzknecht's opinion merited "less weight" because it was not well documented or reasoned, or supported by medical credentials. Decision and Order at 17; *see* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 509, 22 BLR at 2-640.

Similarly, the administrative law judge permissibly gave less weight to the opinion of Dr. Baker, whose medical specialty credentials are not of record. Dr. Baker diagnosed claimant with coal workers' pneumoconiosis 1/0 due to coal dust exposure, along with COPD, chronic bronchitis, and hypoxemia, all due to both coal dust exposure and cigarette smoking. Director's Exhibit 13 at 4. The administrative law judge properly found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was not well reasoned or documented because Dr. Baker gave no basis for the diagnosis beyond his own positive x-ray reading and a reference to claimant's coal mine employment history. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649. Additionally, the administrative law judge was within his discretion to find that Dr. Baker provided no support for his opinion that both coal dust exposure and cigarette smoking caused claimant's COPD and hypoxemia. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge also permissibly chose to give "less weight" to Dr. Baker's diagnosis of chronic bronchitis because it was based solely on claimant's self reported symptoms. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge additionally found that although Dr. Repsher's opinion that claimant does not have pneumoconiosis was not well-reasoned, Dr. Jarvis's opinion that claimant does not have pneumoconiosis was well reasoned and entitled to "substantial weight." Decision and Order at 15. The Director alleges that the administrative law judge failed "to note and discuss the deficiencies and limitations of Dr. Jarvis's opinion . . . ." Director's Brief at 3. The Director essentially asks the Board to evaluate the credibility of Dr. Jarvis's opinion, which we cannot do. *Anderson*, 12 BLR at 1-113. Moreover, the administrative law judge found that claimant's evidence of pneumoconiosis was not well-reasoned or supported, and it is claimant who bears the burden of establishing the existence of pneumoconiosis. Therefore, we reject the Director's allegation of error and we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by the new medical opinions pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(i), the administrative law judge correctly found that claimant's pulmonary function studies conducted on July 10, 2001, November 12, 2002, and March 24, 2004 were qualifying,[4] and he noted accurately that the pulmonary function study conducted on April 27, 2001 was qualifying before the administration of a bronchodilator and non-qualifying after the bronchodilator. Because the majority of the

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

pulmonary function studies were qualifying, and because the three most recent studies were all qualifying, the administrative law judge found that "the pulmonary function testing supports total disability." Decision and Order at 20. The administrative law judge's finding is supported by substantial evidence and is therefore affirmed.

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge correctly found that both of the new blood gas studies were non-qualifying. Pursuant to Section 718.204(b)(2)(iii), the administrative law judge properly found that Dr. Repsher's diagnosis of early cor pulmonale due to smoking did "not support total disability under the regulations." Decision and Order at 21; *see* 20 C.F.R. §718.204(b)(2)(iii) (requiring both that the miner have pneumoconiosis and demonstrate cor pulmonale with right-sided congestive heart failure). These findings are supported by substantial evidence and are therefore affirmed.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered that Drs. Baker, Jarvis, and Repsher opined that claimant is totally disabled by a respiratory or pulmonary impairment. The administrative law judge found that Dr. Baker's diagnosis of total disability was "based on objective evidence" but merited less weight because Dr. Baker did not explain why coal dust exposure contributed to claimant's total disability. Decision and Order at 22. Similarly, the administrative law judge found that Dr. Repsher did not give valid reasons for why coal dust did not contribute to claimant's disabling impairment. Finally, the administrative law judge found that Dr. Jarvis's opinion was well-reasoned and documented, but since Dr. Jarvis opined that claimant's disability is not due to pneumoconiosis, the administrative law judge found that claimant "did not establish total disability due to pneumoconiosis under § 718.204(b)(2)." Decision and Order at 22.

Contrary to the administrative law judge's approach, the issue at Section 718.204(b)(2) is whether claimant suffers from a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(1),(2); *see Collins v. J & L Steel*, 21 BLR 1-181, 1-190-91 (1999). Therefore, the administrative law judge erred in weighing the medical opinions concerning the presence of a totally disabling impairment based on what the opinions said about its causation. *Collins*, 21 BLR at 1-191. In the case at bar, if claimant can establish with new evidence that he is totally disabled by a respiratory or pulmonary impairment, he will have established a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See* 20 C.F.R. §725.309(d)(2). He would then be entitled to a decision on the merits of his claim based on the entire record. *See* 20 C.F.R. §725.309(d)(4). The record contains evidence submitted with claimant's prior claim that claimant has pneumoconiosis, that he is totally disabled, and that his total disability is due to pneumoconiosis. Director's Exhibits 1, 11. Accordingly, we must vacate the administrative law judge's finding that total disability was not established with the new evidence pursuant to Section 718.204(b)(2) and remand this case for him to reconsider

whether claimant has established that he is totally disabled. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In employer's cross-appeal, employer contends that the administrative law judge erred in excluding several x-ray readings and medical reports submitted by employer, because Section 725.414 violates Section 923(b) of the Act, Section 556(d) of the Administrative Procedure Act, and the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The Board has rejected these arguments and held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). We therefore reject employer's argument that the administrative law judge could not apply the evidentiary limits of Section 725.414.[5]

Employer argues that the administrative law judge erred in giving no probative weight to claimant's hospitalization and medical treatment records. Records of a miner's hospitalization or treatment "for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Both employer and claimant submitted hospitalization and treatment records. Director's Exhibits 11, 12; Claimant's Exhibits 4, 6; Employer's Exhibits 3, 4, 6, 7. The administrative law judge found that under the provision governing the admission of "Other medical evidence," no party demonstrated that the treatment records were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). He therefore gave the records "no probative weight and g[a]ve them no further consideration." Decision and Order at 13. The Director argues that any error by the administrative law judge was harmless, as he essentially found that the records were not helpful in resolving the issues before him. Director's May 20, 2005 letter at 1-2.

Because we are remanding this case for further consideration, we instruct the administrative law judge to reconsider the admissibility and probative value of the proffered treatment records. Section 718.107 governs the admissibility of medical "test[s] or procedure[s]" not addressed by the Part 718 quality standards.[6] 20 C.F.R.

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[5] Employer also alleges that its evidence should have been admitted pursuant to the good cause provision of 20 C.F.R. §725.456(b)(1). Review of the record reflects that employer did not raise the good cause issue with the administrative law judge. Therefore, we do not address the good cause issue.

[6] The tests or procedures governed by the quality standards are chest x-rays, pulmonary function studies, blood gas studies, physical examination reports, and autopsy or biopsy reports, that are developed in connection with a claim for benefits. 20 C.F.R. §§718.101-718.106.

§718.107(a). In this case, the administrative law judge has not explained why "record[s] of [the] miner's hospitalization . . . or medical treatment for a respiratory or pulmonary or related disease," 20 C.F.R. §725.414(a)(4), necessarily constituted a medical "test or procedure" subject to Section 718.107(b). Review of the medical records at issue reveals that they contain, among other things, conventional chest x-rays, physical examination reports, pulmonary function studies, and blood gas studies, which do not appear to be the sorts of tests or procedures subject to Section 718.107(b). Although the Department of Labor has indicated that a hospitalization or treatment record must be "reliable in order for it to form the basis for a finding of fact on an entitlement issue," 65 Fed.Reg. 79920, 79928 (Dec. 20, 2000), neither the administrative law judge nor the parties identify a provision categorically subjecting treatment records to the standard of Section 718.107 for establishing the admissibility of a medical "test or procedure" not addressed by the Part 718 quality standards. Therefore, the administrative law judge on remand should reconsider this issue.

Employer also asserts that the administrative law judge erred in discounting Dr. Repsher's opinion that claimant does not have pneumoconiosis, as not supported by sound reasoning and analysis, where Dr. Repsher opined that coal dust may cause obstructive lung disease, but only in a statistical sense that is not measurable in any individual miner's case. We disagree. Review of the record reflects that Dr. Repsher relied on this reason for concluding that claimant's obstructive lung disease is unrelated to coal dust. Employer's Exhibit 1 at 4-5; Employer's Exhibit 11 at 16-17. The administrative law judge did not find that Dr. Repsher's opinion was "hostile" to the Act or regulations, but did find that it was not supported by adequate data or sound analysis, and chose to give it "less weight." Decision and Order at 16. This was a permissible credibility determination concerning the quality of Dr. Repsher's reasoning. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. We therefore reject employer's allegation of error.

Because we are remanding this case for further consideration, we address one final issue. The Board recently held that under revised Section 718.107 and Section 725.414(a)(2)(ii), (a)(3)(ii), each party may proffer only one reading of each CT scan in support of its affirmative case and one reading in rebuttal of each reading submitted by the opposing party in its affirmative case. *Webber v. Peabody Coal Co.*, --- BLR ---, BRB No. 05-0335 BLA, slip op. at 8-9 (Jan. 27, 2006)(*en banc*)(Boggs, J. concurring). In this case, the administrative law judge permitted employer to submit four negative readings of a November 12, 2002 CT scan in its affirmative case. Employer's Exhibit 2. On remand, the administrative law judge should consider *Webber*. *See also Harris v. Old Ben Coal Co.*, --- BLR ---, BRB No. 04-0812 (Jan. 27, 2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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