BRB No. 04-0668 BLA

PAUL J. RHODES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 04/15/2005
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5672) of Administrative Law Judge Richard A. Morgan denying benefits on 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 involves a subsequent claim filed on January 22, 2001.[2]

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

After crediting claimant with approximately twenty-three years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also contends that the evidence is sufficient to establish that the miner's totally disabling respiratory impairment arose out of his coal mine employment. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration on July 5, 1973. Director's Exhibit 1. The Department of Labor denied the claim on June 12, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on April 18, 1994. Director's Exhibit 1. However, claimant subsequently requested that this claim be withdrawn. *Id.* On October 13, 1994, the Department of Labor granted claimant's request to withdraw his claim. *Id.*

Claimant filed a third claim on January 21, 1997. Claimant's Exhibit 1. In a Decision and Order dated August 5, 1998, Administrative Law Judge Clement J. Kennington found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, Judge Kennington denied benefits. By Decision and Order dated August 17, 1999, the Board affirmed Judge Kennington's denial of benefits. *Rhodes v. Buffalo Mining Co.*, BRB No. 98-1525 BLA (Aug. 17, 1999) (unpublished). The Board subsequently denied claimant's motion for reconsideration. *Rhodes v. Buffalo Mining Co.*, BRB No. 98-1525 BLA (Oct. 22, 1999) (Order) (unpublished). Although claimant filed an appeal with the United States Court of Appeals for the Fourth Circuit, he subsequently filed an unopposed motion to dismiss his case. Director's Exhibit 1. By Order dated January 12, 2000, the Fourth Circuit dismissed claimant's case. *Rhodes v. Buffalo Mining Co.*, No. 99-2635 (4th Cir. Jan. 12, 2000) (Order) (unpublished). There is no indication that claimant took any further action in regard to his 1997 claim.

Claimant filed a fourth claim on January 22, 2001. Director's Exhibit 2.

[3]As discussed *infra*, the administrative law judge mistakenly characterized this claim as a "duplicate" claim rather than a "subsequent" claim.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1997 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[4] has changed since the date upon which the order denying the prior claim became final. *Id.* Administrative Law Judge Clement J. Kennington denied benefits on claimant's 1997 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 1. Thus, in order to establish that an applicable condition of entitlement has changed, the newly submitted evidence must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[5]

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] Although Dr. Rasmussen opined

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[4]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d). The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2).

[5]Although the administrative law judge considered whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) rather than whether claimant established that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R. §725.309, the administrative law judge's error is harmless since he properly addressed whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that claimant suffered from pneumoconiosis,[7] Director's Exhibit 8. Drs. Zaldivar and Crisalli opined that claimant did not suffer from coal workers' pneumoconiosis or any other disease arising out of his coal mine employment. Director's Exhibits 21, 24; Employer's Exhibits 11, 12. The administrative law judge properly questioned Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis because it was based, at least in part, upon a positive x-ray finding, a reading that the administrative law judge found inconsistent with the preponderance of the newly submitted x-ray evidence.[8] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 11. Moreover, the administrative law judge properly credited the opinions of Drs. Zaldivar and Crisalli that claimant did not suffer from pneumoconiosis because they were based upon more comprehensive documentation. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order at 11. The administrative law judge also properly credited the opinions of Drs. Zaldivar and Crisalli over that of Dr. Rasmussen, based upon their superior qualifications.[9] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the

[7]Dr. Rasmussen diagnosed both clinical pneumoconiosis (coal workers' pneumoconiosis) and legal pneumoconiosis (chronic bronchitis attributable to cigarette smoking and coal dust exposure). *See* 20 C.F.R. §718.201.

[8]Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based upon Dr. Patel's positive interpretation of a March 12, 2001 x-ray. Director's Exhibits 8, 13. Dr. Patel is dually qualified as a B reader and a Board-certified radiologist. *See* Director's Exhibit 13. However, Dr. Wiot, an equally qualified physician, interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibit 7. Moreover, the administrative law judge found that the newly submitted x-ray evidence, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See* Decision and Order at 11. The administrative considered seven newly submitted x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Of these seven interpretations, three are positive for pneumoconiosis. *See* Director's Exhibits 13, 21; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 10. We note that the administrative law judge did not consider Dr. Smith's negative interpretation of claimant's January 28, 2002 x-ray. *See* Director's Exhibit 24. However, because this x-ray interpretation does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge's error, if any, in not considering this evidence is harmless. *Larioni, supra*.

[9]While Dr. Rasmussen is Board-certified in Internal Medicine, Director's Exhibit 8, Drs. Zaldivar and Crisalli are Board-certified in both Internal Medicine and Pulmonary Disease. Director's Exhibits 21, 24.

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Compton*, *supra*, we hold that claimant failed to establish that any of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge