BRB No. 05-0826 BLA

ROY E. WHEELER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDLAND COAL COMPANY	)	
	)	
and	)	
	)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY	)	DATE ISSUED: 04/26/2006
	)	
Employer/Carrier-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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Roy E. Wheeler, Makanda, Illinois, *pro se*.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5387) of Administrative Law Judge Jeffrey Tureck rendered on a 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). After determining that this claim is a

subsequent claim,[1] the administrative law judge noted the proper standard and adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2-3. The administrative law judge credited claimant with "at least" forty years of coal mine employment.[2] Decision and Order at 2. Based on a review of the entire record, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 3-6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes 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

[1] Claimant's initial claim for benefits, filed on July 3, 1985, was finally denied by the district director on December 13, 1985 because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on April 2, 1987 but withdrew it on December 5, 1988. Director's Exhibit 2. Claimant filed this claim on October 22, 2001. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Illinois. Director's Exhibits 1, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 he did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09, 21 BLR 2-113, 2-127 (7th Cir. 1997)(*en banc*)(holding under former provision that a miner "must show that something capable of making a difference has changed since the record closed on the first application").

Rather than make a specific finding that claimant proved the required change in an applicable condition, the administrative law judge assumed *arguendo* that the new evidence established that claimant is totally disabled, and thus a change in an applicable condition. Decision and Order at 3. He then reviewed the entire record and denied the claim on its merits. We need not resolve whether the administrative law judge's approach to 20 C.F.R. §725.309(d) was correct, because substantial evidence supports his determination that the entire record did not support a finding of the existence of pneumoconiosis. Thus, any error by the administrative law judge under 20 C.F.R. §725.309(d) was harmless in view of his decision to deny benefits. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately noted that claimant's hospitalization records contained numerous x-ray readings, but that none revealed pneumoconiosis. Director's Exhibits 7, 8; Employer's Exhibits 6-8. The administrative law judge then considered eleven readings of three x-rays taken in connection with claimant's two claims, in light of the readers' radiological qualifications. The September 5, 1985 x-ray was read as uniformly negative by Drs. Berney, Bishop, and Sargent. Director's Exhibit 1. However, the administrative law judge reasonably assigned "little probative value" to the 1985 x-ray, "since pneumoconiosis can be progressive . . . ." Decision and Order at 3; *see* 20 C.F.R. §718.201(c).

The March 4, 2002 x-ray was read as positive for pneumoconiosis by Dr. Whitehead, who is Board-certified in radiology, and by Drs. Ahmed and Cappiello, who are both Board-certified radiologists and B-readers. Director's Exhibits 16, 17; Claimant's Exhibits 2, 3. The March 4 x-ray was read as negative for pneumoconiosis by Drs. Wiot and Spitz, who are Board-certified radiologists, B-readers, and who are also professors of radiology. Director's Exhibit 19; Employer's Exhibits 1, 4. The August 19, 2002 x-ray was read as positive for pneumoconiosis by Dr. Alexander, who is qualified

as a Board-certified radiologist and B-reader, as negative by Dr. Wiot, and as negative by Dr. Repsher, who is a B-reader. Claimant's Exhibit 1; Director's Exhibits 28, 29

The administrative law judge questioned Dr. Whitehead's "3/2" reading of the March 4, 2002 x-ray, because he found it "unclear whether [Dr. Whitehead] is diagnosing pneumoconiosis," when his narrative report accompanying the x-ray classification form was taken into account. Decision and Order at 3. The administrative law judge's analysis was reasonable, as Dr. Whitehead stated that there were "irregular opacities" which "[m]ay reflect changes of pneumoconiosis although chronic CHF[3] may contribute to this appearance." Director's Exhibit 16; *see Cranor v. Peabody Coal Co*., 22 BLR 1-1, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

As to the remaining readings of the March 4 and August 19, 2002 x-rays, the administrative law judge found that although Drs. Alexander, Ahmed, and Capiello were "well-qualified radiologists," Drs. Wiot and Spitz had "superior qualifications." Decision and Order at 4. In so finding, the administrative law judge permissibly considered that Drs. Wiot and Spitz are professors of radiology, and that Dr. Wiot helped to create the B-reader examination and was a C-reader. Decision and Order at 4; *see Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Because the administrative law judge found that the doctors who read the March 4 and August 19, 2002 x-rays as negative for pneumoconiosis had superior qualifications, he found that the x-ray evidence was negative for pneumoconiosis. Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.201(a)(1).[4]

The administrative law judge also correctly found that the claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy results. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 3. Although the administrative law judge did not specifically discuss the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306, those

[3] The administrative law judge interpreted "CHF" to mean "congestive heart failure." Decision and Order at 3.

[4] Because substantial evidence supports the administrative law judge's finding that Drs. Wiot and Spitz had superior qualifications in radiology, we do not address his finding that Dr. Repsher, a B-reader, also had superior qualifications because Dr. Repsher is a pulmonary specialist with a subspecialty in environmental and occupational lung disease. *Cf. Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993)(permitting the administrative law judge to consider additional factors "relevant to the level of radiological competence").

presumptions are not applicable to this living miner's claim filed after January 1, 1982, in which the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Fox, Harris, Sanjabi, and Repsher, and claimant's medical treatment records.[5] Drs. Fox, Harris, and Sanjabi diagnosed claimant with pneumoconiosis, Director's Exhibits 1, 12; Claimant's Exhibit 4, while Dr. Repsher concluded that claimant does not have pneumoconiosis but has mild COPD due to smoking, and shortness of breath resulting from heart disease. Director's Exhibit 28; Employer's Exhibit 5. The administrative law judge permissibly discounted Dr. Fox's September 5, 1985 opinion that claimant has obstructive and restrictive lung disease due to both coal mine dust exposure and smoking, because the administrative law judge could discern "no basis for Dr. Fox to conclude that the claimant has any condition related to his coal mine employment." Decision and Order at 5; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Specifically, the administrative law judge reasonably considered that Dr. Fox's pulmonary function study was invalidated by a Department of Labor consulting physician, that his blood gas study was non-qualifying, and that the September 5, 1985 x-ray was read as negative for pneumoconiosis. *See Trumbo*, 17 BLR at 1-88-89 and n.4. Substantial evidence supports the administrative law judge's finding.

Additionally, the administrative law judge acted within his discretion in finding that Dr. Sanjabi's undated opinion diagnosing "coal workers' pneumoconiosis most likely," Claimant's Exhibit 4 at 2, was "conjectural and relie[d] to a major degree on his finding of pneumoconiosis on claimant's x-ray. As stated above, I find that claimant's x-rays are negative for pneumoconiosis."[6] Decision and Order at 6; *see Trumbo*, 17 BLR at 1-88-89 and n.4; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

The administrative law judge also was within his discretion to discredit Dr. Harris's March 4, 2002 diagnoses of chronic bronchitis and COPD due to both smoking and coal dust exposure, because Dr. Harris cited "chest x-ray findings consistent with coal workers' pneumoconiosis" as support for the coal-dust etiology of the chronic bronchitis and COPD, when the administrative law judge found that the March 4, 2002 x-

[5] The administrative law judge considered the medical opinions in context with two CT-scans that were read as negative for pneumoconiosis. Director's Exhibit 29; Employer's Exhibits 5, 7.

[6] As noted by the administrative law judge, Dr. Sanjabi read an unspecified x-ray as revealing "interstitial changes compatible with coal workers' pneumoconiosis." Claimant's Exhibit 4 at 2.

ray was negative for pneumoconiosis. Director's Exhibit 12 at 7; *see Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In addition, the administrative law judge permissibly took into account that although Dr. Harris also relied on a pulmonary function study and blood gas study, Dr. Repsher opined that neither test was valid because claimant was in congestive heart failure at the time Dr. Harris evaluated him.[7] *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-133-34 (1986); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984); Employer's Exhibit 5 at 15-16.

Finally, the administrative law judge accurately noted that claimant's extensive treatment records did not contain a diagnosis of coal workers' pneumoconiosis or of any respiratory or pulmonary condition related to coal dust exposure. Employer's Exhibits 7-9. According "greatest weight" to Dr. Repsher's opinion that claimant does not have pneumoconiosis, the administrative law judge found that the evidence did not "support a finding that claimant has pneumoconiosis, either clinical or legal." Decision and Order at 6. Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4). *See McFall*, 12 BLR at 1-177.

Because claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[7] In discussing the medical opinions, the administrative law judge accurately noted that Dr. Repsher is Board-certified in Internal Medicine and Pulmonary Disease, and that Dr. Harris's credentials are not in the record. Director's Exhibit 28.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge