BRB No. 05-0882 BLA

CECIL KEENE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	DATE ISSUED: 04/19/2006
	)	
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-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Cecil Keene, Pilgrims Knob, Virginia, *pro se.*

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order-Denial of Benefits (04-BLA-5465) of Administrative Law Judge Richard T. Stansell-Gamm 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). The

[1] Brenda Yates, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

administrative law judge found that the claim constituted a subsequent claim pursuant to 20 C.F.R. §725.309,[2] and that the parties stipulated to a coal mine employment history of at least thirty years. Decision and Order at 5-6. Considering the newly submitted evidence of record, *i.e.*, that evidence submitted subsequent to the previous denial of benefits, the administrative law judge found that it failed to establish disability causation, *i.e.*, that claimant's pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment, 20 C.F.R. §718.204(c), the only element of entitlement adjudicated against claimant. Accordingly, the administrative law judge found that claimant failed to establish a change in the condition of entitlement previously adjudicated against him and, therefore, denied benefits in claimant's subsequent claim.

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

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that pneumoconiosis arises out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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

[2] The history of this case is set forth in the Board's prior decisions in *Keene v. Beatrice Pocahontas Coal Co.*, BRB No. 89-407 BLA (Apr. 29, 1991)(unpub.); *Keene v. Beatrice Pocahontas Coal Co.*, BRB No. 92-1685 BLA (May 19, 1994)(unpub.); and *Keene v. Beatrice Pocahontas Coal Co.*, BRB No. 96-1449 BLA and 96-1449 BLA-A (Feb. 25, 1997)(unpub.).

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 finally denied because he failed to establish disability causation. 20 C.F.R. §718.204(c). Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*).[3]

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the newly submitted opinions of Drs. Forehand, Thakkar, Smiddy, that claimant's totally disabling respiratory impairment was due to pneumoconiosis and the opinions of Drs. Castle and Rosenberg, Decision and Order at 10-18; Director's Exhibits 14, 23, 28; Employer's Exhibits 4, 6, 7, that claimant's totally disabling pulmonary impairment was due to idiopathic pulmonary fibrosis, a disease unrelated to coal workers' pneumoconiosis, coal mine employment and coal dust exposure. The administrative law judge found that the opinion of Dr. Forehand was entitled to little weight as Dr. Forehand's opinion was based on only one pulmonary examination and he did not review additional recent medical records, including the most recent CT scan. Decision and Order at 17. The administrative law judge further found that while Drs. Smiddy and Thakkar, as claimant's treating physicians, had a much broader documentary foundation for their opinions, Dr. Thakkar's opinion lost some probative value because his diagnosis appeared to identify coal worker's pneumoconiosis as the cause of claimant's chronic obstructive pulmonary disease simply based on his thirty-three year history of coal mine employment. The administrative law judge further concluded that while the opinions of Drs. Smiddy, Rosenberg and Castle were well-reasoned assessments based on thorough documentation, the opinions of Drs. Rosenberg and Castle were entitled to superior weight because they possessed credentials superior to those of Dr. Smiddy, *i.e.*, they were board-certified in pulmonary disease, while Dr. Smiddy was only board-certified in internal medicine. Additionally, the administrative law judge found that, more significantly, the analyses of Drs. Castle and Rosenberg were "more expansive and better integrated" than that of Dr. Smiddy inasmuch as the former physicians considered three possible causes of claimant's totally disabling respiratory impairment, *i.e.*, cigarette smoke, coal mine employment and idiopathic pulmonary fibrosis, while Dr. Smiddy addressed only smoking and coal mine employment issues. Decision and Order at 18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Thus, the administrative law judge found that Drs. Rosenberg and Castle presented the best reasoned and most probative opinions on the issue of disability causation.

In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, addressed the crediting of doctors' opinions on the issue of whether the miner's totally disabling impairment was or was not related to dust exposure in coal mine employment. In that case, the court concluded that the administrative law judge could accord little weight to doctors' causation opinions which were in direct contradiction of an administrative law judge's finding of legal or clinical pneumoconiosis unless the administrative law judge provided specific and persuasive reasons for according the opinions greater weight. *Scott*, 289 F.3d at 269, 22 BLR at 2-383, *citing Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In the instant case, the existence of pneumoconiosis was found to have been established in the previous claim by x-ray and medical opinion evidence. The threshold issue in the subsequent claim before the administrative law judge was whether the evidence established disability causation, *i.e.*, that claimant's legal or clinical pneumoconiosis substantially contributed to claimant's total respiratory disability.

Review of the opinions of Drs. Rosenberg and Castle demonstrate that both physicians opined that there was no x-ray evidence of pneumoconiosis and that claimant did not suffer from coal workers' pneumoconiosis or any disease of the lung related to coal dust exposure and coal mine employment. Both physicians specifically diagnosed idiopathic pulmonary fibrosis and opined that the condition was unrelated to the inhalation of coal mine dust. Director's Exhibit 23; Employer's Exhibits 4, 6, 7.

The administrative law judge failed, however, to address the opinions of Drs. Rosenberg and Castle in the context of the holdings in *Scott* and *Toler*. Accordingly, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish disability causation at Section 718.204(c) and, therefore, a change in an applicable condition of entitlement pursuant to Section 725.309(d) and we remand the claim for further consideration of the relevant evidence. On remand, the administrative law judge must again weigh the causation opinions in light of the Fourth Circuit's holdings in *Scott* and *Toler*.

If, on remand, the administrative law determines that the newly submitted evidence supports a finding of disability causation and, therefore, a change in an applicable condition of entitlement, the administrative law judge must consider all of the evidence of record, *i.e.*, the newly submitted evidence along with evidence submitted in the prior claims, to determine whether it supports a finding of entitlement to benefits. *See Rutter*, 86 F.3d 1358, 20 BLR 2-227.

Accordingly, the Decision and Order-Denial of Benefits of the administrative law judge is vacated and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge