BRB No. 07-0678 BLA

C.A.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/29/2008
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

C.A.S., MacArthur, West Virginia, *pro se*.

William S. Mattingly and Francesca Tan (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-5847) of Administrative Law Judge William S. Colwell denying benefits 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). This case involves a subsequent claim filed on September 19, 2001.[1] After crediting claimant with sixteen

[1] Claimant initially filed a claim for benefits on November 29, 1976. Director's Exhibit 1. That claim was denied on March 7, 1980, because the evidence did not establish the existence of pneumoconiosis or total disability. *Id.* There is no indication that claimant took any further action in regard to his 1976 claim.

years and five months of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. 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.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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*

Claimant filed a second claim on July 15, 1985. However, by Order dated April 7, 1985, Administrative Law Judge James Guill dismissed the claim because claimant failed to submit a medical release or answer employer's interrogatories. Director's Exhibit 2. Claimant filed a third claim on September 3, 1996. Director's Exhibit 3. In a Decision and Order dated August 22, 2000, Administrative Law Judge John C. Holmes denied the claim because he found that the evidence did not establish the existence of pneumoconiosis or total disability. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim. Claimant filed a fourth claim on September 19, 2001. Director's Exhibit 5.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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). Claimant's prior claim was denied because he failed to establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 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*) (holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

The administrative law judge initially addressed whether the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four interpretations of three x-rays taken on December 6, 2001, April 24, 2002, and January 19, 2004. Although Dr. Gaziano, a B reader, interpreted claimant's December 6, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 11, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease.[3] Director's Exhibit 13. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of claimant's December 6, 2001 x-ray, over Dr. Gaziano's positive interpretation, based upon Dr. Wiot's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 15-16.

The remaining x-ray interpretations of record were negative for pneumoconiosis.[4] Therefore, the administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order at 16. Because it is based

[3] Dr. Navani, a B reader and Board-certified radiologist, interpreted claimant's December 6, 2001 x-ray for quality purposes only. Director's Exhibit 11.

[4] Dr. Zaldivar, a B reader, interpreted claimant's April 24, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 15. Dr. Willis, a B reader and Board-certified radiologist, interpreted claimant's January 19, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

upon substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant was precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 14-15. Furthermore, the administrative law judge properly found that claimant was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[5] *Id.*

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports of Drs. Patel, Gaziano, Crisalli, and Zaldivar. In a prescription pad note dated December 7, 2005, Dr. Patel stated that claimant "carries the diagnosis of pneumoconiosis." Claimant's Exhibit 1. However, because Dr. Patel did not provide any explanation for his diagnosis, the administrative law judge properly found that Dr. Patel's opinion was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 17-18.

In a report dated December 6, 2001, Dr. Gaziano diagnosed coal workers' pneumoconiosis. Director's Exhibit 11. However, the administrative law judge permissibly found that the December 6, 2001 x-ray that Dr. Gaziano relied upon as positive for pneumoconiosis was interpreted by Dr. Wiot, a physician with superior radiological qualifications, as negative for the disease, thus calling into question the reliability of Dr. Gaziano's opinion. *See generally Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 18.

The administrative law judge also credited the opinions of Drs. Zaldivar and Crisalli, that claimant did not suffer from pneumoconiosis, because he found that their

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[5] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, since this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

opinions were consistent with the overall x-ray evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 18; Director's Exhibit 15; Employer's Exhibits 1, 2, 4, 5. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Turning to the issue of total disability, the administrative law judge accurately noted the record contains three new pulmonary function studies conducted on April 24, 2002, April 11, 2003, and January 9, 2004. Decision and Order at 19; Director's Exhibits 11, 15; Employer's Exhibit 1. Of these pulmonary function studies, the administrative law judge properly noted that only the April 24, 2002 study produced qualifying values.[7] Decision and Order at 19. However, the administrative law judge noted that Dr. Zaldivar, the administering physician, invalidated this study due to poor cooperation. Director's Exhibit 15. The administrative law judge, therefore, found that the new pulmonary function study evidence did not establish total disability. Decision and Order at 18. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge next accurately noted that the record contains three new arterial blood gas studies. While the two earliest arterial blood gas studies, conducted within four and one-half months of each other on December 6, 2001 and April 24, 2002, are qualifying, claimant's most recent arterial blood gas study taken on January 19, 2004, produced non-qualifying values. Director's Exhibits 11, 15; Employer's Exhibit 1. The administrative law judge permissibly accorded greatest weight to claimant's non-qualifying arterial blood gas study taken on January 19, 2004 because it was almost two years more recent than claimant's two earlier arterial blood gas studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); Decision and Order at 19. We, therefore, affirm the administrative law judge's finding that the new arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Gaziano, Crisalli, and Zaldivar. Although Dr. Gaziano opined that claimant was "disabled for coal mine work," the administrative law judge noted that Dr. Gaziano did not indicate that claimant's disability was "total." Decision and Order at 19; Director's Exhibit 11. Consequently, the administrative law judge permissibly found that Dr. Gaziano's opinion did not support a finding that claimant suffered from a totally disabling respiratory or pulmonary impairment. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986); Decision and Order at 19.

The administrative law judge noted that Drs. Zaldivar and Crisalli opined that claimant was not totally disabled from a pulmonary standpoint.[8] Decision and Order at 19. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i-(iv), we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[8] Dr. Zaldivar opined that, from a pulmonary standpoint, claimant was capable of performing his usual coal mine employment. Director's Exhibit 15; Employer's Exhibit 2. Although Dr. Crisalli opined that claimant might have a very mild degree of pulmonary functional impairment, he opined that this impairment was not sufficient to prevent claimant from performing his usual coal mine work. Employer's Exhibits 1, 5.

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

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