BRB No. 09-0239 BLA

D.M. Claimant-Petitioner v. TENNESSEE CONSOLIDATED COAL COMPANY and A. T. MASSEY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/24/2009 DECISION and ORDER

Appeal of the Decision and Order of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

D.M., Whitwell, Tennessee, *pro se*.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

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 (08-BLA-5206) of Administrative Law Judge Paul C. Johnson, Jr., 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 February 22, 2007.[1] After crediting claimant with twenty-two years and four months of coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one 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. Consequently, the administrative law judge considered claimant's 2007 claim on the merits. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer also contends that the administrative law judge erred in finding that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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).

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[1] Claimant's prior claim, filed on September 21, 1998, was denied by the district director on February 16, 1999 because claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

[2] The record reflects that the miner's coal mine employment was in Tennessee. Director's Exhibit 4. 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*).

Section 718.202(a)(1)

The record contains three interpretations of two x-rays taken on December 14, 1998 and April 16, 2007. Dr. Sargent, a B reader and Board-certified radiologist, and Dr. Soteres, a physician with no radiological qualifications, interpreted claimant's December 14, 1998 x-ray as negative for pneumoconiosis. Director's Exhibit 1. The administrative law judge, therefore, properly found that the December 14, 1998 x-ray is negative for pneumoconiosis. Decision and Order at 5.

Dr. Enjeti, a physician with no radiological qualifications, rendered the only interpretation of claimant's April 16, 2007 x-ray.[3] Dr. Enjeti checked a box indicating that the x-ray did not reveal any parenchymal abnormalities consistent with pneumoconiosis. Director's Exhibit 11. Although Dr. Enjeti included a hand-written notation of "not sure" next to this box, the administrative law judge accurately noted that the doctor did not "check any of the boxes that would indicate that he observed small or large opacities." Decision and Order at 5. The administrative law judge, therefore, properly found that the April 16, 2007 x-ray is negative for pneumoconiosis. *Id.* Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2), (3)

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[4] *Id.*

[3] Dr. Barrett, a B reader and Board-certified radiologist, interpreted the April 16, 2007 x-ray for quality only. Director's Exhibit 11.

[4] 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, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

Section 718.202(a)(4)

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),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains the medical opinions of Drs. Soteres, Enjeti, and Chandra. The administrative law judge properly found that the opinions of Drs. Soteres and Enjeti do not support a finding of clinical or legal pneumoconiosis.[6] Decision and Order at 7; Director's Exhibits 1, 11.

Dr. Chandra conducted a sleep study and diagnosed "sleep-disordered breathing / obstructive sleep apnea." Director's Exhibit 12. In his report, Dr. Chandra noted "a history of [chronic obstructive pulmonary disease] and exposure to coal dust" and a "history of black lung." *Id.* However, because Dr. Chandra did not provide any explanation for his diagnoses of chronic obstructive pulmonary disease and "black lung," the administrative law judge permissibly found that these diagnoses were not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 6-7. Because it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address employer's contentions of error regarding the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d).[7] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[5] "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).

[6] Dr. Soteres diagnosed shortness of breath "of unknown etiology." Director's Exhibit 1.

Dr. Enjeti diagnosed: (1) restrictive lung disease; (2) a right mid-lung density; and (3) bilateral hilar adenopathy. Director's Exhibit 11. Dr. Enjeti indicated that claimant's restrictive lung disease was due to "body habitus." *Id.* Dr. Enjeti indicated the etiologies of the other two conditions was "not known." *Id.*

[7] Claimant, in his Petition for Review and Brief, attached a number of office notes and medical reports from Drs. Leff and Huffman. These documents are not a part of the

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

record. Because this evidence was not properly before the administrative law judge, the Board is precluded from considering it on appeal. *See* 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). In order to have additional evidence considered, claimant may file a petition for modification, 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.310 and 725.480. *See Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).