BRB No. 05-0714 BLA

WADE J. MCNEELY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY COAL COMPANY	)	DATE ISSUED: 12/29/2005
	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Wade J. McNeely, Grundy, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without representation, the Decision and Order Denying Benefits (04-BLA-6708) of Administrative Law Judge Linda S. Chapman on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant first filed a claim for benefits on February 18, 1998, which was denied by the district director on April 21, 1998. Director's Exhibit 1. Claimant filed his second claim on June 20, 2000. Director's Exhibit 2. The district director denied benefits on November 11, 14, 2000 on the grounds that claimant failed to establish the existence of pneumoconiosis, total disability due to pneumoconiosis, or a material change in conditions. Director's Exhibit 2; *see* 20 C.F.R. §§718.202(a), 718.204(c) (2000), 725.309 (2000).

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed the instant subsequent claim on August 12, 2002. Director's Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on April 26, 2004. Director's Exhibit 56. Claimant requested a formal hearing, which was held on February 15, 2005.[2] The administrative law judge determined that the new evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), and thus, that claimant established, pursuant to 20 C.F.R. §725.309, that there had been a change in one of the applicable conditions of entitlement that was previously denied in his prior claims. Based on the Section 725.309 finding, the administrative law judge then considered the claim on the merits and weighed all of the record evidence relevant to the issues of entitlement. The administrative law judge found that while claimant was totally disabled, he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R .§718.202(a) or that his total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant has filed a statement in support of his appeal.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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).

[2] The administrative law judge properly informed claimant of his right to be represented at the hearing by an attorney of his choice, without charge to him. Claimant, however, waived his right to be represented and appeared *pro se*. *See* 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[3] Claimant alleges on appeal that his most recent coal mine employment for one full year was with Raider Mining Company. We note that the district director informed the parties that the miner's *combined* employment, from September 9 1995 to December 13, 1996, with Valley Coal Company and Knox Coal Company, which are subsidiaries of the United Company, had been determined to equal over one full year of employment, and therefore that Valley Coal Company was identified as the responsible operator. *See* 20 CF.R.§ 725.494; Director's Exhibit 12. Employer has not challenged its designation as the responsible operator.

In this case, claimant's prior claim of June 20, 2001 was denied because he failed to establish all of the requisite elements of entitlement. *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that, in a case involving the prior regulations, in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[4] If claimant proves one of the elements, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*.

In this case, the administrative law judge properly considered whether the new evidence established a change in an applicable condition of entitlement, and determined based on the new evidence that claimant was totally disabled based on the results of his qualifying pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(1). Decision and Order at 10. We therefore review whether the administrative law judge properly denied the claim on the merits.

After consideration of the issues presented on appeal, the administrative law judge's Decision and Order, and the record evidence, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding on the merits that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis.

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to

[4] Because claimant's last coal mine employment occurred in the Commonwealth of Virginia, jurisdiction for this claim resides with the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

pneumoconiosis.[5] 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

We first address whether the administrative law judge properly weighed the x-ray evidence relevant to whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). At the hearing, the parties were asked to designate certain x-ray readings as part of their affirmative case in accordance with the evidentiary limitations at 20 C.F.R. §718.202(a)(1). Claimant designated Dr. Patel's 1/1 reading of an x-ray dated May 6, 1992, and Dr. Cole's reading of an x-ray dated September 16, 2002, which listed "small opacities in the mid and lower lung zones suggestive of possible [c]oal [w]orkers' pneumoconiosis." Director's Exhibit 1, 21; Hearing Transcript at 9-13. In response to employer motion, however, the administrative law judge properly excluded Dr. Patel's positive reading because the x-ray had been destroyed and was no longer available for a rebuttal reading by employer.[6] *See* 20 C.F.R. §718.102(d); Employer's Motion to Exclude Evidence; Hearing Transcript at 12-13. Claimant was therefore asked to proffer a substitute reading, and chose as his second piece of affirmative evidence, the negative x-ray reading by Dr. Forehand, a B-reader, of an x-ray dated March 9, 1998. Hearing Transcript at 10; Director's Exhibit 1. Employer selected Dr. Halberts's negative reading of a December 8, 2003 x-ray, and Dr. Wiot's negative reading of a November 5, 2004 x-ray as part of its affirmative case. Employer's Prehearing Report (Completed Evidentiary Form); Hearing Transcript at 63; Director's Exhibit 47; Employer's Exhibit 6. Employer further designated a negative reading of the September 16, 2002 x-ray by Dr. Wheeler, a Board-certified radiologist and B-reader, as rebuttal evidence. Hearing Transcript at 63, Director's Exhibit 52.

[5] Claimant argues on appeal that employer did not meet its burden of proof, citing Board case law pertaining to rebuttal of the interim presumption. *See* 20 C.F.R. §727.203. However, since claimant filed his claim after April 1, 1980, this claim is governed by the regulations at 20 C.F.R. Part 718, and the interim presumption found at 20 C.F.R. Part 727 is not applicable. Consequently, it is claimant who bears the burden of proof to establish his entitlement to benefits.

[6] The administrative law judge noted that in her Decision and Order that "claimant offered narrative interpretations by Dr. Patel of x-rays dated December 5, 1988, August 10, 1988, and May 6, 1992," and that employer "filed a motion to exclude these interpretations, on the grounds that the films had been destroyed; counsel attached a statement to that effect from the Radiology Department at Buchanan General Hospital." Decision and Order at 2; n.3. We affirm the administrative law judge's decision to exclude Dr. Patel's readings.. Section 725.102(d) provides that an x-ray reading will be admitted as evidence "only if the original film is otherwise available to the Office and other parties." 20 C.F.R. §725.102(d).

In addition to the evidence proffered by the parties at the hearing, the administrative law judge also noted in her Decision and Order that the record contained x-ray readings obtained in conjunction with claimant's earlier denied claims. These consisted of an additional negative reading by Dr. Navani, a dually qualified physician of the x-ray dated March 9, 1998, as well as one positive reading by Dr. Patel, and two negative readings by Drs. Sargent and Barnett of an x-ray dated September 20, 2000.

In weighing the entirety of the x-ray evidence, the administrative law judge properly found that there was only one positive reading of record by Dr. Patel of the September 12, 2000 x-ray, and that this single positive reading was outweighed by the majority of negative readings. Decision and Order at 11. The administrative law judge specifically found Dr. Patel's reading outweighed by the negative readings by Drs. Sargent and Barnett of that same film. *Id*. Furthermore, the administrative law judge properly found Dr. Cole's interpretation of claimant's September 16, 2002 to be insufficient to establish pneumoconiosis at Section 718.202(a)(1) since he did not identify any profusion value for the alleged opacities that he saw on the film, and since the administrative law judge found Dr. Cole's interpretation that opacities "may" represent pneumoconiosis to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Decision and Order at 9. We therefore affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1).

Since there was no new biopsy evidence of record, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11. Similarly, since the record contains no evidence that claimant suffers from complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and since he is not eligible to invoke either of the presumptions at 20 C.F.R. §§718.305 and 718.306, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[7]

Furthermore, the administrative law judge properly considered the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains six medical opinions relevant to whether claimant has either clinical or legal pneumoconiosis. On July 15, 1998, claimant's treating physician, Dr. Sutherland, prepared a brief, handwritten note on a prescription pad, which stated that claimant was disabled due to chronic bronchitis. Claimant's Exhibit 1.

[7] The presumption provided at 20 C.F.R. §718.305 is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). The presumption provided at 20 C.F.R. §718.306 is also inapplicable because the instant claim is not a survivor's claim. *See* 20 C.F.R. §718.306.

Because Dr. Sutherland did not diagnose coal workers' pneumoconiosis or provide an etiology for claimant's chronic bronchitis stating that it was due to coal dust exposure, his opinion is insufficient to establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See generally Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Likewise, Dr. Forehand examined claimant on March 9, 1998 and diagnosed mild chronic bronchitis due to smoking. He did not diagnosis pneumoconiosis or any chronic respiratory or pulmonary impairment attributable to coal dust exposure. Director's Exhibit 1.

Dr. Cole completed a Department of Labor examination form indicating that claimant suffered from coal workers' pneumoconiosis, but he also opined in his narrative report prepared in conjunction with the same examination that claimant had only "possible pneumoconiosis." Director's Exhibit 19; Decision and Order at 8-9. The administrative law judge had discretion to reject. Dr. Cole's diagnosis of "possible pneumoconiosis" as she found that he offered "no rationale or supporting reasoning for his equivocal conclusion." Decision and Order at 9; s*ee Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 19.[8]

As to the issue of legal pneumoconiosis, the administrative law judge permissibly found that while both Drs. Cole and Rasmussen diagnosed that claimant had severe chronic obstructive pulmonary disease due to smoking and coal dust exposure, "neither [physician] offered any explanation or rationale for this bald conclusion" and therefore their opinions were not persuasive.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

[8] The administrative law judge did not discuss Dr. Rasmussen's diagnosis of pneumoconiosis but this error was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 2. Dr. Rasmussen did not cite any other basis for his diagnosis of pneumoconiosis other than a positive chest-x-ray reading and claimant's history of coal mine employment. The administrative law judge determined that the x-ray taken in conjunction with Dr. Rasmussen's examination was negative for pneumoconiosis based on the majority of negative readings by dually qualified Board-certified radiologists and B-readers. Decision and Order at 11. Furthermore, claimant cannot rely on Dr. Rasmussen's diagnosis of pneumoconiosis based solely on claimant's history of coal mine employment, as it does not qualify as a reasoned medical opinion pursuant to 20 C.F.R. §718.202(a)(4). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-265 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988).

[9] On July 15, 1998, claimant's treating physician, Dr. Sutherland, prepared a brief, handwritten note on a prescription pad, which stated that claimant was disabled due to chronic bronchitis. Claimant's Exhibit 1. Because Dr. Sutherland did not diagnose coal workers' pneumoconiosis or provide the etiology for claimant's chronic bronchitis, his

(1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibits 2; 19; Decision and Order at 11. Conversely, the administrative law judge had discretion to credit Drs. Rosenberg and Fino, who opined that claimant did not have pneumoconiosis or any chronic respiratory impairment due to coal dust exposure, because she found that their opinions were well-reasoned and better supported by the objective test results.[10] *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985)*; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Director's Exhibit 47; Employer's Exhibit 6; Decision and Order at 12. Thus, because substantial evidence supports the administrative law judge's conclusion that claimant does not have pneumoconiosis based on the credible and reasoned medical opinion evidence, we affirm her finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

The administrative law judge properly concluded after weighing all of the medical evidence that claimant does not have coal workers' pneumoconiosis. Because claimant is

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opinion is insufficient to establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See generally Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Likewise, Dr. Forehand examined claimant on March 9, 1998 and diagnosed mild chronic bronchitis due to smoking. He did not diagnosis pneumoconiosis or any chronic respiratory or pulmonary impairment attributable to coal dust exposure. Director's Exhibit 1.

[10] The administrative law judge noted that while Dr. Rosenberg acknowledged that chronic obstructive pulmonary disease [COPD] can be caused by coal dust exposure, he also explained why such a diagnosis was not supported by the objective evidence, pointing out that there was no evidence of micronodularity to serve as the basis for the development of coal-dust related COPD, and that the "significant response to bronchodilators was not consistent with the fixed impairment of coal workers' pneumoconiosis." Decision and Order at 6; *see* Director's Exhibit 47. Furthermore, the administrative law judge relied on Dr. Fino's explanation that the reduction in the FVC and FEV1 during pulmonary function testing was caused by claimant's significant obesity. The administrative law judge noted that "according to Dr. Fino, [since claimant weighed over 300 pounds] this exerts an effect on the [c]laimant's lungs, preventing them from expanding." Decision and Order at 7; *see* Employer's Exhibit 6. Dr. Fino also noted that the claimant's lung volumes, normal diffusion capacity, and normal blood gas study results were classic for an obesity-induced restriction. *Id*.

unable to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[11] *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

The Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[11] Because we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.202(a), we decline to address the administrative law judge's finding with respect to disability causation at 20 C.F.R. §718.204(c).