BRB No. 02-0491 BLA

HAROLD C. TROUTEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
BELLAIRE CORPORATION	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

Mary Forrest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-604) of Administrative Law Judge Michael P. Lesniak denying benefits on a duplicate 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).[1] The administrative law judge found, and the parties stipulated to, thirty-five years of coal mine employment and that employer was the properly named responsible operator. Decision and Order at 3; Hearing Transcript at 8, 10-12. Considering entitlement in this duplicate claim[2] pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the prior claim was denied as the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 3, 6-7; Director's Exhibit 21. The administrative law judge, after reviewing all of the relevant, newly submitted evidence of record, concluded that claimant failed to establish that the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 8-9. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to give proper weight to the opinion of Dr. Reddy pursuant to Section 718.202(a)(4) and in the alternative, if the Board affirms the administrative law judge's weighing of Dr. Reddy's opinion, claimant has not been provided a complete evaluation

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his initial claim for benefits on July 12, 1979, which was denied by Administrative Law Judge Robert S. Amery as the evidence failed to establish the existence of pneumoconiosis. Director's Exhibit 21. Claimant filed a second claim for benefits on November 21, 1997, which was denied on April 2, 1998 by reason of abandonment. Director's Exhibit 20. Claimant filed the instant duplicate claim for benefits on April 9, 2000, which was denied by the district director on November 1, 2000. Director's Exhibits 1, 13. Claimant requested a hearing and the case was referred to the Office of Administrative Law

pursuant to 20 C.F.R. §718.101. Employer responds that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds taking no position with respect to entitlement but agreeing with claimant that if Dr. Reddy's opinion was properly discredited then the case must be remanded for a complete pulmonary evaluation in accordance with the regulations.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Judges on March 26, 2001. Director's Exhibits 17, 23.

[3]The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*). In addition, in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, in order to establish a material change in conditions with respect to this duplicate claim, claimant is required to prove at least one of the elements of entitlement previously adjudicated against him.[4] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Because claimant's prior claim was denied on the ground that he did not establish the existence of pneumoconiosis, the administrative law judge properly addressed this element in his Decision and Order. Decision and Order at 7-10.

Claimant argues on appeal that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Reddy as it is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 3-6. We do not

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

find merit in claimant's argument. In the instant case, the administrative law judge rationally determined that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge, in a proper exercise of his discretion, fully considered this evidence and rationally concluded that the only opinion supportive of claimant's burden, that of Dr. Reddy, was not adequately reasoned and, therefore, insufficient to satisfy claimant's burden of proof. The administrative law judge properly based his finding on his determination that Dr. Reddy's diagnosis of pneumoconiosis was premised solely upon claimant's history and a positive x-ray reading, which the administrative law judge deemed insufficient to support a finding of pneumoconiosis under Section 718.202(a)(1). *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*; Decision and Order at 9; Director's Exhibit 7. Consequently, we affirm the administrative law judge's credibility determination with respect to Dr. Reddy and his finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence and is in accordance with law. *See Trent, supra*; *Perry, supra*; *Ross, supra*.

Based upon our review of the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), however, we agree with claimant and the Director that remand is required in this case. Notwithstanding claimant's burden of proving entitlement to benefits, the Department of Labor has a statutory duty to provide claimant with a complete, credible

pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). Inasmuch as the Board affirmed the administrative law judge's finding that the opinion of Dr. Reddy, the examining physician for the Department of Labor, is unreasoned, and the Director has requested remand to the district director in the event of this holding and as such, is insufficient to satisfy the Department's duty pursuant to 30 U.S.C. §923(b). We vacate the administrative law judge's denial of benefits and remand this case to the district director to furnish claimant with a complete, credible pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges, supra*; *Pettry, supra*; *Hall, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete pulmonary examination and for further consideration of the merits of this claim in light of the new evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge