BRB No. 04-0633 BLA

DARRIS R. ARMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 02/24/2005
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.

Darris R. Arms, Cedar Bluff, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (03-BLA-6066) 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's initial claim, filed on October 30, 1974, was denied by the District Director, Office of Workers' Compensation Programs on September 11, 1980 for failure to establish either the existence of pneumoconiosis or a totally disabling pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000). Director's

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge initially found that the current claim was timely filed pursuant 20 C.F.R. §725.308. Decision and Order Denying Benefits at 4; *Andryka v. Rochester & Pittsburgh Coal Co.,* 14 BLR 1-34 (1990). The administrative law judge further found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2), the elements of entitlement previously adjudicated against claimant. The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement as required by 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. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.

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, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R.

Exhibit 1. Claimant did not request a hearing and the denial became final. On April 18, 2001, claimant filed this subsequent claim, which the district director denied. Subsequently, claimant requested a hearing. Director's Exhibits 4, 31. On December 9, 2003, the administrative law judge granted claimant's unopposed request for a decision on the record.

[2] 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.

§§'718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Additionally, Section 725.309(d) provides that a subsequent claim is subject to automatic denial on the basis of the prior denial unless claimant demonstrates 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., Inc.*, 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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of 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)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

In finding that the new x-ray evidence was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge did not consider the "1/1" reading of the October 1, 2001 x-ray by Board-certified radiologist and B reader Dr. Alexander. Director's Exhibit 23. Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for her to consider whether all of the new x-ray evidence supports a finding of the existence of pneumoconiosis. *See* 30 U.S.C. §923(b); *Johnson v. Califano*, 585 F.2d 89, 90 (4th Cir. 1978). Accordingly, we also vacate the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Pursuant to Section 718.202(a)(2)-(a)(4), substantial evidence supports the administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis because the record contains no biopsy evidence, the presumptions under Section 718.202(a)(3) are inapplicable in this case, and neither of the new medical opinions diagnosed pneumoconiosis. Decision and Order Denying Benefits 9, 10; Director's Exhibit 10, 36. We therefore affirm those findings. On remand, if the administrative law judge finds that the new x-ray evidence supports a finding of the existence of pneumoconiosis under Section 718.202(a)(1), she must weigh together all of the relevant evidence pursuant to Section 718.202(a)(1)-(a)(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), to determine whether a preponderance of all the new evidence establishes the existence of pneumoconiosis.

In considering whether claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), the

administrative law judge found that the two newly submitted blood gas studies were conflicting and at best in equipoise[3] pursuant to Section 718.204(b)(2)(ii), that there was no evidence that claimant has cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii), and that the two new medical opinions concluded that claimant is not totally disabled[4] pursuant to 718.204(b)(2)(iv). Decision and Order Denying Benefits at 11; Director's Exhibits 12, 36. Substantial evidence supports these findings, which we therefore affirm.

Under Section 718.204(b)(2)(i), however, the administrative law judge did not consider all of the relevant evidence when she found that the new pulmonary function study evidence did not establish total disability. Specifically, the administrative law judge considered the July 9, 2002, qualifying study and the October 1, 2001, non-qualifying study, but did not discuss the July 3, 1997, qualifying study or the August 31, 2000, non-qualifying study. Decision and Order Denying Benefits at 8, 11; Director's Exhibits 12, 25, 36. We must therefore vacate the administrative law judge's finding under Section 718.204(b)(2)(i) and remand this case for her to consider all of the new pulmonary function studies. 30 U.S.C. §923(b). The administrative law judge must then reweigh the contrary probative evidence to determine whether claimant has established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (*en banc*); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

If on remand the administrative law judge finds that claimant has established a change in an applicable condition of entitlement, the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. 20 C.F.R. §725.309(d); *see also Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

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[3] The July 9, 2002 test yielded non-qualifying results while the October 1, 2001 test yielded qualifying results. Director's Exhibits 12, 36.

[4] Drs. Hippensteel and Forehand concluded that despite having some qualifying tests, claimant retains sufficient residual ventilatory capacity to return to his job as a shuttle car operator. Director's Exhibits 10, 36.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge