BRB No. 06 0487 BLA

DELVIN MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 02/28/2007
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 Administrative Law Judge Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Wendle D. Cook (Cook & Cook), Madison, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5482) of Administrative Law Judge Richard A. Morgan on a subsequent 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). The administrative law judge noted that the parties stipulated that the miner had forty years of coal mine employment.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim,[2] the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against him. In considering the claim on the merits, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis arising out coal mine employment and total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203, and 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in according weight to Dr. Zaldivar's medical opinion that claimant does not have pneumoconiosis. Claimant further asserts that he presented sufficient medical opinion evidence to establish the existence of pneumoconiosis.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not submit a substantive response to claimant's appeal. However, in this letter, the Director argues that the administrative law judge "erred by

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[1] Claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2. 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*).

[2] Claimant filed his first claim for benefits on June 19, 1973, which was ultimately denied on December 4, 1980, based on claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibit 1. Claimant filed his second claim for benefits on July 20, 1989, but he requested a withdrawal of the claim, which the district director granted on July 15, 1991. *Id.* Claimant filed his third claim for benefits on October 29, 1993, which was denied by the district director on April 15, 1994, for claimant's failure to establish any element of entitlement or a material change in conditions since the previous final denial. Director's Exhibit 3. Claimant filed this claim for benefits on February 21, 2001. Director's Exhibit 5.

[3] Claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3). Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

admitting too many medical reports submitted by the employer . . . ." Director's Letter at 2. The Director states that the administrative law judge's error "may be harmless" if the Board affirms the administrative law judge's finding that the medical reports favorable to claimant did not meet his burden of proving the existence of pneumoconiosis. *Id.*

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 and 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Walker, Rasmussen, Fino, and Zaldivar, and the treatment records of Dr. Stollings.[4] Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 1, 5-7, 10. Dr. Walker examined and tested claimant, and opined that there was "No Coal Workers' Pneumoconiosis" on claimant's chest x-ray, but that claimant does have "Chronic Obstructive Pulmonary Disease with bullous emphysema," due to "Occupational Dust," and "Tobacco Abuse." Director's Exhibit 13 at 4. Dr. Rasmussen examined and tested claimant, and diagnosed clinical coal workers' pneumoconiosis based on a chest x-ray reading and claimant's history of coal dust exposure, and "legal pneumoconiosis in the form of COPD emphysema," due to both smoking and coal dust exposure. Claimant's Exhibit 2 at 5-6. By contrast, Dr. Zaldivar examined and tested claimant, and reviewed the medical evidence of record, and concluded that claimant does not have coal workers' pneumoconiosis or any dust disease of the lungs, but suffers from severe emphysema due to smoking. Employer's Exhibits 1, 7, 8. Dr. Fino reviewed the medical evidence of record and reached the same conclusion. Employer's Exhibit 5. Dr. Stollings' treatment

[4] The administrative law judge found that the medical reports submitted in the current claim were more probative than the older medical reports in claimant's prior claims, because the current reports "consider[ed] a broader scope of objective information." Decision and Order at 18. Because the administrative law judge based his findings on the evidence submitted in the current claim, we reject claimant's argument that the administrative law judge improperly considered old evidence from the prior claims. Claimant's Brief at 7.

records contained diagnoses of COPD, bullous disease, and emphysema.[5] Employer's Exhibits 6, 10.

The administrative law judge found that Dr. Walker "did not provide any explanation beyond listing 'coal dust exposure' as a cause of claimant's bullous emphysema." Decision and Order at 21. The administrative law judge therefore determined that Dr. Walker's diagnosis was "not reasoned." *Id*. Additionally, the administrative law judge found that Dr. Rasmussen's diagnosis of clinical coal workers' pneumoconiosis by x-ray was not well-documented, because Dr. Rasmussen cited only one x-ray reading in support, without considering any of claimant's negative x-ray readings.[6] The administrative law judge additionally accorded "diminished weight" to Dr. Rasmussen's diagnosis of legal pneumoconiosis, because Dr. Rasmussen did not "support this ultimate conclusion with specific objective evidence related to the Claimant," but instead, relied on medical studies concluding that smoking and coal dust exposure can contribute to COPD. The administrative law judge found that because Dr. Rasmussen did not present specific evidence relating to the miner's health, his report was not "well-reasoned." Decision and Order at 20. Further, the administrative law judge found it "significant," that in four years of treating claimant, Dr. Stollings did not diagnose pneumoconiosis. Decision and Order at 20. Finding there to be "scant medical evidence in support of" claimant's position, the administrative law judge found that claimant "has not met his burden of establishing" the existence of pneumoconiosis. Decision and Order at 21.

Claimant does not challenge the administrative law judge's analysis of the opinions of Drs. Walker or Rasmussen, but instead, alleges that the administrative law judge erred in according any weight to Dr. Zaldivar's opinion, which claimant asserts

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[5] Dr. Stollings's treatment records dated July 10, 2001 through October 3, 2002, include: a CT scan dated July 17, 2002, noting "emphysematous changes with bullous formation in the lungs bilaterally;" a chest x-ray dated July 12, 2002, noting "advanced hyperinflated lungs suggestive of COPD" and "bullous disease at the left medial lung base;" a reading of a chest x-ray dated December 7, 2001 by Dr. Willis, reporting changes with bullous disease diffusely similar to three previous x-rays, scarring in the upper right lobe, and insufficient evidence of occupational pneumoconiosis. Employer's Exhibit 6. The treatment records dated September 5, 2002 through June 3, 2005, include a comparison of the September 5, 2002 x-ray reading to the July 12, 2002 reading, finding "no gross signs of acute infiltrate or signs of failure in this patient with severe emphysema." Employer's Exhibit 10.

[6] The administrative law judge had found that the x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order at 17.

was flawed, and based on inadmissable medical evidence from claimant's withdrawn claim.[7]

We need not address claimant's contention. Claimant bears the burden of establishing the existence of pneumoconiosis. Substantial evidence supports the administrative law judge's unchallenged finding that the opinions of Drs. Walker and Rasmussen were insufficient to meet claimant's burden. Specifically, the administrative law judge permissibly analyzed the reasoning and documentation of Dr. Walker's and Dr. Rasmussen's opinions, and he acted within his discretion in according these opinions less weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Error, if any, by the administrative law judge in his treatment of Dr. Zaldivar's opinion could not change this result.[8] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant's evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

Finally, the Director contends that, because Dr. Zaldivar examined claimant twice, on June 13, 2001, and again on April 27, 2005, and submitted a physical examination report each time, his two reports "may be considered two separate reports for purposes of the evidentiary limitations" applicable to employer under 20 C.F.R. §725.414.[9] Director's Letter at 2. Since the administrative law judge received into evidence both of Dr. Zaldivar's reports, plus the medical report and deposition testimony of Dr. Fino, the Director concludes that the administrative law judge erroneously permitted employer to

[7] The administrative law judge noted that any evidence submitted in connection with claimant's second, withdrawn claim, should not be considered in this claim, since a withdrawn claim is considered never to have been filed, pursuant to 20 C.F.R. §725.306(b). Decision and Order at 2, n.2. Because Drs. Zaldivar and Fino reviewed evidence from claimant's withdrawn claim, the administrative law judge discounted their opinions to the extent they were based on inadmissible evidence. Decision and Order at 18-19.

[8] The administrative law judge emphasized that the basis of his finding was "not the affirmative arguments of Drs. Zaldivar and Fino but rather the failure of the Claimant to meet his burden . . . ." Decision and Order at 21 n.30.

[9] The regulation permitted employer to submit "no more than two medical reports" in support of its affirmative case. 20 C.F.R. §725.414(a)(3)(i). A showing of "good cause" was required to exceed that limit. 20 C.F.R. §725.456(b)(1).

submit three medical reports, contrary to Section 725.414(a)(3)(i). We agree. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006)(holding that where a physician's two "reports constituted two separate written assessments of claimant's pulmonary condition at two different times," the administrative law judge permissibly counted them as two medical reports for purposes of the evidentiary limitations). However, in view of our affirmance of the administrative law judge's finding that claimant's evidence did not meet his burden to prove the existence of pneumoconiosis, the administrative law judge's error does not affect the disposition of this case.[10] *See Larioni*, 6 BLR at 1-1278.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

[10] We address this issue raised by the Director, in the event of any future claim proceedings.

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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JUDITH S. BOGGS
Administrative Appeals Judge