BRB No. 06-0566 BLA

JOSEPH LUCZAK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LUCKY STRIKE COAL CORPORATION	)	DATE ISSUED: 02/26/2007
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

Maureen E. Herron (Cipriani & Werner P.C.), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5155) of Administrative Law Judge Janice K. Bullard denying benefits 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). Based on the date of filing, April 8, 2003, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part

718.[1] The administrative law judge found that the newly submitted evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the presence of a totally disabling respiratory impairment, or that the disability was due to coal mine employment pursuant to 20 C.F.R. §718.204(b), (c), elements of entitlement previously adjudicated against claimant.[2] Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of legal pneumoconiosis or total respiratory disability due to pneumoconiosis established.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not participate in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant has filed numerous claims for benefits. The claim filed prior to this April 8, 2003 claim was filed on July 12, 2001 and was denied by the district director on March 28, 2002 because claimant failed to establish any requisite element of entitlement. Director's Exhibit 6. Claimant took no further action on that claim until filing the present subsequent claim.

[2] The administrative law judge found that the issue of whether pneumoconiosis arose out of coal mine employment was moot since the existence of pneumoconiosis was not established. The administrative law judge noted, however, that if the existence of pneumoconiosis had been established, claimant would be entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment, as the parties stipulated to 41.32 years of coal mine employment and the record supported that stipulation. 20 C.F.R. §718.203(b).

[3] Claimant has not challenged the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1), and that pneumoconiosis cannot be established at Section 718.202(a)(2) and (3) because there is no biopsy evidence available and the presumptions contained in Section 718.202(a)(3) are inapplicable. 20 C.F.R. §§718.202(a)(1), (2), (3); 718.304, 305, 306. These findings are accordingly affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a miner's claim pursuant to 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. §§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*).

Claimant first contends that the administrative law judge erred in failing to find that the newly submitted medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4) and erred, therefore, in failing to find a change in an applicable condition of entitlement at Section 725.309(d). Specifically, claimant contends that the administrative law judge failed to consider whether claimant had a lung disease which would satisfy the definition of pneumoconiosis set forth at 20 C.F.R. §718.201.[4] Claimant contends that Dr. Cali's opinion, that claimant had asthma and that claimant's prior exposure to coal dust was a contributing factor to the development of asthma, was sufficient to establish the existence of legal pneumoconiosis under the regulation at Section 718.201.

In considering the newly submitted evidence relevant to the existence of legal pneumoconiosis, *i.e.*, the opinions of Drs. Dittman and Cali, the administrative law judge concluded that while Dr. Cali was better qualified than Dr. Dittman, she declined to

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[4] Section 718.201(a)(2) defines legal pneumoconiosis as:

> any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

Section 718.201(a)(2)(b) states:

> [f]or purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(2)(b).

accord more weight to Dr. Cali's opinion as it was not well-reasoned. Although the administrative law judge acknowledged that asthma due to coal mine employment could establish the existence of legal pneumoconiosis, she found that it did not do so in this case because Dr. Cali's opinion was unreasoned. The administrative law judge determined that the opinion was unreasoned because Dr. Cali reached his determination based on his observations of claimant's wheezing and the fact that claimant was exposed to coal dust, without reconciling these findings with his finding that claimant's diminished breath sounds were usually indicative of emphysema, a disease whose presence or absence he did not explain. The administrative law judge also noted that Dr. Cali stated that claimant's reflux disease could cause asthma. In addition, the administrative law judge found that Dr. Cali's opinion, that changes in claimant's pulmonary function after the administration of bronchodilators were indicative of asthma, was discredited by Dr. Dittman. Consequently, the administrative law judge determined that Dr. Cali's opinion was unsupported by the objective evidence, and that Dr. Cali failed to adequately explain his conclusions.

Instead, the administrative law judge noted that Dr. Dittman found that the changes on claimant's pulmonary function studies, after the administration of bronchodilators, did not show significant improvement because the test results were normal to begin with. The administrative law judge concluded that this finding was supported by the fact that the test results produced on pulmonary function studies were in the normal range. The administrative law judge further noted that Dr. Dittman explained that the borderline mild hypoxemia observed on claimant's pre-exercise blood gas study would have been caused by heart disease. The administrative law judge found, therefore, that Dr. Dittman had credibly testified that cardiac findings were consistent with claimant's pain on exertion and that Dr. Dittman had also credibly explained that the evidence showed no valid reason for concluding that claimant had asthma. The administrative law judge's consideration of this evidence was rational. Accordingly, we hold the administrative law judge permissibly found that the newly submitted medical opinion evidence did not establish the existence of legal pneumoconiosis. Decision and Order at 4-6, 6-8, 12-13; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4, 6; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BR 1-46 (1985). The administrative law judge's findings that claimant has failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) and, consequently, has failed to establish a change in an applicable condition of entitlement are affirmed.

Claimant also contends that the administrative law judge erred by selectively analyzing Dr. Cali's disability opinion, and by finding that Dr. Cali did not offer a definitive opinion that claimant had a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b). Claimant argues that the administrative erred by focusing on Dr. Cali's statement that his opinion was not based on claimant's current pulmonary capacity, and that the administrative law judge failed to consider Dr. Cali's statements that claimant could not work in the mines due to asthma. We reject claimant's assertions.

It was within the administrative law judge's discretion to accord little weight to Dr. Cali's disability opinion that asthma would prevent claimant from working in the mines as coal dust might induce a potentially fatal asthma attack. The administrative law judge noted that this opinion was not based on claimant's current pulmonary capacity and that the doctor did not indicate whether claimant could perform the exertional requirements of his usual coal mine work from a respiratory or pulmonary standpoint. Decision and Order at 12-13; Claimant's Exhibits 1, 2; Director's Exhibits 14, 15. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Clark*, 12 BLR 1-149; *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Instead, the administrative law judge was free to accord determinative weight to Dr. Dittman's opinion that claimant did not have a totally disabling respiratory or pulmonary impairment because he found it well supported by the objective evidence of record. Decision and Order at 16-17; Employer's Exhibits 1, 4, 6; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-85 (3d Cir. 2004); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King*, 8 BLR at 1-265. We therefore affirm the administrative law judge's finding that the newly submitted evidence fails to establish the existence of total respiratory disability at Section 718.204(b) and a change in an applicable condition of entitlement at Section 725.309(d).

As we have affirmed the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b), essential elements of entitlement, we also affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement at Section 725.309(d). 20 C.F.R. §725.309(d); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). We must, therefore, affirm the denial of benefits. *See Trent*, 11 BLR 1-27; *Perry*, 9 BLR at 1-2.

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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BETTY JEAN HALL
Administrative Appeals Judge