BRB No. 11-0392 BLA

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| JIMMY L. CHILTON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 02/24/2012 |
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| JIM WALTER RESOURCES, INCORPORATED | ) | |
| | ) | |
| 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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William K. Bradford (Bradford Ladner LLP), Birmingham, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5584) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))

(the Act). This case involves a subsequent claim filed on June 5, 2008.[1] After crediting claimant with twenty years and nine months of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant failed to establish that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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, rational, and 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant's previous claim, filed on September 8, 2006, was finally denied because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] Because claimant does not challenge the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(2), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm the administrative law judge's findings that claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306. *Id.*; Decision and Order at 10.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds 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.,* 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 that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d).

**The Existence of Pneumoconiosis**

Claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of clinical pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4).[5] In considering whether the new medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge reviewed the opinions of Drs. O'Reilly, Connolly, and Goldstein.[6] Although Drs.

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[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). This definition "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.*

[5] A finding of legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is also sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, because claimant does not challenge the administrative law judge's finding that the new medical opinion evidence did not establish the existence of legal pneumoconiosis, this finding is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 9.

[6] The administrative law judge did not consider Dr. Fino's medical opinion.

O'Reilly and Connolly diagnosed coal workers' pneumoconiosis, Director's Exhibits 13, 15, Dr. Goldstein opined that claimant does not suffer from the disease. Director's Exhibit 16.

In her consideration of the new medical opinion evidence, the administrative law judge found that the opinions of Drs. O'Reilly and Connolly, that claimant suffers from clinical pneumoconiosis, were not sufficiently reasoned. Decision and Order at 9. The administrative law judge found that Dr. Goldstein did not diagnose coal workers' pneumoconiosis. *Id.* The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Claimant argues that the administrative law judge erred in according little weight to the opinions of Drs. O'Reilly and Connolly. We disagree. The administrative law judge permissibly found that the x-ray that Dr. O'Reilly relied upon as positive for pneumoconiosis was inconclusive for the existence of the disease,[7] thus calling into question the reliability of Dr. O'Reilly's diagnosis of pneumoconiosis. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 9. Dr. Connolly based his diagnosis of coal workers' pneumoconiosis on "nodular opacities seen on chest x-ray and pulmonary function studies consistent with pneumoconiosis." Director's Exhibit 15. The administrative law judge, however, found that the x-ray relied upon by Dr. Connolly was not interpreted as revealing nodular opacities in the lungs.[8] Decision and Order at 9. The administrative

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Director's Exhibit 33. However, because Dr. Fino opined that claimant does not suffer from pneumoconiosis or any other respiratory impairment, and is not totally disabled, any error committed by the administrative law judge in not considering Dr. Fino's opinion was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-710 (1984).

[7] Dr. O'Reilly based his diagnosis of coal workers' pneumoconiosis on Dr. Ahmed's positive interpretation of a July 15, 2008 x-ray. Director's Exhibit 13. Although Dr. Ahmed is a Board-certified radiologist, Dr. Wheeler, an equally qualified physician, interpreted the x-ray as negative for the disease. Director's Exhibit 14. Based upon the equal radiological qualifications of the doctors, the administrative law judge permissibly found that the July 15, 2008 x-ray was "inconclusive on the presence of pneumoconiosis." Decision and Order at 6.

[8] Dr. Connolly relied upon Dr. Lindsey's interpretation of a November 19, 2008 x-ray. Director's Exhibit 15. Although Dr. Lindsey interpreted the x-ray as revealing mild interstitial lung disease, the doctor did not interpret the x-ray as revealing the presence of nodular opacities, or the existence of clinical pneumoconiosis. *Id.*

law judge also found that Dr. Connolly "failed to explain why he felt [c]laimant's pulmonary function test was consistent with pneumoconiosis." *Id.* The administrative law judge, therefore, acted within her discretion in finding that Dr. Connolly's opinion was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 9.

Because the opinions of Drs. O'Reilly and Connolly are the only new medical opinions supportive of a finding of clinical pneumoconiosis, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

**Total Disability**

Claimant next argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. O'Reilly, Connolly, and Goldstein, and found that "none of the physicians' reports . . . credibly established total disability." Decision and Order at 12. Claimant's statements do not raise any substantive issue or identify any specific error on the part of the administrative law judge in determining that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, we reject claimant's assertion that his testimony is sufficient to establish total disability.[9] In a living miner's claim, lay testimony is generally insufficient to establish total respiratory disability, unless it is corroborated by at least a quantum of medical evidence. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Because we affirm the administrative law judge's finding that there is no credible medical evidence of total disability submitted in this subsequent claim, claimant's testimony is insufficient to carry his burden of establishing total disability pursuant to Section 718.204(b)(2). *See Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999). We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv).

[9] Claimant testified that he gets short of breath when cutting grass or walking to the mailbox. Transcript at 41. Claimant also testified that he gets short of breath when showering or singing in church. *Id.* at 42. Claimant further testified that he could not perform his job as a foreman because he could only walk the "longwall" once, and could not climb or help evacuate ill workers. *Id.*

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b), we affirm her finding that claimant failed to establish that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final.[10] 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10] The administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Because we affirm the administrative law judge's finding that claimant is not totally disabled, we also affirm her finding that claimant is unable to invoke the rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 13.