BRB No. 04-0422 BLA

RAY CASE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L. H. HALL COAL COMPANY	)	DATE ISSUED: 01/25/2005
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Upon Remand From The Benefits Review Board of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky for claimant.

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

Sarah M. Hurley (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand From The Benefits Review Board of Administrative Law Judge Janice K. Bullard 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] This case is before the Board for a third time. The procedural history was set forth in the Board's prior decisions. The Board most recently remanded the case for reassignment to a new administrative law judge,[2] and for consideration of whether claimant's duplicate claim, filed on September 18, 1986, should be barred as untimely pursuant to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). *Case v. L. H. Hall Coal Co.*, BRB No. 01-0821 BLA (Sept. 27, 2002) (unpub.) If reached, the administrative law judge was also directed to consider, consistent with the Board's remand instructions in *Case v. L. H. Coal Co.*, BRB No. 99-0683 BLA (Sept. 27, 2000) (unpub.) whether the newly submitted medical evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] *Id*.

On remand, the administrative determined that claimant's 1986 application for benefits was timely filed.[4] The administrative law judge also found that claimant did not demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), as

[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] This case was previously assigned to Administrative Law Judge Paul H. Teitler.

[3] In weighing the medical opinion evidence relevant to the existence of pneumoconiosis, the administrative law judge was directed to consider the credibility of the physicians' opinions in light of the discrepancy between the determined length of coal mine employment and the work history relied upon by the physicians in reaching their respective conclusions as to whether claimant has pneumoconiosis. *Case v. L. H. Hall Coal Co.*, BRB No. 99-0683 BLA (Sept. 27, 2000) (unpub.) Furthermore, the administrative law judge was directed to reweigh the medical opinions with consideration as to the length of claimant's smoking history. *Id*.

[4] The administrative law judge refers to the claim as a "subsequent" claim, consistent with the language set forth in the revised regulation at 20 C.F.R. §725.309. The Board notes, however, that this claim is a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). The amendments to the regulations at 20 C.F.R §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

the newly submitted evidence did not differ qualitatively from the previously submitted evidence. Considering all of the evidence, old and new, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, that administrative law judge denied benefits.

Claimant appeals, alleging that the administrative law judge exceeded the scope of the Board's remand order by revisiting the validity of the new pulmonary function study evidence. Claimant's Brief at 7-9. Claimant argues that administrative law judge erred in finding that he had only 12 years of coal mine employment. Claimant's Brief at 20-12. Claimant further challenges the administrative law judge's weighing of the medical opinion evidence for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] Claimant's Brief at 9-14. Employer responds, urging affirmance of the denial of benefits.[6] The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Sixth Circuit has held that in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v.*

[5] The administrative law judge set forth and discussed all of the x-ray evidence of record. She found that the new x-ray evidence failed to establish the existence of pneumoconiosis and further that the "x-ray evidence of record in conjunction with [c]laimant's initial claim does not establish the existence of pneumoconiosis." Decision and Order at 23. She thus determined that claimant failed to establish the existence of pneumoconiosis pursuant to C.F.R. §718.202(a)(1). The administrative law judge also found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Employer argues that the administrative law judge erred in finding that claimant's duplicate claim was not time barred. Employer's Brief 1-3. Employer, however, concedes that if the Board affirms the denial of benefits, the administrative law judge's error may be deemed harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). *Id.*

Ross, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*.

After consideration of the administrative law judge's Decision and Order, the issue on appeal, and the evidence of record, we affirm as supported by substantial the administrative law judge's denial of benefits based on her finding that the record evidence as a whole fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). We specifically reject claimant's assertion that the administrative law judge erred in weighing the medical opinion evidence and in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Contrary to claimant's contention, the administrative law judge had discretion to assign less probative weight to Dr. Cohen's opinion that claimant had pneumoconiosis. The administrative law judge reasonably questioned why Dr. Cohen would trivialize a 15-pack year history of cigarette smoking by calling it a "modest" smoking history when compared to his characterization of claimant's 15 year coal mine history as a "significant" history of coal dust exposure. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Claimant's Exhibits 1, 2, 3; Decision and Order at 26. The administrative law judge noted that most of the physicians recorded a 12-pack year cigarette smoking history, while Dr. Cohen considered a pack year history as low as five years. Claimant's Exhibit 3; Decision and Order at 18, 26. Furthermore, the administrative law judge specifically stated, "I find Dr. Cohen's discounting of [c]laimant's tobacco use seriously compromises his opinion, particularly where he had the opportunity to review all of the other physician's opinions and could not have failed to see how other doctors viewed the impact of smoking upon claimant's pulmonary condition." Decision and Order at 26.

Additionally, the administrative law judge permissibly rejected Dr. Cohen's opinion as unreasoned, finding that while Dr. Cohen understated claimant's smoking history, he overstated claimant's coal dust exposure history. *See Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (*en banc*); Decision and Order at 26. Although claimant challenges the administrative law judge's finding that he established only 12 years of coal mine employment, we affirm her determination as it is supported by substantial evidence including claimant's social security records. *See Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Director's Exhibit 42; Decision and Order at 6.

Claimant also argues that the administrative law judge's rejection of Dr. William's diagnosis of pneumoconiosis was irrational. We disagree. The administrative law judge

properly assigned less probative weight to Dr. William's diagnosis of pneumoconiosis as it was based in part on the physician's own positive reading of an October 15, 1996 x-ray, which was read as negative by a preponderance of the more qualified Board-certified radiologists and B-readers. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Director's Exhibits 11, 12, 13, 29, 30, 31; Decision and Order at 25.

Because the administrative law judge correctly found that the opinions of Drs. Cohen and Williams were entitled to less probative weight for the reasons stated above, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) based on the new medical opinion evidence.[7] Since the administrative law judge also found that the medical opinion evidence submitted with the prior claim failed to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding overall that claimant failed to establish the existence of pneumoconiosis. Decision and Order at 29.

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[8]

[7] The administrative law judge permissibly credited the weight of the well-reasoned opinions of Drs. Broudy, Branscomb, and Tuteur, who opined that claimant did not have clinical or legal pneumoconiosis. Decision and Order at 28.

[8] Since we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a) we decline to address claimant's arguments regarding the administrative law judge's weighing of the pulmonary function study and medical opinion evidence relevant to the issue of total disability pursuant to 20 C.F.R. §718.203(b)(2)(i), (iv). We also decline to address employer's argument regarding the timeliness of the claim as any error committed by the administrative law judge in finding the claim timely filed is harmless error. *See Larioni*, 6 BLR at 1-1276.

Accordingly, the administrative law judge's Decision and Order Upon Remand From The Benefits Review Board is hereby 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