BRB No. 06-0661 BLA

FRANCIS R. PETROSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEST VIRGINIA ELECTRIC CORPORATION	)	DATE ISSUED: 07/26/2007
	)	
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 of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Francis R. Petroski, Moatsville, West Virginia, *pro se*.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-6801) of Administrative Law Judge Stephen L. Purcell denying benefits on a 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). This case involves a subsequent claim filed on September 8, 2003.[1] After crediting claimant with nineteen

[1] Claimant initially filed a claim for benefits on August 19, 1999. Director's Exhibit 1. On July 25, 2000, the district director denied benefits based upon claimant's failure to establish the existence of pneumoconiosis or that he was totally disabled. *Id.*

years of coal mine employment, the administrative law judge found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. 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.

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 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had

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At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* After claimant failed to appear at the scheduled hearing, Administrative Law Judge Robert J. Lesnick issued an Order to Show Cause, ordering claimant to show cause why his claim should not be dismissed. *Id.* Claimant failed to respond to the Order to Show Cause. Consequently, by Order dated August 14, 2001, Judge Lesnick dismissed claimant's 1999 claim. *Id.* Claimant filed this claim on September 8, 2003. Director's Exhibit 3.

to submit new evidence establishing either that he suffers from 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)(*en banc*) (holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

The administrative law judge initially addressed whether the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four x-ray interpretations, including Dr. Harron's positive interpretation of a May 16, 1997 x-ray. Decision and Order at 13; Director's Exhibit 19. The administrative law judge erred in considering whether Dr. Harron's x-ray interpretation supported a change in an applicable condition of entitlement. Because Dr. Harron interpreted an x-ray that predated the filing of claimant's previous claim, this evidence cannot assist claimant in establishing that an applicable condition of entitlement has changed since the denial of the previous claim. *See* 20 C.F.R. §725.309(d)(3); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997) (holding that an administrative law judge properly declined to consider evidence that was in existence at the time the first claim was decided, because such evidence cannot show a material change in conditions since the previous denial). The administrative law judge properly found that none of the new x-ray interpretations of record is positive for pneumoconiosis.[2] Decision and Order at 13. Consequently, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 13. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[3] *Id.*

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[2] Dr. Scott, a B reader and Board-certified radiologist, interpreted claimant's August 11, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 26. Dr. Bellotte, a B reader, interpreted claimant's November 17, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 17. Dr. Fino, a B reader, interpreted claimant's April 13, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

[3] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, since this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[4] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports of Drs. Bellotte and Fino. The administrative law judge noted that Dr. Bellotte diagnosed, *inter alia*, "[coal workers' pneumoconiosis] – 5% award – State of W.Va. – 1995."[5] Decision and Order at 14; Director's Exhibit 14. However, the administrative law judge further noted that Dr. Bellotte, in addressing the etiology of claimant's cardiopulmonary diagnoses, stated that there was "no coal dust related diagnosis." *Id.* The administrative law judge, therefore, reasonably found that Dr. Bellotte's report did not support a finding of pneumoconiosis. The administrative law judge also properly found that Dr. Fino's opinion did not support a finding of pneumoconiosis.[6] Decision and Order at 14; Employer's Exhibit 1. Because there is no new medical opinion evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We, therefore, further affirm 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)-(4).

Having found that the new evidence did not establish the existence of pneumoconiosis, the administrative law judge next should have addressed whether the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). A finding that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b) would enable claimant to establish that an applicable condition of entitlement has changed since the date upon which the order denying his prior claim became final. Because the administrative law judge has not yet addressed this alternative method of establishing that an applicable condition of entitlement has changed, we remand the case to the administrative law judge for him to do so. Consequently, we

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] As previously discussed in regard to Dr. Harron's x-ray interpretation, evidence that predates the denial of claimant's previous claim cannot support a finding that an applicable condition of entitlement has changed. Because the 1995 West Virginia award predates the filing of claimant's previous claim, it does not assist claimant in establishing that an applicable condition of entitlement has changed.

[6] Dr. Fino opined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Fino further opined that there was no evidence of a coal mine dust-related pulmonary condition. *Id.*

vacate the administrative law judge's finding that claimant failed to establish that an applicable condition of entitlement has changed pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2003 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge