BRB No. 06-0749 BLA

| | | |
|---|---|---|
| EZRA R. GIBSON | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BETTY B COAL COMPANY | ) | 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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

John R. Sigmond (PennStuart), Bristol, Tennessee/Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-6089) of Administrative Law Judge Linda S. Chapman with respect to 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). The administrative law judge credited claimant with 16.2 years of coal mine employment and noted that the claim before her was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The administrative law

[1] Claimant filed his first application for benefits with the Social Security Administration on January 17, 1972, which was denied on April 25, 1980, following

judge considered the newly submitted evidence of record to determine whether claimant established that he was totally disabled and whether his totally disabling condition was due to pneumoconiosis, which were the elements of entitlement adjudicated against claimant in the denial of his most recent prior claim. The administrative law judge determined that this evidence was insufficient to prove that claimant is suffering from a totally disabling respiratory or pulmonary impairment caused by pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge further found, therefore, that claimant failed to establish a change in the applicable conditions of entitlement as is required under Section 725.309(d) and denied benefits accordingly.

Claimant argues on appeal that the administrative law judge did not properly weigh the newly submitted medical opinion evidence. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers'

---

review by the Department of Labor. Director's Exhibit 1. Claimant filed a second claim on September 24, 1987, which was denied in a Decision and Order issued by Administrative Law Judge Julius Johnson. *Id*. The Board affirmed Judge Johnson's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but vacated his finding that claimant did not establish that he was totally disabled due to pneumoconiosis and remanded the case for further consideration. *Gibson v. Betty B Coal Co.*, BRB No. 92-1914 BLA (Apr. 21, 1993)(unpublished). On remand, Judge Johnson denied benefits, finding that claimant failed to establish total disability due to pneumoconiosis. Claimant appealed to the Board, which vacated the denial of benefits and remanded the case again. *Gibson v. Betty B Coal Co.*, BRB No. 94-2426 BLA (Sept. 13, 1995)(unpublished). The case was reassigned to Administrative Law Judge Edward J. Murty, Jr., who awarded benefits. On appeal, the Board affirmed Judge Murty's finding that claimant established the existence of pneumoconiosis, but vacated his finding of total disability due to pneumoconiosis. *Gibson v. Betty B Coal Co.*, BRB Nos. 96-1280 BLA and 96-1280 BLA-A (June 25, 1997)(unpublished). On remand, Judge Murty returned the case to the district director so that claimant could receive a complete pulmonary evaluation. When the case was returned to the Office of Administrative Law Judges for a hearing, it was reassigned to Administrative Law Judge Edward Terhune Miller, who denied benefits in a Decision and Order issued on July 27, 2000, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Claimant took no further action until filing a claim on March 18, 2002, which was denied on March 6, 2003 by the district director because claimant did not prove that he was totally disabled due to pneumoconiosis. Director's Exhibit 2. Claimant subsequently filed the claim at issue in this appeal on March 31, 2004. Director's Exhibit 3.

Compensation Programs, has submitted a letter indicating that he will not file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

When 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., Inc.*, 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 total disability and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2), (c). Consequently, claimant had to submit new evidence establishing these elements of entitlement to proceed with his claim. 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*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). [3]

The newly submitted evidence consists of four nonqualifying pulmonary function studies, seven qualifying blood gas studies, two nonqualifying blood gas studies, and the

[2] The Director, Office of Workers' Compensation Programs (the Director), initially filed a cross-appeal in this case. By Order dated September 8, 2006, the Board granted the Director's request to dismiss his appeal. *Gibson v. Betty B Coal Co.*, BRB Nos. 06-0749 BLA and 06-0749 BLA-A (Sept. 8, 2006)(unpub. Order).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment took place in Virginia. Director's Exhibits 5, 7; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

medical opinions of Drs. Robinette, Rasmussen, Rosenberg, and Fino.[4] Dr. Robinette, claimant's treating physician, diagnosed severe pulmonary disease caused by dust exposure in coal mine employment and indicated that it was associated with a mild to moderate impairment. Director's Exhibit 14. Dr. Rasmussen examined claimant on June 14, 2004, and diagnosed a totally disabling pulmonary impairment and opined that pneumoconiosis was a major contributing cause of this impairment. Director's Exhibit 12. Dr. Rosenberg examined claimant on November 1, 2004, and reviewed claimant's medical records. Dr. Rosenberg determined that claimant is suffering from a mild restrictive impairment caused by claimant's obesity. Director's Exhibit 13. Dr. Rosenberg also indicated that based upon the variation in claimant's blood gas results over time, any impairment that they revealed is attributable to claimant's obesity, rather than a coal mine dust related condition. *Id*. Dr. Fino examined claimant on April 7, 2005 and reviewed claimant's medical records. Dr. Fino stated in his report that claimant retains the pulmonary capacity necessary to perform his usual coal mine work, assuming that it required sustained heavy labor. Employer's Exhibit 1. Dr. Fino concurred with Dr. Rosenberg's opinion regarding the significance of claimant's blood gas study results. *Id*.

The administrative law judge determined that claimant did not establish total disability pursuant to Section 718.204(b)(2)(i), as the four newly submitted pulmonary function studies produced nonqualifying values. Decision and Order at 10; Director's Exhibits 12-14; Employer's Exhibit 1. With respect to the newly submitted blood gas studies, the administrative law judge concluded that they did not support a finding of total disability under Section 718.204(b)(2)(ii) because "the medical opinion reports persuasively establish that the arterial blood gas test results are not the result of a respiratory impairment." *Id*. The administrative law judge found that total disability was not demonstrated pursuant to Section 718.204(b)(2)(iii) on the ground that the record contains no evidence of cor pulmonale. Decision and Order at 10. With respect to Section 718.204(b)(2)(iv), the administrative law judge concluded that the opinions in which Drs. Rosenberg and Fino attributed the impairment revealed on claimant's blood gas studies to obesity were entitled to greatest weight. The administrative law judge found, therefore, that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment. *Id*. at 12; Director's Exhibit 13; Employer's Exhibit 1. Relevant to Section 718.204(c), the administrative law judge determined that claimant did not prove that any impairment that he suffered was caused by pneumoconiosis. *Id*.

[4] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Claimant argues on appeal that the administrative law judge "inappropriately disregarded the findings of Dr. Rasmussen." Claimant's Brief at 7. Claimant also asserts that Dr. Rasmussen has extensive qualifications and experience that the administrative law judge ignored. Claimant further maintains that the administrative law judge erred in discrediting Dr. Rasmussen's opinion "based on his failure to note every disorder or condition he alternatively considered."[5] *Id*. at 8. These contentions are without merit.

Contrary to claimant's assertion, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Rasmussen's opinion regarding total disability and total disability causation was entitled to less weight than the contrary opinions of Drs. Rosenberg and Fino. The administrative law judge rationally based her finding upon the fact that Dr. Rasmussen did not explain how the general principle that coal dust exposure can cause a marked impairment in oxygen transfer in the absence of a ventilatory impairment applied to claimant, did not discuss the nonpulmonary and nonrespiratory conditions from which claimant suffered that could affect his ability to breathe and, unlike Drs. Rosenberg and Fino, did not have the opportunity to review the other newly submitted blood gas tests and, therefore, did not comment upon the significance of the variation in the blood gas study results. Decision and Order at 11; Director's Exhibit 12; *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). In light of the administrative law judge's permissible determination that Dr. Rasmussen's opinion was not as well reasoned as the contrary opinions of Drs. Rosenberg and Fino, she was not required to resolve the conflict between these opinions by referring to the physicians' respective qualifications and expertise. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-323, 2-335; *Akers*, 131 F.3d 438 at 441, 21 BLR at 2-275-76. Thus, we affirm the administrative law judge's finding that the medical opinions of Drs. Rosenberg and Fino establish that claimant is not totally disabled due to pneumoconiosis pursuant to Section 718.204(b)(2), (c).

Because claimant did not establish a change in the applicable conditions of entitlement, we must also affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). *See White*, 23 BLR at 1-7.

[5] We affirm the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(i) and (iii), as they have not been challenged on appeal. Decision and Order at 10; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge