BRB No. 07-0853 BLA

H.D.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASY MONEY TRUCKING COMPANY	)	DATE ISSUED: 07/24/2008
	)	
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 Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5935) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim[1] filed

[1] Claimant's first application for benefits, filed on July 11, 1988, was denied by Administrative Law Judge Clement J. Kichuk on March 17, 1993, and the Board affirmed the denial on May 29, 1996. Claimant's second application for benefits, filed on September 3, 1997, was denied by Administrative Law Judge Stuart Levin on November 22, 2000. Judge Levin denied claimant's request for modification on June 28, 2002, and

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 the miner with eighteen years of coal mine employment, and adjudicated this subsequent claim, filed on December 1, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's prior claim had been denied on the ground that the evidence was insufficient to establish either the existence of pneumoconiosis or that claimant's totally disabling respiratory impairment was due to pneumoconiosis. The administrative law judge found that the new evidence submitted in support of this subsequent claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, thus, was insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding it insufficient to establish the existence of pneumoconiosis at Section 718.202(a). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.[2] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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the district director denied claimant's second request for modification on October 7, 2003. Claimant took no further action until the filing of the present subsequent claim.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. Director's Exhibit 1. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*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 "shall be limited to 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 the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant initially challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1), arguing that the administrative law judge improperly relied on the numerical superiority of negative x-rays. We can discern, however, no error in the administrative law judge's weighing of this evidence. The administrative law judge accurately reviewed the newly submitted x-ray evidence, and permissibly found that the existence of pneumoconiosis was not established based on "the preponderance of negative interpretations, in particular those by dually qualified physicians."[3] Decision and Order at 15; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *White*, 23 BLR 1-1; *Dixon v. North Camp Coal Co.*, 8 BLR 1-31 (1991). As the administrative law judge properly considered both the quality and the quantity of the newly submitted x-ray evidence, we affirm her finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), as supported by substantial evidence.

Claimant next challenges the administrative law judge's consideration of the evidence pursuant to Section 718.202(a)(2). Specifically, claimant asserts that Dr.

[3] The newly submitted x-ray evidence consists of interpretations of seven x-rays. The June 4, 1995 and March 3, 1996 x-rays do not refer to pneumoconiosis. Director's Exhibit 17. The March 14, 2002 film was read as negative for pneumoconiosis by Drs. Scatarige and Scott, both of whom are dually qualified Board-certified radiologists and B readers. Director's Exhibit 27. The August 26, 2003 x-ray did not refer to pneumoconiosis. Director's Exhibit 17. The April 7, 2005 film was read as positive for pneumoconiosis by both Dr. Rasmussen, a B reader, and by Dr. Alexander, a dually qualified physician, but was also read as negative by Drs. Scatarige and Scott, both dually qualified. The April 7, 2005 film was also read for quality purposes only. Director's Exhibits 18, 25, 28; Claimant's Exhibit 5; Employer's Exhibit 3. The December 1, 2005 x-ray was interpreted as negative for pneumoconiosis by Dr. Fino, a B reader. Employer's Exhibit 2. The February 7, 2006 x-ray was read as negative for pneumoconiosis by Dr. Wheeler, a dually qualified physician. Employer's Exhibit 1.

Caffrey's finding of anthracosis upon review of the tissue slides from claimant's 1999 left lung biopsy constitutes a diagnosis of pneumoconiosis. Claimant is in error. Dr. Caffrey reviewed the five biopsy slides and found that the lung tissue abnormalities were "consistent with usual interstitial pneumonitis (UIP), and mild amount of anthracotic pigment present (no cwp)." Director's Exhibit 1. Additionally, Dr. Hudgens, who performed the biopsy, reported "lung, left, biopsy: consistent with usual interstitial pneumonitis (UIP)." Director's Exhibit 1. Because anthracotic pigment is not a condition included within the definition of pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), and neither doctor diagnosed anthracosis, we affirm the administrative law judge's finding that pneumoconiosis was not established by biopsy evidence pursuant to Section 718.202(a)(2), as supported by substantial evidence.

Regarding Section 718.202(a)(4), claimant contends that the administrative law judge's findings are not supported by substantial evidence, and additionally, that she substituted her opinion for that of Dr. Rasmussen, while failing to recognize the probative value of claimant's treatment records. Claimant further contends that Dr. Castle's report is hostile to the Act. Claimant's arguments are without merit. The administrative law judge permissibly discounted Dr. Rasmussen's diagnosis of clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), as it was based solely on a history of coal mine employment and the physician's own positive interpretation of the April 7, 2005 x-ray, which the administrative law judge found to be contradicted by the weight of the x-ray evidence as a whole. Decision and Order at 15; s*ee Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). With respect to Dr. Rasmussen's diagnosis of legal pneumoconiosis, the administrative law judge acted within her discretion in finding that the opinion was speculative and insufficient to meet claimant's burden at Section 718.202(a)(4), as Dr. Rasmussen, who did not have access to claimant's medical records, acknowledged his uncertainty and failed to explain his basis for concluding that claimant's histories of cigarette smoking, coal mine dust exposure, and diffuse lung disease all contributed to claimant's disabling respiratory condition. Decision and Order at 6-7, 15-16; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). By contrast, the administrative law judge determined that Drs. Castle and Fino, who examined claimant and reviewed the totality of the medical evidence, opined that the x-ray evidence, computerized tomography scan, biopsy and clinical findings were consistent with the diagnosis of UIP unrelated to coal dust exposure. Decision and Order at 10-14, 18. The administrative law judge additionally reviewed claimant's hospitalization reports and medical records, including those of Dr. Robinette, claimant's treating physician, and determined that they contained no objective support for a diagnosis of pneumoconiosis, but merely reflected objective evidence of chronic interstitial pneumonitis and coronary problems, and a "history" of pneumoconiosis. Decision and Order at 7-10, 16-18. Further, the administrative law judge correctly determined that no physician provided any rationale or support for a finding that claimant's chronic obstructive condition was related to coal

dust exposure. Decision and Order at 18. Thus, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), and we affirm her findings thereunder, as supported by substantial evidence.

As the administrative law judge properly found that the evidence favorable to claimant was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), any determination that Dr. Castle's contrary report is hostile to the Act would not help claimant meet his burden of proof. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d), and affirm her denial of benefits.

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