BRB No. 07-0893 BLA

J.C. Claimant-Petitioner v. TRIPLE L, INCORPORATED and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/17/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Jasper, Alabama, for claimant.

Anthony Finaldi (Ferreri & Fogle, PLLC), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the June 26, 2007 Decision and Order Denying Benefits (2007-BLA-05249) of Administrative Law Judge Ralph A. Romano (the administrative law

judge) rendered on a subsequent claim[1] 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). After accepting the parties' stipulation to twenty-one years, seven months of qualifying coal mining employment, as supported by the record, the administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and denied benefits.

On appeal, claimant contends that he has shown by uncontroverted medical evidence and lay testimony that he is totally disabled by pneumoconiosis. Employer has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

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). 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 the existence of pneumoconiosis at 20 C.F.R.

[1] Claimant filed his first claim for benefits on July 6, 1976 and was denied benefits on January 6, 1980. Claimant filed a second claim on January 29, 1985, that was denied on June 7, 1985. A third claim was filed on July 13, 1989, and denied on November 7, 1989. A fourth claim was filed on March 1, 2000, and denied on April 25, 2000 for failure to establish pneumoconiosis and total disability due to pneumoconiosis. Claimant's fifth and current claim was filed on March 22, 2006. Director's Exhibits 1-4, 6.

[2] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because the miner was last employed in the coal mine industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 7, 10.

§718.202(a) and total respiratory disability at 20 C.F.R. §718.204(b). Director's Exhibit 4. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

In assessing whether claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), the administrative law judge initially determined that the weight of the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a). In so finding, the administrative law judge accurately summarized the newly submitted x-ray interpretations of record and found that they were all negative for pneumoconiosis.[3] Thus, the administrative law judge properly concluded that pneumoconiosis could not be established at Section 718.202(a)(1). Additionally, the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record contained no biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305 and 718.306 were not applicable. *See generally Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). At Section 718.202(a)(4), the administrative law judge accurately summarized the two newly submitted medical opinions and permissibly gave little weight to Dr. Weaver's opinion,[4] that claimant suffered from chronic obstructive pulmonary disease aggravated by coal dust exposure, because the physician provided no findings on physical examination, treatment notes, or objective testing results that would support his conclusions. The administrative law judge acted within his discretion in finding that Dr. Weaver's conclusory diagnosis, standing alone, was insufficient to establish pneumoconiosis, and that the opinion was also outweighed by the better reasoned and supported opinion of Dr. Hasson, finding no pneumoconiosis.[5] Decision

[3] Although newly submitted, the October 2, 1989 x-ray, read by Drs. Russakoff and Cole, and the May 21, 1999 x-ray, interpreted by Dr. Harron, predated the prior denial of benefits. Thus, the administrative law judge properly found that this evidence could not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(2). The administrative law judge correctly determined that the only new x-ray evidence obtained after the prior denial was a May 2, 2006 x-ray interpreted by Drs. Hasson and Wiot as negative for pneumoconiosis. Decision and Order at 4.

[4] Although the administrative law judge considered Dr. Weaver's report as constituting new evidence submitted in support of this subsequent claim, the report was dated February 4, 2000, and thus it preceded the prior denial of benefits on April 25, 2000. Decision and Order at 5, 7; Claimant's Exhibit 5.

[5] Dr. Hasson reported the results of his physical examination and testing of claimant, including a negative chest x-ray, normal blood gas study results, and normal pulmonary function study results, with the exception of a severely decreased MVV

and Order at 5; *see United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

After consideration of all the newly submitted evidence, the administrative law judge rationally found that the existence of pneumoconiosis was not established at Section 718.202(a), and we affirm his findings thereunder as supported by substantial evidence.

Next, in assessing the evidence relevant to the issue of total disability at Section 718.204(b)(2), the administrative law judge accurately found that the newly submitted pulmonary function study and blood gas study of record, conducted by Dr. Hasson on May 2, 2006, produced non-qualifying values,[6] and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibit 13; Decision and Order at 6. Thus, the administrative law judge properly found that claimant failed to establish total disability at Section 718.204(b)(2)(i)-(iii). *See generally Shedlock*, 9 BLR 1-195. In evaluating the newly submitted medical opinions at Section 718.204(b)(2)(iv), the administrative law judge determined that, although Dr. Weaver opined that coal mine dust exposure aggravated claimant's chronic obstructive pulmonary disease, the physician did not discuss whether claimant was able to perform his usual coal mine employment from a pulmonary standpoint.[7] Decision and Order at 7. Because Dr. Weaver's report does not address any functional impairment, the administrative law judge properly found that the opinion was insufficient to establish total respiratory disability. *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985); *Hillibush v. United States*

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maneuver. Dr. Hasson found no evidence of pneumoconiosis, and diagnosed asthmatic bronchitis due to smoking and idiopathic HCVD by history that caused a mild impairment. Director's Exhibit 13.

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

[7] Dr. Weaver's opinion states in full: "Mr. Crump is a 72 year old white male who quit smoking 33 years ago. He has a history of granduloma (*sic*) in the left upper lobe, chronic obstructive pulmonary disease, and wheezing. These conditions were aggravated by dust exposure. Mr. Crump worked in the mining industry for 40 years." Claimant's Exhibit 5.

Department of Labor, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). As the administrative law judge found that Dr. Hasson's conclusion, that claimant has no pulmonary or respiratory disability, was consistent with the objective evidence and the remaining medical opinions of record, the administrative law judge properly found that claimant failed to establish total disability at Section 718.204(b)(2)(iv). Decision and Order at 7; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-155.

The administrative law judge's finding that the newly submitted evidence of record was insufficient to establish total respiratory disability at Section 718.204(b)(2)(i)-(iv) is affirmed, as supported by substantial evidence. Further, contrary to claimant's arguments, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2), lay testimony alone cannot alter the administrative law judge's findings. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d), and affirm his 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