BRB No. 07-0932 BLA

E.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL 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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

E.L., Pound, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (06-BLA-5358) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) denying benefits on a subsequent claim[2] filed pursuant to the provisions of

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant's estate, but Mr. Murphree is not representing it on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The pertinent procedural history of this case is as follows: Claimant filed his first

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 accepted the parties' stipulation that claimant had thirty-three years of coal mine employment,[3] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

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claim on August 22, 1980. Director's Exhibit 1. It was finally denied by the district director on June 4, 1981, because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed his second claim on September 1, 1982. Director's Exhibit 2. On February 23, 1987, Administrative Law Judge V.M. McElroy issued a Decision and Order denying benefits, because the evidence did not establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge McElroy's denial of benefits. [*E.L.*] *v. Clinchfield Coal Co*., BRB No. 87-0861 BLA (Sept. 27, 1988)(unpub.). Claimant filed his third claim on March 24, 1989, which the Department of Labor construed as a request for modification. Director's Exhibit 2. The district director denied benefits on June 22, 1989, because the evidence did not establish a material change in conditions. *Id*. However, on July 7, 1989, the district director granted claimant's request to hold the case in abeyance while the appeal of the Board's decision in *Lukman v. Director*, OWCP, 10 BLR 1-56 (1987), was pending before the United States Court of Appeals for the Tenth Circuit. Claimant filed his fourth claim on July 17, 1992. Director's Exhibit 3. The district director denied benefits on December 7, 1992, because the evidence did not establish the existence of pneumoconiosis, that the disease was caused at least in part by coal mine work, or that claimant was totally disabled by the disease. *Id*. On February 23, 1994, Administrative Law Judge Robert D. Kaplan issued a Decision and Order denying benefits, because the evidence did not establish the existence of pneumoconiosis or total disability. *Id*. Claimant filed a request for modification on February 2, 1995. *Id*. The district director denied benefits on August 21, 1995, because the evidence did not establish a change in conditions or a mistake in a determination of fact. *Id*. By Order of Dismissal dated April 21, 1997, Administrative Law Judge Thomas F. Phalen, Jr. granted claimant's request to withdraw his claim. *Id*. Claimant filed his fifth claim on October 25, 1999. Director's Exhibit 4. On June 6, 2003, Administrative Law Judge Linda S. Chapman issued a Decision and Order denying benefits, because the evidence did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Administrative Law Judge's Exhibit 4. Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim on August 13, 2004. Director's Exhibit 6.

[3] The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibits 1, 2, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

CHANGE IN AN APPLICABLE CONDITION OF ENTITLEMENT

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). The administrative law judge stated that "[claimant's] prior claim was denied in June 2003 due to his failure to prove the presence of pneumoconiosis." Decision and Order at 5. The administrative law judge therefore stated, "for purposes of adjudicating his subsequent claim, I will evaluate the evidence developed since the denial of [claimant's] third[4] claim to determine whether he can now prove that he has pneumoconiosis." *Id*.

Contrary to the administrative law judge's finding, claimant's prior claim was denied because the evidence did not establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. Administrative Law Judge's Exhibit 4. Thus, the issue properly before the administrative law judge was whether the medical evidence developed since the denial of benefits in the prior claim established either the existence of pneumoconiosis or total disability due to pneumoconiosis, 20 C.F.R. §§718.202(a) and 718.204(c), thereby establishing a change in an applicable condition of entitlement at 20

[4] As discussed, *supra*, claimant's prior claim was actually his fifth claim. Director's Exhibit 4.

C.F.R. §725.309. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2); *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)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Existence of Pneumoconiosis
Section 718.202(a)(1)

The administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of nine interpretations of five x-rays dated August 4, 2002, September 24, 2004, June 23, 2004, March 9, 2005, and March 17, 2005. Of these nine new x-ray interpretations, five readings were negative for pneumoconiosis, Director's Exhibits 19, 20, and four readings were positive for pneumoconiosis. Director's Exhibits 14, 17, 18; Claimant's Exhibit 4. Dr. Hatcher, who is not a B reader or a Board-certified radiologist, read the August 4, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 19. Whereas Dr. Baker, who is a B reader, read the September 24, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 14, Dr. Wheeler, who is dually qualified as a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Director's Exhibit 19. Dr. Scott, who is dually qualified, read the June 23, 2004 x-ray as negative for pneumoconiosis, Director's Exhibit 19, while Dr. Alexander, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Director's Exhibit 17. Similarly, Dr. Scatarige, who is dually qualified, read the March 9, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 19, while Dr. Ahmed, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Director's Exhibit 18. Lastly, Dr. Wheeler, who is dually qualified, read the March 17, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 20, while Dr. Miller, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 4.

The administrative law judge initially found that the August 4, 2002 x-ray was negative for pneumoconiosis, because this x-ray was uncontested. Decision and Order at 7. As required by Section 718.202(a)(1), the administrative law judge next considered the B reader and Board-certified status of the readers of the remaining x-rays dated September 24, 2004, June 23, 2004, March 9, 2005, and March 17, 2005. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge properly accorded greater weight to the x-ray readings that were provided by physicians who were dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Specifically, the administrative law judge found that the September 24, 2004 x-ray was negative for pneumoconiosis, because the physician who read this x-ray as negative for pneumoconiosis was better qualified than the physician who read this x-ray as positive

for pneumoconiosis. *Id*. The administrative law judge then found that the June 23, 2004, March 9, 2005, and March 17, 2005 x-rays were inconclusive for pneumoconiosis, because all of the physicians who read these x-rays, both as positive and as negative for pneumoconiosis, were dually qualified. *Id*. The administrative law judge therefore concluded that the preponderance of the new x-ray evidence was negative for pneumoconiosis, because "…setting aside the three inconclusive chest x-rays of June 23, 2004, March 9, 2005 and March 17, 2005, the remaining two films from August 4, 2002 and September 24, 2004 are negative for pneumoconiosis." *Id*.

Because substantial evidence supports the administrative law judge's finding that the preponderance of the x-ray evidence was negative for pneumoconiosis, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Section 718.202(a)(2)

Further, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy or autopsy evidence.

Section 718.202(a)(3)

Additionally, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) because none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Section 718.202(a)(4)

Finally, the administrative law judge found that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the new opinions of Drs. Mullins, Smiddy, Baker, Fino, and Hippensteel. Dr. Mullins diagnosed coal workers' pneumoconiosis and obstructive lung disease. Director's Exhibit 17. Similarly, Dr. Smiddy diagnosed coal workers' pneumoconiosis, bronchitis, and chronic obstructive pulmonary disease. *Id*. Additionally, Dr. Baker

diagnosed coal workers' pneumoconiosis, chronic bronchitis related to coal dust exposure, and chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 14. By contrast, Dr. Fino opined that claimant did not have clinical or legal pneumoconiosis.[5] Employer's Exhibit 3. Lastly, Dr. Hippensteel opined that claimant did not have coal workers' pneumoconiosis.[6] Director's Exhibit 20.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the administrative law judge considered the validity of the bases for Dr. Hippensteel's opinion regarding the existence of clinical and legal pneumoconiosis. The administrative law judge specifically stated:

> Dr. Hippensteel's conclusion relating to the absence of clinical pneumoconiosis is consistent with the preponderance of the probative radiographic evidence. Additionally, for various medically supported reasons, including the noted variability of [claimant's] pulmonary obstruction, the treatment of his breathing condition with bronchodilators, and the presence of significant air trapping, Dr. Hippensteel's conclusion that [claimant's] pulmonary obstruction is not related to his coal mine employment is sufficiently reasoned.

Decision and Order at 13. The administrative law judge therefore acted within his discretion in finding that Dr. Hippensteel's opinion regarding the existence of clinical and legal pneumoconiosis was sufficiently documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In addition, the administrative law judge acted within his discretion in according diminished probative value to the opinions of Drs. Mullins, Smiddy, Baker, and Fino regarding the existence of both clinical and legal pneumoconiosis, based on "various documentary and reasoning deficiencies."[7] Decision and Order at 13; *Clark*, 12 BLR at

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[5] Dr. Fino opined, "[c]learly the inhalation of coal mine dust did not cause any problem prior to this man's leaving the mining industry." Employer's Exhibit 3.

[6] Dr. Hippensteel opined, "I think his obstructive lung disease has been variable and partly reversible consistent with industrial bronchitis from his lengthy cigarette smoking and not consistent with coal workers' pneumoconiosis which causes a fixed pulmonary impairment." Director's Exhibit 20.

[7] The administrative law judge acknowledged that Drs. Mullins and Smiddy were

1-155. The administrative law judge permissibly determined that "[t]o the extent Dr. Mullins' pneumoconiosis finding rests on positive radiographic evidence, and represents clinical pneumoconiosis, it loses probative value since I have determined the preponderance of the probative radiographic evidence is negative for pneumoconiosis." Decision and Order at 12; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge also permissibly determined that "since Dr. Mullins referenced no other objective medical evidence, his conclusion has little probative value in establishing legal pneumoconiosis absent any further explanation." Decision and Order at 12; *Clark*, 12 BLR at 1-155.

Further, the administrative law judge permissibly determined that "Dr. Smiddy did not explain which aspects of his three treatments of [claimant's] pulmonary impairment led to his conclusion that [claimant] has pneumoconiosis." *Id*. Additionally, the administrative law judge permissibly determined that Dr. Baker's diagnosis of clinical pneumoconiosis was not based on accurate documentation, because "[c]ontrary to Dr. Baker's interpretation, based on Dr. Wheeler's better qualified reading, I have concluded [that] the September 24, 2004 chest x-ray and the preponderance of the probative radiographic evidence are actually negative for pneumoconiosis." Decision and Order at 12; *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175. Moreover, the administrative law judge permissibly determined that "Dr. Baker's finding of legal pneumoconiosis also has minimal probative value because he did not explain how he was able to attribute coal mine dust exposure and cigarette smoke as the causes of [claimant's] severe obstructive pulmonary impairment based on the results of his pulmonary examination." Decision and Order at 12; *Clark*, 12 BLR at 1-155. Lastly, the administrative law judge permissibly determined that "[Dr. Fino's] reasoning is inconsistent with [the] regulatory definition of pneumoconiosis as a progressive and latent pulmonary disease, "which may first become detectable only after the cessation of coal mine dust exposure.' 20 C.F.R.

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claimant's treating physicians. However, the administrative law judge did not specifically consider the opinions of Drs. Mullins and Smiddy in light of the criteria provided in 20 C.F.R. §718.104(d)(1)-(4) to determine whether they were entitled to greater weight than the contrary opinions, based on their status as claimant's treating physicians. Nonetheless, because the administrative law judge permissibly determined that the opinions of Drs. Mullins and Smiddy were not reasoned, *see* 20 C.F.R. §718.104(d)(5); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), any error by the administrative law judge in failing to specifically consider their opinions pursuant to the criteria in 20 C.F.R. §718.104(d) was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-2-276; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

§718.201(c)."[8] Decision and Order at 12; *see Stephens v. Bethlehem Mines Corp*., 8 BLR 1-350 (1985); *see also Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998)(recognizing that pneumoconiosis is a progressive and irreversible disease).

Because it is support by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Compton

The administrative law judge also weighed the x-ray evidence and the medical opinion evidence together at 20 C.F.R. §718.202(a)(1), (4). The administrative law judge stated that "[s]ince standing alone neither the preponderance of the probative chest x-rays nor the more probative medical opinion established the presence of pneumoconiosis, consideration of that evidence together obviously still fails to produce a finding of pneumoconiosis." Decision and Order at 13. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Total Disability due to Pneumoconiosis
Section 718.204(c)

As previously noted, the prior claim was also denied because the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Drs. Smiddy and Baker rendered the only new opinions of record that could establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Dr. Smiddy opined that claimant was totally disabled by coal workers' pneumoconiosis. Director's Exhibit 17. Similarly, Dr. Baker opined that claimant's coal dust exposure contributed to his pulmonary impairment. Director's Exhibit 14. However, the administrative law judge did not consider whether the new evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Nonetheless, because the disability causation opinions of Drs. Smiddy and Baker were adversely affected by the administrative law judge's permissible determination, at 20 C.F.R. §718.202(a)(4), that their diagnoses of pneumoconiosis were not reasoned, *compare* 20 C.F.R. §718.202(a)(4) *with* 20 C.F.R. §718.204(c); *see also Clark*, 12 BLR at 1-155, we hold as a matter of law that the new evidence does not

[8] The administrative law judge noted that "[i]n eliminating coal mine dust exposure as a cause of [claimant's] pulmonary obstruction, Dr. Fino emphasized that [claimant's] pulmonary impairment developed more than a decade after he left coal mining and while he continued smoking cigarettes." Decision and Order at 12.

establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, we hold that the administrative law judge's error in failing to consider whether the new evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) was harmless. *Larioni*, 6 BLR at 1-1278.

Conclusion
Section 725.309

In view of the foregoing, we hold that substantial evidence supports the administrative law judge's finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *White v. New White Coal Co*., 23 BLR 1-1, 1-7 (2004). Thus, an award of benefits is precluded.

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