BRB No. 13-0033 BLA

ROGER K. MCVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/29/2013
	)	
S.S. JOE BURFORD	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger K. McVey, Coalton, West Virginia, *pro se*.

William S. Mattingly (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2011-BLA-5249) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on March 15, 2010.[1]

After crediting claimant with no more than twelve years of coal mine employment,[2] the administrative law judge found that claimant could not invoke the rebuttable presumption, under Section 411(c)(4) of the Act, that he is totally disabled due to pneumoconiosis.[3] The administrative law judge further found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, held that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging that, should the Board affirm the administrative law judge's denial of benefits based on the evidence in the record, the case must be remanded to the district director for further development of the medical evidence in order to provide claimant with a complete pulmonary evaluation. In a reply brief, employer responds in support of the denial of benefits, and argues that claimant was provided with a complete pulmonary evaluation.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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

---

[1] Claimant's previous claim, filed on June 26, 1995, was denied as abandoned on October 15, 1996. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. 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 (1989) (en banc).

[3] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

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 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); *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 by reason of abandonment. Director's Exhibit 1. Under the regulations, a denial "by reason of abandonment" is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §§725.309(d)(2),(3).

Length of Coal Mine Employment

Because the administrative law judge's determination of the length of claimant's coal mine employment is relevant to whether claimant can establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we will review the administrative law judge's finding that claimant established less than fifteen years of coal mine employment. The administrative law judge found that claimant worked for no more than twelve years in coal mine employment, as claimant conceded that he worked in coal mine employment only from 1973 to 1985. Decision and Order at 7-8; Director's Exhibit 8.

Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). Claimant alleges that he worked in coal mine employment from 1973 to 1985, a period of no more than twelve years. Director's Exhibits 1, 5; Hearing Tr. at 27. Claimant's allegations are consistent with his Social Security records, which similarly reveal coal mine employment from 1973 to 1985. Director's Exhibit 7. As the record indicates that claimant's

allegations, even if fully credited, would establish less than fifteen years of qualifying coal mine employment, we affirm the administrative law judge's determination that claimant has established an insufficient length of coal mine employment to invoke the Section 411(c)(4) presumption.

The Existence of Pneumoconiosis

Section 718.202(a)(1)

The record contains two interpretations of a new x-ray taken on April 13, 2010. Dr. Gaziano, a B reader, and Dr. Wheeler, a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 12, 21. Because there are no positive interpretations of the new x-ray, we affirm the administrative law judge's finding that the new x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] Decision and Order at 3, 8-9.

Section 718.202(a)(2), (3)

Because there is no biopsy evidence of record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Moreover, claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306.[5]

Section 718.202(a)(4)

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),[6] is sufficient to support a finding of

[4] The record also contains a new digital x-ray taken on January 19, 2012. Dr. Bellotte, the only physician to interpret the digital x-ray, interpreted it as negative for pneumoconiosis. Employer's Exhibit 3.

[5] 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. As this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that there are no new medical opinions in the record supportive of a finding of clinical or legal pneumoconiosis. Decision and Order at 9. The record contains the new medical opinions of Drs. Gaziano and Bellotte. Dr. Gaziano did not opine that claimant suffers from any type of pulmonary disease. Director's Exhibit 12. Dr. Bellotte opined that there is no evidence of clinical or legal pneumoconiosis. Employer's Exhibits 3, 6. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability

The record contains one new pulmonary function study, taken in association with Dr. Gaziano's Department of Labor-sponsored pulmonary evaluation on April 13, 2010. Director's Exhibit 12. The technician who administered this pulmonary function study noted that claimant provided poor cooperation. *Id*. Dr. Gaziano determined that the results of this pulmonary function study were invalid due to claimant's poor effort. *Id.* Although a consultant for the Department of Labor (DOL) checked a box validating the study, Director's Exhibit 14, Dr. Bellotte, a reviewing physician, opined that the study was invalid. Employer's Exhibit 4 at 7-9. The administrative law judge noted that the DOL consultant provided no explanation for his validation of the study. Decision and Order at 11. The administrative law judge, therefore, credited Dr. Bellotte's opinion, and that of the technician, and found that the study was invalid due to poor effort. *Id.* at 10-11. Because the administrative law judge's finding, that the April 13, 2010 pulmonary function study is invalid, is supported by substantial evidence, it is affirmed. We, therefore, affirm the administrative law judge's finding that the new pulmonary function study does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The record contains two new arterial blood gas studies conducted on April 13, 2010 and January 19, 2012. Director's Exhibit 12; Employer's Exhibit 3. The administrative law judge correctly found that both of these studies are non-qualifying.[7] Decision and Order at 10. Consequently, we affirm the administrative law judge's

---

lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

finding that the new arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly determined that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10.

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that none of the new medical opinions supports a finding of total disability. The administrative law judge correctly stated that those physicians who submitted new medical opinions, namely Drs. Gaziano and Bellotte, opined that claimant does not suffer from a totally disabling pulmonary impairment.[8] Decision and Order at 11; Director's Exhibit 12; Employer's Exhibits 3, 6. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the new evidence of record fails to establish that any of the applicable conditions of entitlement have changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(d).

Complete Pulmonary Evaluation

The Director states that, "should the Board find that the [administrative law judge] properly denied benefits based upon the evidence before him," the Board must remand the case to the district director "to provide [c]laimant with the opportunity for additional testing." Director's Brief at 2. As we would otherwise affirm the administrative law judge's denial of benefits based upon the new evidence of record, we now address the

[8] Dr. Gaziano did not diagnose a totally disabling pulmonary impairment. Director's Exhibit 12. Dr. Bellotte stated that there is no basis to conclude that claimant has a pulmonary disability that would prevent him from performing his previous coal mine employment. Employer's Exhibits 3, 6.

Director's concession that the DOL has not provided claimant with a complete pulmonary evaluation.[9]

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). When an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). Furthermore, "[w]here the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

In this case, the Director states that the medical report of Dr. Gaziano, who examined claimant on behalf of the DOL, is incomplete because it lacks a valid pulmonary function study. In light of our affirmance of the administrative law judge's finding that the pulmonary function study associated with Dr. Gaziano's examination is invalid, we agree with the Director that claimant should have been provided an "additional opportunity to produce a satisfactory result," pursuant to 20 C.F.R. §725.406(c). Director's Brief at 2.

Consequently, although we affirm the administrative law judge's findings, based upon the current evidentiary record, that claimant is not entitled to invocation of the Section 411(c)(4) presumption, and that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. § 725.309(d), we vacate the denial of benefits, and remand this case to the district director "to provide [c]laimant with the opportunity for additional testing," in accordance with the Director's request. *See* 20 C.F.R. §725.406(c); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. S. Ohio Coal Co.*, 24 BLR 1-129, 1-147 (en banc); *Hodges*, 18 BLR at1-93.

[9] Contrary to employer's contention, the Director, Office of Workers' Compensation Programs (the Director), has timely raised the issue of claimant's right to a complete pulmonary evaluation. *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the district director for further development of the evidence.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge