BRB No. 03-0835 BLA

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| WILLIAM R. VAUGHN | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DONALDSON CREEK UNDERGROUND | ) | |
| | ) | |
| and | ) | |
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| OLD REPUBLIC INSURANCE COMPANY, INCORPORATED | ) | DATE ISSUED: 06/29/2004 |
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| Employer/Carrier-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (00-BLA-1055) of Administrative Law Judge Robert L. Hillyard rendered on a duplicate[1] 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).[2] In this duplicate claim, the administrative law judge found the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) because it failed to establish the existence of pneumoconiosis or total disability, elements previously adjudicated against claimant. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge mischaracterized the newly submitted medical opinion evidence in finding that claimant did not establish the existence of pneumoconiosis or total disability under 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv) and, thereby, a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers'

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[1] The initial claim, filed on September 29, 1988, and a second claim filed on April 12, 1990, were denied by the district director on the ground that claimant failed to establish any of the elements of entitlements. Subsequently, claimant filed a timely request for modification of the denial of the second claim that was denied following an informal conference on September 11, 1991. Director's Exhibit 30. On February 24, 1992, claimant filed a request for modification that was denied by the district director on June 30, 1992. Claimant filed a third claim on July 26, 1995 that was denied by the district director on December 14, 1995. Director's Exhibit 31. On July 10, 1996 and November 6, 1996, claimant filed applications that were treated as a request for modification. Director's Exhibit 31. In a proposed Decision and Order filed on June 25, 1997, the district director denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000). Claimant filed his fourth and current duplicate claim on September 1, 1999. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Compensation Programs (the Director), filed a letter in reply stating that employer's assertion that the Director conceded in *Nat=l Mining Ass=n v. U.S. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001), that legal pneumoconiosis cannot be latent and progressive, is without merit.[3]

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. 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 prove 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. 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*).

Under Section 718.202(a)(4), claimant argues that the administrative law judge mischaracterized the opinions of Drs. Simpao and Taylor. Claimant asserts that in addition to claimant's work history and a positive x-ray, Dr. Simpao based his opinion diagnosing pneumoconiosis on a physical examination, claimant's symptomatology, and the results of blood gas and pulmonary function studies. The administrative law judge acknowledged that Dr. Simpao examined claimant on September 23, 1999, and that his opinion recorded claimant's occupational and smoking histories and the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order-Denial of Benefits at 5. However, in finding that claimant did not establish the existence of pneumoconiosis, the administrative law judge gave Dr. Simpao's opinion little weight because the doctor based his diagnosis solely on his positive x-ray interpretation and history of coal dust exposure. Decision and Order-Denial of Benefits at 9. Dr. Simpao opined that in addition to the "objective findings on the chest x-ray of CWP 1/0," other factors he relied on to diagnose pneumoconiosis included "hypoxia and ventilatory mismatch noted on the ABG and a mild degree of obstructive airway disease on the Pulmonary Function Study." Dr. Simpao also referred

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[3] We affirm as unchallenged the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

to claimant's symptomatology and physical limitations observed during physical examination. Director's Exhibit 11. Because the administrative law judge did not accurately characterize the basis for Dr. Simpao's opinion in his analysis under Section 718.202(a)(4), we vacate this finding and the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish a material change in conditions. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Regarding Dr. Taylor's opinion, the administrative law judge found that in response to a letter from claimant's attorney, the doctor noted that claimant has a chronic obstructive disease, a restrictive lung disease, "probably" a mild impairment and that "coal dust probably contributed to that impairment." Decision and Order-Denial of Benefits at 7; Claimant's Exhibit 2. The administrative law judge rationally found that although Dr. Taylor determined that claimant suffered from a chronic pulmonary disease, which can be considered a chronic dust disease of the lung under 20 C.F.R. §718.201, the doctor "equivocates as to whether his diagnosis is related to claimant's coal dust exposure." *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order-Denial of Benefits at 9.[4] Therefore we affirm the administrative law judge's treatment of Dr. Taylor's opinion under Sections 718.202(a)(4) and 718.204(b)(2)(iv).

Under Section 718.204(b)(2)(iv), claimant also argues that the administrative law judge "discounted" Dr. Simpao's opinion that claimant is totally disabled without an explanation sufficient to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Contrary to claimant's assertions, the administrative law judge reasonably accorded less weight to Dr. Simpao's opinion because the objective medical evidence of record does not support it. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10

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[4] Claimant's reliance on *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989), to assert that the use of "probably" is not an "equivocation," is misplaced. In *Crisp,* the United States Court of Appeal for the Sixth Circuit held that a doctor's statement, that cigarette smoking was "probably" a major cause of claimant's respiratory impairment, did not rule out coal dust exposure as a "contributing cause" of Crisp's respiratory disability, and therefore was insufficient to establish rebuttal under 20 C.F.R. §727.203(b)(3) (1989).

BLR 1-19 (1987). Furthermore, Dr. Simpao failed to explain how the non-qualifying pulmonary function and blood gas studies support his opinion of impairment.[5] *Id.*

Claimant further asserts that the administrative law judge erred in relying on the contrary opinions of Drs. Selby, Wise and Rosenberg under Section 718.204(b)(2)(iv) because their reports did not include the most recent pulmonary function study. We reject claimant's argument.[6] The administrative law judge, within a proper exercise of his discretion, found that the opinion of Dr. Selby, that claimant is not disabled and has the respiratory capacity to perform the work of a coal miner or similar arduous work, entitled to "greatest weight" because it is consistent with the objective medical evidence of record and supported by the consultative reports of Drs. Wise and Rosenberg. *See Clark*, 12 BLR 1-149; Decision and Order-Denial of Benefits at 10; Employer's Exhibits 1, 3-5, 9; Claimant's Exhibit 1. Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish total disability pursuant to Section 718.204(b)(2), and therefore, a material change in conditions with respect to that element of entitlement. *See Sharondale*, 42 F.3d 993, 19 BLR 2-10.

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[5] In response to a January 26, 2000 letter from the U.S. Department of Labor (DOL) requesting clarification of Dr. Simpao's disability opinion, the DOL stated: "As the pulmonary function studies and blood gas studies are above the U.S. Department of Labor's standards for disability, please note the objective medical evidence and other factors you relied upon to arrive at this conclusion." Director's Exhibit 11. Dr. Simpao answered "N/A." *Id.*

[6] Claimant also alleges that the administrative law judge erred in crediting these opinions because Drs. Selby, Wise and Rosenberg did not address whether coal dust exposure contributed to claimant's respiratory impairment. Because the administrative law judge did not reach the causation issue pursuant to 20 C.F.R.§718.204(c), we decline to consider claimant's argument.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge