BRB No. 09-0717 BLA

BOBBY L. LAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/16/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Bobby L. Lay, Arcadia, Florida, *pro se*.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (08-BLA-5110) of Administrative Law Judge Stuart A. Levin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on February 9, 2007.[1] After crediting claimant with seven years and ten months of coal

[1] Claimant initially filed a claim for benefits on April 25, 1994. Director's Exhibit 1. The district director denied benefits on March 7, 1995, because claimant did not establish any of the elements of entitlement. *Id.* There is no indication that claimant took

mine employment,[2] the administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). 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), responds in support of the administrative law judge's denial of benefits.

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 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*).

Impact of the Recent Amendments

By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant and the Director have responded.

The recent amendments to the Act, which became effective on March 23, 2010, apply to claims filed after January 1, 2005. The Director correctly states that, although the amendments apply to claimant's claim based on its filing date, the amendments do

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any further action in regard to his 1994 claim.

[2] The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

not affect the adjudication of the claim, because there is no evidence, and no allegation that, claimant had at least fifteen years of coal mine employment.[3]

Entitlement to Benefits

The administrative law judge considered claimant's 2007 claim on the merits. Before adjudicating claimant's 2007 claim on the merits, the administrative law judge should have initially addressed whether claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final.[4] 20 C.F.R. §725.309(d); Director's Exhibit 23. However, since the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis is supported by substantial evidence and is, therefore, affirmed, *see* discussion, *infra*, the administrative law judge's failure to make initial findings pursuant to 20 C.F.R. §725.309(d) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

[3] The Director, Office of Workers' Compensation Programs (the Director), notes that Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). On his two claims for benefits, claimant alleged no more than ten to eleven years of coal mine employment. Director's Exhibits 1, 3.

[4] 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 because he did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Pneumoconiosis

Section 718.202(a)(1)

The administrative law judge correctly found that there are no positive x-ray interpretations in the record.[5] Decision and Order at 3. Consequently, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[6]

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),[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge

[5] The record contains seven negative interpretations of x-rays taken on October 19, 1994, November 20, 2006, January 16, 2007, and April 19, 2007. Director's Exhibits 1, 9-13.

[6] 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. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *supra*, n.3, this amendment does not apply in the present case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment. Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

considered the medical reports of Drs. Alokeh and Maas.[8] In 2007, Dr. Alokeh diagnosed chronic obstructive pulmonary disease and acute bronchitis. Director's Exhibits 13, 14. However, because Dr. Alokeh did not attribute either of these conditions to claimant's coal mine employment, the administrative law judge correctly found that these diagnoses do not constitute legal pneumoconiosis. Decision and Order at 6. In reports dated May 2, 2007 and June 1, 2007, Dr. Maas diagnosed, *inter alia*,: (1) "Shortness of breath likely multifactorial, including component of congestive heart failure;" (2) "CHF/CMO;" and (3) "Exposure in coal mines." Director's Exhibit 15. To the extent that Dr. Maas attributed claimant's shortness of breath to his coal mine employment, the administrative law judge found that the doctor did not provide any explanation for his opinion. Decision and Order at 7. Consequently, the administrative law judge permissibly found that Dr. Maas' diagnosis was not sufficiently reasoned to establish the existence of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 6-7. Because it is supported by substantial evidence,[9] 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) is affirmed.

Because the medical evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[8] 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). Although the Director acknowledges that he did not provide claimant with a complete pulmonary evaluation in this case, the Director quotes a letter from Dr. Alokeh documenting that claimant is "homebound," and is prevented by severe pain "from traveling any distance." Director's Brief at 2 n.2 (quoting Dr. Alokeh's October 15, 2008 letter). Given these circumstances, we agree with the Director that a "remand for a pulmonary evaluation is unnecessary." Director's Brief at 2 n.2.

[9] Although the administrative law judge did not explicitly consider the two medical opinions in claimant's prior claim, we agree with the Director that "the evidence from [the] original claim is insufficient to establish pneumoconiosis." Director's Brief at 3 n.4. In a December 16, 1994 report, Dr. Rashid opined that "[r]adiographically there is nothing to suggest any definite evidence of pneumoconiosis." Director's Exhibit 1. In a February 3, 1995 report, Dr. Matthew diagnosed only "possible pneumoconiosis." *Id.*

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