BRB No. 10-0577 BLA

JOHN E. JEFFREY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNOPIN MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/24/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

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

Ann Marie Scarpino (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (08-BLA-5874) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim[1] 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). The administrative law judge noted claimant's testimony that he had thirty-seven years and seven months of coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's last claim did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the new blood gas study and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv). Further, claimant contends that the administrative law judge erred by failing to apply the recent amendment to the Act, enacted by Section 1556 of Public Law. No. 111-148.[3] Employer/carrier (employer) responds, urging affirmance of the administrative law judge's denial of benefits. Employer further responds that the recent amendment does not affect this case, as claimant did not establish that he is totally disabled. The Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge erred in his analysis of the medical evidence, because he combined the issues of the existence of

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. His most recent prior claim, filed on August 14, 2001, was denied by an administrative law judge on November 29, 2005, because the evidence did not establish total disability. Director's Exhibit 3. Claimant filed his fourth and current claim on March 23, 2007. Director's Exhibit 5.

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

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on March 23, 2010, were enacted. Relevant to this claim, Section 1556 of Public Law No. 111-148 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 has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

total disability and the cause of total disability. In addition, the Director contends that the administrative law judge erred by not considering whether a physician's opinion was based on a premise that is contrary to the regulations. The Director therefore requests that the case be remanded for the administrative law judge to reconsider whether claimant has established total disability, and if so, whether he can establish entitlement pursuant to the amended provision of the Act. Employer has filed a reply brief, disagreeing with the Director's arguments.[4]

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. If 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 last claim was denied because he did not establish total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing total disability to obtain consideration of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

The administrative law judge reviewed the evidence developed since the prior denial to determine whether it established total disability pursuant to Section 718.204(b)(2). The administrative law judge found that none of six new pulmonary function studies yielded qualifying values pursuant to Section 718.204(b)(2)(i).[5]

[4] We affirm the administrative law judge's findings that there was no new evidence of complicated pneumoconiosis under 20 C.F.R. §718.204(b)(1), and that the new evidence did not demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii), as those findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] 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

Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibits 1, 6. Additionally, the administrative law judge correctly noted that there was no evidence of cor pulmonale with right-sided congestive heart failure, under Section 718.204(b)(2)(iii).

Turning to the four new blood gas studies, pursuant to Section 718.204(b)(2)(ii), the administrative law judge accurately noted that none of the studies yielded qualifying values at rest, but that two studies, administered by Dr. Rasmussen on May 27 and October 6, 2008, yielded qualifying values with exercise. Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibit 1. The administrative law judge then turned to three new medical reports containing conflicting interpretations of the qualifying exercise blood gas studies.[6] In evaluating those medical reports,[7] the administrative law judge found that Drs. Rasmussen and Celko concluded that claimant is disabled from performing his usual coal mine work, "based primarily" on the May 27 and October 6,

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718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] A fourth medical report, from Dr. Fino, stated that claimant is not totally disabled, but Dr. Fino did not consider the two qualifying blood gas studies. Employer's Exhibit 1. The administrative law judge therefore accorded little weight to Dr. Fino's opinion. Decision and Order at 8.

[7] Dr. Rasmussen examined and tested claimant, and opined that he does not retain the pulmonary capacity to perform his usual coal mine job because of his impairment in oxygen transfer with exercise. Claimant's Exhibits 1, 5. Dr. Celko examined and tested claimant, and opined that he is not impaired from a pulmonary standpoint. Director's Exhibit 14. When deposed, however, Dr. Celko opined that Dr. Rasmussen's exercise blood gas studies indicated that claimant is totally disabled. Claimant's Exhibit 6 at 15, 20-21. Dr. Renn reviewed the medical evidence of record, and reported that claimant retains the pulmonary capacity to perform his usual coal mine employment. Employer's Exhibit 2. When deposed, Dr. Renn explained that the decrease in claimant's exercise blood gas studies is not reflective of a respiratory or pulmonary impairment, but rather, indicates that claimant has a congenital heart defect. Employer's Exhibit 13 at 46-47. Dr. Renn described this defect, a right to left cardiac shunt, as a hole in the atrial wall of claimant's heart. *Id*. at 43. Dr. Renn explained that the shunt allows unoxygenated blood from the right side of claimant's heart to leak through and mix with the oxygenated blood in the left side, thereby "dilut[ing] out the amount of oxygen that is in the blood." *Id*. at 44. Dr. Renn concluded that the right to left shunt, which was detected by an echocardiogram, "is the total explanation for the decrease in the arterial blood gas and the oxygen tension. . . . This is an anatomic defect that [claimant] was born with." *Id*. at 47-48.

2008 qualifying exercise blood gas studies. Decision and Order at 8. The administrative law judge also considered Dr. Renn's opinion that, from a pulmonary standpoint, claimant is able to perform his usual coal mine employment, along with Dr. Renn's explanation that the reduced values on claimant's exercise blood gas studies "did not arise from a pulmonary impairment but were caused by a right to left shunt, a congenital anatomic defect" of the heart. Decision and Order at 8. The administrative law judge found that Drs. Rasmussen and Celko were not aware that the miner had a right to left shunt, and he accorded greater weight to Dr. Renn's opinion, because he found that Dr. Renn had a more complete picture of claimant's condition.[8] *Id.* at 8-9. Based on his review of the evidence, the administrative law judge found that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2).

Claimant contends that the administrative law judge misunderstood Dr. Renn's opinion which, claimant argues, confirms that he has a totally disabling respiratory impairment. Claimant's Brief at 4. Upon review, we conclude that substantial evidence supports the administrative law judge's analysis of Dr. Renn's opinion. Specifically, the administrative law judge reasonably found Dr. Renn's explanation to be that claimant does not have a respiratory or pulmonary problem, but has a right to left shunt in his heart. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Employer's Exhibit 13 at 46-47. Dr. Renn specified that this anatomic defect, detected on an echocardiogram, was "the total explanation" for claimant's blood gas study results, and he opined that "from a respiratory standpoint, [claimant] could do his job." Employer's Exhibit 13 at 47, 52. We therefore conclude that the administrative law judge did not mischaracterize Dr. Renn's opinion.

The Director characterizes Dr. Renn's opinion as addressing the cause of claimant's disability rather than its existence, and he argues that, by crediting Dr. Renn's opinion instead of accepting the qualifying exercise blood gas studies as evidence that claimant has a disabling respiratory impairment, the administrative law judge improperly combined the issues of the existence of disability and disability causation. Director's Brief at 2. On the facts of this case, we disagree with the Director's contention that the administrative law judge combined those two issues.

Review of the administrative law judge's decision reflects that he focused on whether the evidence established that claimant has a totally disabling respiratory or

[8] Dr. Renn reviewed a November 2007 report of a transesophageal echocardiogram conducted at West Virginia University Hospital, which revealed a right to left shunt at the atrial level. Employer's Exhibit 13 at 45-46.

pulmonary impairment. Decision and Order at 8-9. The administrative law judge correctly recognized that "[i]n the absence of contrary probative evidence," qualifying blood gas studies could establish claimant's total disability. Decision and Order at 8; 20 C.F.R. §718.204(b)(2). Further, he recognized that two of claimant's blood gas studies yielded qualifying values with exercise. The administrative law judge, however, reasonably took into account Dr. Renn's opinion, explaining that those blood gas studies did not detect a respiratory or pulmonary impairment, but rather, an anatomic defect in claimant's heart. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-134 (1986). Further, the administrative law judge rationally found that the contrary opinions of Drs. Rasmussen and Celko were not as well reasoned, as they were not aware that claimant has a right to left shunt. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Because the administrative law judge's evaluation of the new blood gas study and medical opinion evidence pursuant to Section 718.204(b)(2)(ii),(iv) is supported by substantial evidence, it is affirmed.

In view of our affirmance of the administrative law judge's reliance upon the opinion of Dr. Renn, explaining that claimant does not have a totally disabling pulmonary impairment, we also affirm the administrative law judge's finding that Dr. Renn's opinion outweighed the exercise blood gas study evidence under Section 718.204(b)(2).[9] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; *Beatty*, 16 BLR at 1-13-14; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

Based on the foregoing, we affirm the administrative law judge's finding that the new evidence developed since the prior denial did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, we affirm the administrative law judge's finding that the new evidence did not establish a change in the applicable condition of entitlement,[10] and we affirm the denial of benefits pursuant to 20 C.F.R.

[9] Because we affirm the administrative law judge's decision to rely on Dr. Renn's testimony that claimant's right to left cardiac shunt fully explains his exercise blood gas study results, we need not address the assertion by the Director, Office of Workers' Compensation Programs, that the administrative law judge erred by failing to consider whether a different portion of Dr. Renn's testimony expressed a view that is contrary to the regulations. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Brief at 3.

[10] Claimant asserts that, because he established total disability and a change in the applicable condition of entitlement, no findings made in his earlier denied claims remain binding. *See* 20 C.F.R. §725.309(d)(4). He therefore argues that the administrative law judge should have reconsidered whether a 1998 biopsy of claimant's right lung established that he has complicated pneumoconiosis. Claimant's Brief at 8. This

§725.309(d). *See White*, 23 BLR at 1-3. Further, because claimant did not establish total disability, the amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), n.3, *supra*, does not affect this case.

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

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contention lacks merit, as we have affirmed the finding that claimant did not establish a change in the applicable condition of entitlement.