

BRB No. 11-0620 BLA

JIMMY RAY PERDUE)
)
 Claimant-Petitioner)
)
 v.)
)
 P-F MINING COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/19/2012
 PNEUMOCONIOSIS FUND)
)
 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 on Remand Denying Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Jimmy Ray Perdue, Bluefield, West Virginia, *pro se*.

Waseem A. Karim (Jackson Kelly, PLLC), Lexington, Kentucky, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand Denying Benefits (04-BLA-6695) of Administrative Law Judge Pamela J. Lakes rendered 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

miner's subsequent claim¹ filed on March 8, 2002,² and is before the Board for the second time. In the initial decision, Administrative Law Judge Edward Terhune Miller credited claimant with at least fifteen years of coal mine employment,³ and found that the new evidence did not establish the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Judge Miller therefore found that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the denial of his previous claim became final, pursuant to 20 C.F.R. §725.309(d). Accordingly, Judge Miller denied benefits.

Pursuant to claimant's appeal, the Board affirmed in part, and vacated in part, Judge Miller's decision denying benefits. *Perdue v. P-F Mining Co.*, BRB No. 06-0511 BLA (Nov. 28, 2006) (unpub.). Specifically, the Board affirmed Judge Miller's finding that the new evidence did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). *Perdue*, slip op. at 3-5. Further, the Board affirmed the findings that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Perdue*, slip op. at 5-6. The Board, however, found merit in the argument of the Director, Office of Workers' Compensation Programs (the Director), that Judge Miller did not adequately explain his analysis of the new medical opinion of Dr. Gaziano, provided to claimant as part of the pulmonary evaluation conducted by the Department of Labor, when Judge Miller found that total disability was not established by the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv).

Therefore, the Board vacated Judge Miller's finding and remanded the case for him to reconsider Dr. Gaziano's opinion. *Perdue*, slip op. at 6-8. At the Director's request, the Board further instructed Judge Miller that if, on remand, he again found that Dr. Gaziano's opinion was ambiguous as to whether the physician diagnosed a disability

¹ Claimant's previous claim for benefits, filed on October 30, 1997, was finally denied by the district director on April 7, 1998, based on claimant's failure to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

² Because this claim was filed before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

³ The record indicates 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. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

that was entirely pulmonary in nature, he should remand the case to the district director for claimant to be provided with a new pulmonary evaluation addressing each element of entitlement, as required under Section 413(b) of the Act, 30 U.S.C. §923(b). The Board further instructed that if, after further evidentiary development, the case was again forwarded to the Office of Administrative Law Judges, Judge Miller should reconsider whether claimant established a change in an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R. §725.309(d), based on all the evidence developed since the denial of claimant's previous claim, including any new evidence developed with a new pulmonary evaluation by the Director. *Perdue*, slip op. at 8. The Board further instructed that if a change in an applicable condition was established, claimant would then be entitled to consideration of the merits of his claim.⁴ *Id.*

On remand, Judge Miller found that Dr. Gaziano's opinion was ambiguous regarding whether the physician diagnosed a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Director's Exhibit 56. Accordingly, Judge Miller remanded the case to the district director to allow for the development of a new pulmonary evaluation. Claimant received a new pulmonary evaluation, which was performed by Dr. Porterfield on March 5, 2009. Director's Exhibit 60. Subsequently, the district director denied benefits, and claimant requested a hearing. Director's Exhibits 61, 62. Because Judge Miller had retired, the case was reassigned, without objection, to Administrative Law Judge Pamela J. Lakes (the administrative law judge), who held a hearing on April 21, 2010.

In a Decision and Order on Remand issued on May 20, 2011, the administrative law judge found that all of the medical evidence developed since the denial of claimant's prior claim did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's finding that he is not entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director has indicated that he will not file a substantive response to claimant's appeal.

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

⁴ By Order dated August 13, 2007, the Board summarily denied employer's motion for reconsideration. Director's Exhibit 47.

substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of four new x-rays dated May 30, 2002, June 23, 2004, March 5, 2009, and January 26, 2010 regarding the existence of pneumoconiosis, and considered the readers' radiological qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge accurately found that all readings of the June 23, 2004, March 5, 2009, and January 26, 2010 x-rays were negative for pneumoconiosis. *See* 20 C.F.R. §718.102(b); Director's Exhibits 33, 60; Claimant's Exhibit 1. With respect to the May 30, 2002 x-ray, the administrative law judge noted that Dr. Gaziano,⁵ a B reader, interpreted the x-ray as positive for pneumoconiosis, while Dr. Binns, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 2. The

⁵ Although Dr. Gaziano's pulmonary evaluation was superseded by the new evaluation provided by Dr. Porterfield, and claimant had already submitted two affirmative x-ray readings, the administrative law judge found that good cause existed for her to consider Dr. Gaziano's positive x-ray reading, because claimant sought to rely upon it, and because it was considered in both Judge Miller's decision and the Board's decision. *See* 20 C.F.R. §725.456(b)(1). Employer has not challenged this aspect of the administrative law judge's Decision and Order on Remand.

administrative law judge noted further that Judge Miller found that Dr. Gaziano's positive reading was outweighed by Dr. Binns's negative reading, and "[t]he Board accepted his analysis." Decision and Order on Remand at 10. Finding that the x-ray readings originally considered by Judge Miller were "at best in equipoise," the administrative law judge concluded that the new x-ray evidence did not establish the existence of pneumoconiosis. *Id.* The administrative law judge based her finding on a proper quantitative and qualitative analysis of the x-ray evidence, and substantial evidence supports her conclusion. *See Adkins*, 958 F.2d at 52-53, 16 at 2-66; *White*, 23 BLR at 1-4; Decision and Order on Remand at 10-11. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge accurately determined that the record contains no biopsy evidence and no evidence of complicated pneumoconiosis, in this living miner's claim filed after January 1, 1982. Decision and Order at 15. We therefore affirm the administrative law judge's finding that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Gaziano, Castle, Hippensteel, and Porterfield, and considered the physicians' qualifications.⁶ Dr. Gaziano examined and tested claimant and diagnosed "coal workers' pneumoconiosis." Director's Exhibit 15. In contrast, Drs. Castle, Hippensteel, and Porterfield opined that claimant does not have pneumoconiosis. Specifically, Drs. Castle and Hippensteel diagnosed an obstructive impairment due to smoking, and Dr. Porterfield diagnosed emphysema due to smoking. Director's Exhibit 60; Employer's Exhibits 1-3.

The administrative law judge noted that Judge Miller had found that Dr. Gaziano's opinion was not well-documented or reasoned, because Dr. Gaziano set forth no basis for his conclusion other than a positive x-ray reading that Judge Miller found rebutted by a negative reading from a more highly qualified reader. The administrative law judge noted further that the Board had affirmed Judge Miller's credibility determination. The administrative law judge stated that she also found "Dr. Gaziano's opinion is entitled to little, if any, weight as it includes no reasoning supporting his conclusions." Decision

⁶ The administrative law judge noted that Drs. Gaziano, Castle, and Hippensteel are Board-certified in Internal Medicine and Pulmonary Disease by the American Board of Internal Medicine, while Dr. Porterfield is Board-certified in Internal Medicine and Diseases of the Chest by the American Osteopathy Association. Decision and Order on Remand at 11-12.

and Order on Remand at 12. This finding was within the administrative law judge's discretion, and it is supported by substantial evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established by the new medical opinion evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge accurately determined that claimant failed to establish total disability, as all of the new pulmonary function and blood gas studies yielded non-qualifying values,⁷ and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Director's Exhibit 60; Employer's Exhibit 2; Claimant's Exhibit 1. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Gaziano, Castle, Hippensteel, and Porterfield. Dr. Gaziano opined that claimant is totally disabled. Director's Exhibit 15. In contrast, Drs. Castle, Hippensteel, and Porterfield opined that claimant is not totally disabled from a respiratory or pulmonary standpoint, and could return to his previous coal mine employment. Director's Exhibits 33, 60; Employer's Exhibits 1-3.

The administrative law judge found that Dr. Gaziano's opinion was not probative of the existence of a totally disabling respiratory or pulmonary impairment, "as it was correctly determined to be ambiguous," because, "although [Dr. Gaziano] found claimant to be totally disabled, he listed one non-pulmonary cause (hypertensive vascular disease) and one pulmonary cause (coal workers' pneumoconiosis); thus it is impossible to determine from his report whether he determined that [c]laimant was disabled from a pulmonary or respiratory standpoint." Decision and Order on Remand at 15. The administrative law judge correctly noted that claimant must establish that he is totally disabled by a respiratory or pulmonary impairment, *see* 20 C.F.R. §718.204(a),(b)(1), and substantial evidence supports her permissible finding that Dr. Gaziano's opinion was ambiguous on that issue. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Jewell Smokeless*

⁷A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C, for establishing total disability. A non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Coal Corp. v. Street, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). As the administrative law judge correctly noted, the remaining opinions stated that claimant is not totally disabled from a respiratory or pulmonary standpoint. Thus, we affirm the administrative law judge's finding that the new medical opinions did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence. We further affirm the administrative law judge's finding that the new evidence, considered together, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), as it is supported by substantial evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Based on the foregoing, we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis or total disability based on the new evidence and thus, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Therefore, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge