BRB No. 99-0664 BLA

JOHN L. ST. CLAIR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

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

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0970) of

Administrative Law Judge Richard A. Morgan on a 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). The administrative law judge credited claimant with thirty-eight years of coal mine employment, based on a stipulation of the parties, and adjudicated the case pursuant to 20 C.F.R. Part 718, in light of

claimant's July 27, 1997 filing date. Noting the existence of three previously filed claims, the administrative law judge, determined that this case involves a duplicate claim pursuant to 20 C.F.R. §725.309(d).[1] After considering the newly submitted

[1] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on May 24, 1973, which was denied by SSA on September 21, 1973. Director's Exhibit 30. Following claimant's election of review of the denial by SSA, the claim was again denied on October 12, 1978. *Id*. The claim was transferred to the Department of Labor, which denied the claim on November 7, 1980. *Id*. No further action was taken on this claim.

Claimant filed a second application for benefits on November 12, 1981, which was denied by the district director on May 17, 1982. Director's Exhibit 30. Following a formal hearing, Administrative Law Judge Lawrence Brenner issued a Decision and Order - Denying Benefits, finding that claimant's November 1981 claim was a duplicate claim pursuant to 20 C.F.R. §725.309(c). Reviewing the newly submitted evidence, Judge Brenner found this evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and also insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Consequently, Judge Brenner found that claimant failed to establish a material change in conditions and, therefore, denied benefits. *Id*. Claimant appealed this denial to the Board. *Id*. By Order dated March 31, 1988, the Board dismissed claimant's appeal as abandoned. *St. Clair v. Consolidation Coal Co.*, BRB No. 87-2101 BLA (Mar. 31, 1988)(Order)(unpub.).

On April 13, 1989, claimant filed a third application for benefits, which was denied by the district director on August 18, 1989. Director's Exhibit 30. Following a formal hearing, Administrative Law Judge Daniel L. Leland issued a Decision and Order - Denying Benefits on December 23, 1994. *Id.* Initially, Judge Leland determined that the instant claim was a duplicate claim, noting the presence of two previously filed claims. In addition, Judge Leland credited claimant with thirty-eight years of coal mine employment. Considering the newly submitted evidence, Judge Leland found that the medical opinion of Dr. Levine was sufficient to establish the existence of pneumoconiosis and, therefore, was sufficient to establish a material change in conditions. However, considering the evidence as a whole, Judge Leland found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Additionally, Judge Leland found the medical evidence of record insufficient to establish total disability pursuant to Section 718.204(c). Accordingly, Judge Leland denied benefits. *Id*. No further action was taken with respect to this claim.

evidence of record, the administrative law judge found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although he found that claimant was totally disabled, the administrative law judge also found that the newly submitted evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) and insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge held that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence and medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the newly submitted evidence is sufficient to establish that pneumoconiosis was a contributing cause of the miner's total disability pursuant to Section 718.204(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial

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Claimant filed his fourth and current application for benefits on July 23, 1997. Director's Exhibit 1.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with thirty-eight years of coal mine employment or his findings at 20 C.F.R. §718.202(a)(2) and (a)(3). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 Part 718, 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; *Hobbs v. Clinchfield Coal* Co. [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter II*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In the case at bar, the prior claim was denied by Administrative Law Judge Daniel L. Leland, finding that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c). Director's Exhibit 30.

In the instant claim, claimant challenges the administrative law judge's finding that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309(d). Initially, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, claimant asserts that the administrative law judge erred in weighing the x-ray evidence by failing to take into consideration the obvious bias of the various physicians in determining that the x-ray evidence was negative for the existence of pneumoconiosis. Claimant thus argues that the administrative law judge erred in failing to accord dispositive weight to the positive x-ray readings by Drs. Devabhaktuni and Gaziano, which were obtained at the request of the Department of Labor (DOL). We disagree.

Initially, contrary to claimant's contention, the x-ray reading attributed to Dr. Devabhaktuni is not a positive reading for the existence of pneumoconiosis. Within his medical report, Dr. Devabhaktuni stated that the x-ray "showed increased markings at both bases" with no further comment regarding the x-ray. Therefore, this is not a positive interpretation pursuant to 20 C.F.R. §718.102(b). 20 C.F.R. §718.102(b); Director's Exhibit 14; Employer's Exhibit 5; *see generally Trent, supra*. Moreover, contrary to claimant's contention, the administrative law judge did not err in failing to accord dispositive weight to the x-ray readings of Drs. Devabhaktuni and Gaziano because these readings were obtained at the request of DOL inasmuch as there is no evidence in the record establishing that the physicians submitting the x-ray interpretations at employer's request are biased. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Stanford v. Director, OWCP*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984).

Rather, the administrative law judge properly weighed all of the relevant x-ray evidence and found that the record contained eleven readings of five x-ray films, of which only the readings of Drs. Gaziano and Jaworski, both of whom are B readers, were positive for the existence of pneumoconiosis. Decision and Order at 16; Director's Exhibit 17; Claimant's Exhibit 2. The remainder of the x-ray reports, while noting abnormalities of emphysema, nodulation or parenchymal abnormalities, did not provide readings classified as positive for the existence of pneumoconiosis. Decision and Order at 17; Director's Exhibits 16, 18, 20; Claimant's Exhibit 2; Employer's Exhibits 1-3; 20 C.F.R. §718.102(b); *see generally Trent, supra*. Within a reasonable exercise of his discretion as fact-finder, the administrative law judge accorded greatest weight to the negative x-ray interpretations of Dr. Wiot, based on his superior qualifications as a B reader and Board-certified radiologist, and further found these readings supported by the weight of the x-ray evidence of record.[3] Decision and Order at 17; Employer's Exhibit 2; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines*

[3] Likewise, the administrative law judge found that the results of the February 1998 CT scan did not establish the existence of pneumoconiosis. Decision and Order at 17; Director's Exhibit 18; Employer's Exhibits 1-3; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Corp., 8 BLR 1-211 (1985); *see also Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir.1986)(table). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

With respect to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in not according the opinions of claimant's treating physicians, Drs. Devabhaktuni and Jaworski, both of whom concluded that claimant has coal workers' pneumoconiosis, more weight because the administrative law judge found that they lacked specialized expertise, alleging that this finding is not supported by the record. These arguments are not meritorious.

Contrary to claimant's contention, the Fourth Circuit has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner. Rather, the administrative law judge should also consider the qualifications of the physicians, the explanation of their medical opinions, and the documentation underlying their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). In the instant case, the administrative law judge considered the qualifications of all of the physicians and found that Drs. Devabhaktuni and Jaworski were Board-certified in Internal Medicine and pulmonary specialists, as were Drs. Renn and Fino. Decision and Order at 18; Employer's Exhibits 5, 7, 8. Thus, in accordance with the Fourth Circuit's holdings, the administrative law judge reasonably found that the opinions of Drs. Devabhaktuni and Jaworski, were not entitled to greater weight, based solely on their status as treating physicians, but rather, properly considered each of the relevant medical opinions of record to determine the weight to be accorded these opinions. Decision and Order at 18-19; *see Hicks, supra; Akers, supra; Grizzle, supra*.

In weighing the newly submitted medical opinion evidence, the administrative law judge reasonably found that the opinion of Dr. Devabhaktuni was entitled to little weight because the physician did not adequately explain how his underlying documentation supported his diagnosis. Decision and Order at 18; Director's Exhibit 14; Employer's Exhibit 5; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46

(1985). Moreover, the administrative law judge reasonably accorded little weight to the opinion of Dr. Jaworski inasmuch as the physician was not definitive in his opinion that coal dust exposure contributed to the miner's chronic obstructive pulmonary disease.[4] Decision and Order at 18; Claimant's Exhibit 1; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge reasonably accorded greater weight to the opinions of Drs. Renn and Fino, finding that these opinions provided a more detailed explanation of their rationale and were better supported by their underlying documentation and the overall evidence of record, including the opinions of Drs. Devabhaktuni and Jaworski.[5] Decision and Order at 18-19; Director's Exhibit 20;

[4] Dr. Jaworski, in a letter dated April 10, 1997, diagnosed chronic fibrotic lung disease with multiple pulmonary masses, etiology uncertain. In addition, Dr. Jaworski diagnosed chronic obstructive pulmonary disease secondary to cigarette smoking with possible contribution of coal dust exposure. Claimant's Exhibit 1. The record also contains treatment notes from Dr. Jaworski from November 1994 through February 1998, which reflect that Dr. Jaworski was treating claimant specifically for his pulmonary condition, but does not reflect a diagnosis of pneumoconiosis during this time. Director's Exhibit 18.

[5] Claimant also states that the administrative law judge should have considered the low percentages of diagnoses of pneumoconiosis by Drs. Renn and Fino, in weighing their opinions. However, inasmuch as claimant does not provide any specific allegations of bias with respect to the physicians' opinions in

Employer's Exhibits 7, 8; *see Lafferty, supra; Lucostic, supra*; *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *see generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). Inasmuch as the administrative law judge considered all the relevant newly submitted evidence, we affirm his finding that claimant failed to meet his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Perry, supra; see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993)

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this case, we reject claimant's allegation of error. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Cochran v. Consolidation Coal* Co., 16 BLR 1-101 (1992).

Lastly, in order to establish entitlement under Part 718, claimant must establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(4); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *see also Hicks, supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994). In the instant case, while providing a conclusion that claimant was totally disabled, the administrative law judge found, nonetheless, that the newly submitted medical evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(c). Specifically, the administrative law judge found that none of the newly submitted pulmonary function study or blood gas study evidence yielded qualifying values.[6] Decision and Order at 20; Director's Exhibits 10, 11, 18, 20; Employer's Exhibit 4; 20 C.F.R. §718.204(c)(1), (c)(2). In addition, the administrative law judge's found that there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 20; 20 C.F.R. §718.204(c)(3). The administrative law judge further found that all of the physicians found claimant totally disabled from a "whole man" standpoint, but that none of the new medical reports opined that claimant has a total respiratory disability. Decision and Order at 21; Director's Exhibits 14, 20; Claimant's Exhibit 1; Employer's Exhibits 5, 7, 8; 20 C.F.R. 718.204(c)(4); *Street, supra; Carson, supra*. Consequently, the administrative law judge found that claimant has not met his burden of proof in establishing the existence of total respiratory disability.

Claimant asserts that the administrative law judge found total disability but does not challenge the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c). Inasmuch as the administrative law judge rendered a specific finding that the medical evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c), we affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Inasmuch as the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(c), claimant failed to establish a material

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

change in conditions pursuant to Section 725.309(d).[7] 20 C.F.R. §725.309(d); *Rutter II, supra*.

[7] In light of the administrative law judge's appropriate finding that claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(c), proof of a material change in condition based upon a finding of total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) was not available in this case. We decline to address, therefore, claimant's allegations of error under Section 718.204(b).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge