BRB No. 06-0735 BLA

CHARLIE GOINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCKET COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 03/27/2007
	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Charlie Goins, London, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (05-BLA-5402) of Administrative Law Judge Janice K. Bullard denying benefits on a miner's subsequent 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). Claimant's previous claim for benefits, filed on March 20, 1997, was finally denied on October 29,

1999, because claimant did not establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1. Claimant filed his present claim for benefits on February 27, 2001.[1] Director's Exhibit 3.

The administrative law judge credited claimant with eighteen years of coal mine employment.[2] Decision and Order at 5. The administrative law judge also found claimant's present claim to be timely filed pursuant to 20 C.F.R. §725.308. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge, therefore, concluded that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

To be entitled 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,

[1] Claimant filed two claims prior to his 2001 and 1997 claims. Claimant filed his first claim on October 2, 1989, which he later withdrew pursuant to 20 C.F.R. §725.306. Director's Exhibit 1. Claimant filed his second claim on July 24, 1992, which was denied by Administrative Law Judge Robert L. Hillyard because claimant did not establish the existence of pneumoconiosis and total respiratory disability. *Id.*

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 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*).

718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 shall be limited to 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 the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or total respiratory disability to proceed with 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 found that the new x-ray evidence "fails to support a finding of the presence of pneumoconiosis." Decision and Order at 7. The new x-ray evidence consists of one reading of a May 14, 2001 x-ray by Dr. Baker, who interpreted the x-ray as negative for the existence of pneumoconiosis. We affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the new x-ray evidence, because it is supported by substantial evidence. *See Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987).

The administrative law judge properly found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), because the record contains no biopsy or autopsy evidence. Moreover, since there is no evidence of complicated pneumoconiosis, and this case involves a living miner's claim filed after January 1, 1982, the administrative law judge properly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 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 opinion evidence, consisting of the opinions of Drs. Baker and Broudy. Dr. Baker diagnosed legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2),[3] based on

[3] "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).

his diagnosis of chronic bronchitis due to coal dust exposure. Director's Exhibits 14, 33. Dr. Broudy found that claimant does not suffer from coal workers' pneumoconiosis, and he disagreed with Dr. Baker's finding of chronic bronchitis due to coal dust exposure. Employer's Exhibit 1. The administrative law judge "decline[d] to accord substantial weight to Dr. Baker's opinion," because he found that "it is not entirely consistent." Decision and Order at 10. Specifically, the administrative law judge stated that "[a]lthough Dr. Baker's examination of the Claimant revealed no abnormalities and the objective tests were within normal limits, the doctor 'felt' that 'Claimant had legal pneumoconiosis' on the basis of 'his long history of coal dust exposure and symptoms of chronic bronchitis.'" *Id.*, citing Director's Exhibit 33. The administrative law judge found Dr. Broudy's opinion to be "slightly compromised by his conjecture about the etiology of the [claimant's] chronic bronchitis." Decision and Order at 10. However, the administrative law judge found that "Dr. Broudy's opinion on this issue is rehabilitated by his explanation that Claimant had last worked in coal mine employment in 1988, and 'bronchitis due to coal dust exposure subsides without further exposure.'" *Id.*, citing Employer's Exhibit 1. The administrative law judge, therefore, concluded that Dr. Broudy's opinion is "well-reasoned." Decision and Order at 10.

In considering the opinions of Drs. Baker and Broudy, the administrative law judge permissibly "decline[d] to accord substantial weight to Dr. Baker's opinion" that he "felt" that claimant had legal pneumoconiosis, because Dr. Baker based his diagnosis "solely upon claimant's work history and subjective symptoms." Decision and Order at 10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the administrative law judge permissibly accorded less weight to the only new medical opinion that supports claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(4), we need not address the adequacy of the administrative law judge's weighing of the opposing opinion of Dr. Broudy. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984).

Because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), based on the new evidence.

Regarding total respiratory disability, the administrative law judge considered the newly submitted pulmonary function study and blood gas study of record and properly found that claimant did not demonstrate total respiratory disability pursuant to 20 C.F.R.

§718.204(b)(2)(i) and (b)(2)(ii), because as none of the tests yielded qualifying[4] values. Director's Exhibit 14; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Additionally, the administrative law judge properly found that claimant did not demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), because the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we affirm the administrative law judge's finding that claimant did not demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii), based on the new evidence.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker and Broudy. In his May 14, 2001 opinion, Dr. Baker indicated that claimant has no pulmonary impairment and retains the respiratory capacity to perform the work of a coal miner or comparable work. Director's Exhibit 14. In his November 9, 2004 letter, Dr. Baker opined that claimant has "no clinical impairment." Director's Exhibit 33. Dr. Broudy stated that claimant has no respiratory impairment, and that he retains the respiratory capacity to perform the work of a coal miner or comparable work, in his report dated January 14, 2005. Employer's Exhibit 1. Consequently, the administrative law judge properly concluded that claimant did not demonstrate total respiratory disability, based on the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] Because the new medical opinion evidence did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's finding pursuant to this subsection. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

Because claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), based on the new evidence.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values.

[5] Because Drs. Baker and Broudy found that claimant has no pulmonary impairment, it was unnecessary for them to demonstrate knowledge of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

Based on the foregoing, we affirm the administrative law judge's finding that claimant did not establish that an applicable condition of entitlement has changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

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