BRB No. 08-0602 BLA

B.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DARBET, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/11/2009
	)	
WEST VIRGINIA COAL WORKERS' 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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

B.K., English, West Virginia, *pro se*.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5611) of Administrative Law Judge Larry W. Price denying benefits 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). This case involves a

subsequent claim filed on June 9, 2006.[1] The administrative law judge found that the new evidence established neither the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), nor total disability pursuant to 20 C.F.R. §718.204(b).[2] He therefore found that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 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 responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 living 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*).

20 C.F.R. §725.309

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

[1] Claimant filed four previous claims on September 25, 1992, February 28, 1994, March 25, 1998, March 8, 2000. Director's Exhibits 1-4. Each of these claims was finally denied because claimant did not establish any of the elements of entitlement. *Id.*

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*). The administrative law judge made no findings as to the length of claimant's coal mine employment.

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 4. 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).

Section 718.202(a)(1)-(4)

The administrative law judge correctly found that there were no new positive x-ray interpretations in the record.[3] Decision and Order at 6. Consequently, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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 3. 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).[4] *Id.*

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),[5] is sufficient to support a finding of

[3] The record contains four new x-ray interpretations of two x-rays taken on July 12, 2006 and July 26, 2007. Drs. Forehand and Wheeler interpreted claimant's July 12, 2006 x-ray as negative for pneumoconiosis. Director's Exhibit 14; Employer's Exhibit 4. Dr. Gaziano interpreted this x-ray for quality purposes only. Director's Exhibit 14. Drs. Hippensteel and Wiot interpreted claimant's July 26, 2007 x-ray as negative for pneumoconiosis Employer's Exhibits 1, 3.

[4] 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. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[5] "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).

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that there were no new medical opinions in the record supportive of a finding of clinical or legal pneumoconiosis. Decision and Order at 3. The record contains the new medical opinions of Drs. Forehand, Hippensteel, and Castle. Dr. Forehand opined that there was "no evidence of active lung disease." Director's Exhibit 14. Dr. Hippensteel opined that claimant does not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 1. Dr. Castle opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Castle further opined that claimant has no respiratory impairment from any cause. *Id.* We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Section 718.204(b)(2)(i)-(iv)

The administrative law judge correctly noted that all of the new pulmonary function and arterial blood gas studies, namely the studies conducted on July 12, 2006 and July 26, 2007, are non-qualifying.[6] Decision and Order at 5; Director's Exhibit 14; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 5.

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that none of the new medical opinions of record supported a finding of total disability. The administrative law judge correctly stated that all of the physicians who submitted new medical opinions, namely Drs. Forehand, Hippensteel, and Castle, opined that claimant does not suffer from any respiratory impairment.[7] Decision and

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Dr. Forehand diagnosed "no respiratory impairment." Director's Exhibit 14. Dr. Hippensteel opined that claimant did not have any "evidence of ventilatory or gas exchange impairment from any cause . . . that would keep him from going back to work at his previous job in the mines" and that claimant has sufficient pulmonary capacity to

Order at 6; Director's Exhibit 14; Employer's Exhibits 1, 2. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of the our affirmance of the administrative law judge's findings that the new evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement has changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(d). We therefore affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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return to his previous coal mine employment. Employer's Exhibit 1. Dr. Castle stated that claimant "has no respiratory impairment and/or respiratory disability from any cause" and that he retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 2.