BRB No. 07-0690 BLA

C.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/28/2008
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (02-BLA-5443) of Administrative Law Judge Joseph E. Kane rendered 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 is before the Board for the

third time with respect to claimant's subsequent claim filed on May 7, 2001.[1] Director's Exhibit 2.

The Board discussed previously this claim's full procedural history. As of the Board's last decision, in 2006, the Board had affirmed the administrative law judge's finding, on the merits, that claimant established the existence of pneumoconiosis based on the weight of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and had also affirmed his determination that the opinions of Drs. Gaziano and Rasmussen, that claimant is totally disabled by a respiratory impairment due to pneumoconiosis, were sufficiently documented and reasoned. [*C.W.*] *v. Southern Ohio Coal Co.*, BRB No. 06-0199 BLA (Sept. 26, 2006)(unpub.); [*C.W.*] *v. Southern Ohio Coal Co.*, BRB No. 04-0519 BLA (Feb. 28, 2005)(unpub.). However, the Board remanded the case for the administrative law judge to consider the medical reports of employer's physicians, Drs. Bellotte and Zaldivar, and to determine whether claimant established that he is totally disabled by a respiratory or pulmonary impairment. [2006] [*C.W.*], slip op. at 4-5. The Board had already instructed the administrative law judge, in its 2005 decision, that if he found total disability established, claimant would have demonstrated a change in the applicable condition of entitlement, as required by 20 C.F.R. §725.309(d), and the administrative law judge should then consider the merits of the claim. [2005] [*C.W.*], slip op. at 8.

On remand, the administrative law judge considered the opinions of Drs. Bellotte and Zaldivar, as instructed, and found that claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in the applicable condition of entitlement. Considering the merits of the claim, the administrative law judge relied on his prior finding that the x-ray evidence established the existence of pneumoconiosis, and he found that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that claimant's pneumoconiosis arose out of his twenty-eight years of coal mine employment.[2] The administrative law judge further found that the well-reasoned opinions of Drs. Gaziano and Rasmussen established that claimant's total disability is due

[1] Claimant filed his first claim on March 11, 1981, and it was denied on June 23, 1981. Director's Exhibit 24 of Director's Exhibit 1. Claimant filed a second claim on April 22, 1994, and it was denied on December 18, 1998, because claimant did not establish total respiratory disability. [*C.W.*] *v. Southern Ohio Coal Co.*, BRB No. 98-0482 BLA (Dec. 18, 1998)(unpub.); Director's Exhibit 1.

[2] As the record reflects that claimant was last employed in the coal mine industry in Ohio, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled. Employer further asserts that the administrative law judge applied an improper standard in determining that the existence of pneumoconiosis was established. Additionally, employer argues that the administrative law judge erred in his analysis of the medical opinions regarding the cause of claimant's total disability. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief reiterating its contentions. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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).

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, 718.204. Failure to establish any one of these elements precludes 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" 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 failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

The administrative law judge found that, although claimant's new pulmonary function studies and blood gas studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the new medical opinions of Drs. Gaziano and Rasmussen outweighed those of Drs. Bellotte and Zaldivar, and established total disability. In so finding, the administrative law judge accorded less weight to Dr. Zaldivar's opinion, in

part, because Dr. Zaldivar did not explain his opinion that claimant had no pulmonary impairment.

Employer states that the administrative law judge erred because he focused solely on Dr. Zaldivar's initial report and deposition, wherein Dr. Zaldivar stated that claimant had no pulmonary impairment, but ignored Dr. Zaldivar's most recent report of July 9, 2003, wherein Dr. Zaldivar reviewed examination and objective testing results obtained by Dr. Rasmussen, and concluded that "[t]here is a pulmonary impairment present," based on pulmonary function study and diffusing capacity results.[3] Employer's Exhibit 20 at 183. Based on Dr. Zaldivar's most recent opinion, employer concedes that "Dr. Zaldivar agreed [claimant] demonstrated a totally disabling pulmonary impairment based upon Dr. Rasmussen's May 2003 evaluation." Employer's Brief at 6. In its reply brief, employer states further:

> Although Dr. Zaldivar did not identify the existence of a totally disabling pulmonary or respiratory impairment in conjunction with his own evaluation of [claimant] on 4 September 2002 (EE 3), Dr. Zaldivar acknowledged the objective studies taken in conjunction with Dr. Rasmussen's May 2003 evaluation demonstrated the existence of a totally disabling pulmonary impairment. EE 20 at 2, 3. Dr. Zaldivar explained . . . that the impairment documented by Dr. Rasmussen's exam[ination] was due to [claimant's] cardiac disease and renal failure. *Id.*

Employer's Reply Brief at 8.

Based upon employer's concession that its medical expert, Dr. Zaldivar, opined that claimant is totally disabled by a pulmonary impairment, we hold that any error in the administrative law judge's decision to accord less weight to Dr. Zaldivar's opinion was harmless, as the opinion would only support the administrative law judge's finding that claimant is totally disabled. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278

[3] In his July 9, 2003 report, Dr. Zaldivar stated that claimant suffered from an impairment caused by the pulmonary effects of renal failure and heart disease:

> The pulmonary impairment present, as per the last measurement by Dr. Rasmussen, is the result of renal failure with increased pulmonary vascular congestion which has adversely influenced not only the spirometry, but, particularly, the diffusing capacity. Such problem is unrelated to his former work as a coal miner.

Employer's Exhibit 20 at 183.

(1984). Accordingly, we turn to the administrative law judge's discussion of Dr. Bellotte's opinion.

The administrative law judge accorded less weight to Dr. Bellotte's opinion, in part, because Dr. Bellotte diagnosed a mild obstructive impairment, but failed to discuss whether that impairment prevented claimant from performing his usual coal mine employment. Employer argues that the administrative law judge erred in two respects when he discounted Dr. Bellotte's opinion.[4] Employer's Brief at 12-14. We conclude that substantial evidence supports the administrative law judge's finding that Dr. Bellotte did not address whether the mild impairment that he diagnosed would be totally disabling, and that the administrative law judge therefore provided a valid reason for the weight accorded to his opinion. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986); Employer's Exhibit 21 at 3. Therefore, we need not address employer's remaining argument challenging the administrative law judge's other reason for discounting Dr. Bellotte's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n.4 (1983). Consequently, we affirm the administrative law judge's finding that claimant established total respiratory disability and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d).

Pursuant to 20 C.F.R. §718.202(a), employer argues that the administrative law judge erred by failing to weigh the x-ray and medical opinion evidence together to determine whether the existence of pneumoconiosis was established. We reject employer's argument, because we decline to apply the holdings of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-164, 2-174 (4th Cir. 2000), and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997), to this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the law of which does not require the administrative law judge to weigh together all of the evidence presented under 20 C.F.R. §718.202(a)(1)-(4).[5] *See Crockett*

[4] Employer argues that the administrative law judge gave less weight to Dr. Bellotte's opinion because Dr. Bellotte failed to state whether claimant's mild impairment would prevent claimant from performing his last coal mine employment, and because Dr. Bellotte failed to state how he ruled out coal dust exposure as a cause of claimant's pulmonary disease. Employer's Brief at 12-14.

[5] The Board's previous affirmance of the administrative law judge's finding of the existence of pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1) constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). Further, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Collieries, Inc. v. Barrett, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-27 (2002)(*en banc*).

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in relying upon the opinions of Drs. Gaziano and Rasmussen to find that claimant's total disability is due to pneumoconiosis. Dr. Gaziano testified that claimant's coal mine employment was the "primary cause" of his disabling obstruction because his smoking history was "relatively mild" and "quite remote." Employer's Exhibit 9 at 27-28. Dr. Rasmussen opined that claimant's coal mine employment is a "major contributing factor" to his impaired respiratory function, although his cigarette smoking also contributes. Claimant's Exhibit 2 at 3.

We reject employer's argument that the opinions of Drs. Gaziano and Rasmussen are legally insufficient to establish that claimant's total disability is due to pneumoconiosis, because they attribute claimant's pulmonary impairment to both smoking and coal mine employment, and because claimant also suffers from renal disease and heart failure. The presence of more than one causative factor for claimant's respiratory condition does not negate the doctors' conclusions that his disability is due, in part, to his pneumoconiosis. *See* 20 C.F.R. §718.204(c)(1)(i),(ii); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218, 20 BLR 2-360, 2-373 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). We also reject employer's argument that the opinions of Drs. Gaziano and Rasmussen are not documented and reasoned, as the Board's prior holding that the administrative law judge permissibly found them to be documented and reasoned constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

Finally, we reject employer's argument that the administrative law judge erred in discounting the opinions of Drs. Bellotte and Zaldivar, that claimant's total disability is due solely to health conditions unrelated to his coal mine employment, because neither physician diagnosed pneumoconiosis. The administrative law judge had the discretion to discount the disability causation opinions of the physicians who did not diagnose pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.3d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64. Based on the foregoing discussion, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge