BRB No. 09-0618 BLA

ROBERT E. CRESS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/25/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Robert E. Cress, Big Stone Gap, Virginia, *pro se*.

Douglas A. Smoot and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order – Denial of Benefits (2008-BLA-5304) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent claim[2] 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). The administrative law judge credited claimant with at least twenty-one years of qualifying coal mine employment, and adjudicated this subsequent claim, filed on February 28, 2007, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and thus, that claimant had failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's weighing of the evidence and his denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), initially declined to file a substantive response to claimant's appeal. However, pursuant to the Board's Order, issued on March 30, 2010, permitting supplemental briefing in this case, the Director now states that the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are applicable to this case.[3]

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[1] Before the administrative law judge, claimant was represented by Jerry Murphree, a benefits counselor with Stone Mountain Health Services. Mr. Murphree has requested, on behalf of claimant, that the Board review the claim in its entirety, as he is not representing claimant on appeal. Hearing Transcript at 4-5; Claimant's Notice of Appeal.

[2] Claimant's initial claim was filed on October 22, 1974, and administratively denied on December 9, 1980. Claimant's second claim for benefits was filed on June 9, 1989, and was denied on May 19, 1993, for failure to establish total respiratory disability. Claimant's third claim, filed on November 2, 1994, was denied by Administrative Law Judge Edith Barrett for failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and the Board affirmed the denial of benefits. Director's Exhibit 1.

[3] Section 411(c)(4) of the Act was recently amended and is applicable to claims that are filed after January 1, 2005, and pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c) (2010). To invoke the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), claimant must establish that he worked at least fifteen years in qualifying coal mine employment, and must present evidence sufficient to establish a totally disabling respiratory impairment under the criteria set forth at 20 C.F.R. §718.204.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Cress v. Westmoreland Coal Co.*, BRB No. 97-1598 BLA (Aug. 11, 1998)(unpub.); *Cress v. Westmoreland Coal Co.*, BRB No. 96-1549 BLA (Feb. 26, 1997)(unpub.). Consequently, claimant had to submit evidence establishing the existence of pneumoconiosis or total respiratory disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d).

In finding that the newly submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered nine interpretations of four x-rays taken in 2007 and 2008. The administrative law judge determined that the January 23, 2007 x-ray was inconclusive as to the presence of pneumoconiosis, as it was read as positive by Dr. Miller and as negative by Dr. Wiot, both physicians who are dually-qualified as B readers and Board-certified radiologists.[5] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

[5] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C). The terms "A reader" and "B-reader"

U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 7; Director's Exhibits 27, 32; Claimant's Exhibit 2. The March 19, 2007 x-ray was read as positive by both Dr. Baker, a B reader, and by Dr. Miller, a dually-qualified physician, and as negative by Dr. Wiot, a dually-qualified physician. Decision and Order at 7; Director's Exhibits 12, 32, 33. According the greatest probative weight to the readings by the dually-qualified readers, the administrative law judge permissibly found this x-ray to be inconclusive, based on Dr. Miller's and Dr. Wiot's equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Chaffin*, 22 BLR at 1-300; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler*, 7 BLR at 1-131; Decision and Order at 7. The administrative law judge determined that the August 29, 2007 x-ray was negative for pneumoconiosis, as both Dr. Hippensteel, a B reader, and Dr. Meyer, a dually-qualified physician, read the film as negative. Decision and Order at 7; Employer's Exhibits 1, 2. Lastly, the administrative law judge determined that the July 28, 2008 x-ray was inconclusive as to the presence of pneumoconiosis, as it was read as positive by Dr. Ahmed and as negative by Dr. Wiot, both dually-qualified physicians. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Chaffin*, 22 BLR at 1-300; *Sheckler*, 7 BLR at 1-131; Decision and Order at 7; Claimant's Exhibit 1; Employer's Exhibit 6.

After determining that three x-rays were inconclusive and that the remaining x-ray was negative for pneumoconiosis, the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of clinical pneumoconiosis by x-ray evidence at Section 718.202(a)(1). Decision and Order at 7; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(1), they are affirmed.

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 6. 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).[6]

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refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[6] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended,

At Section 718.202(a)(4), the administrative law judge accurately summarized the newly submitted medical opinions of Drs. Baker, Hippensteel, and Rosenberg relevant to the existence of clinical and legal pneumoconiosis.[7] Decision and Order at 8-13; Director's Exhibits 12, 15; Employer's Exhibits 1, 3, 4, 5. Dr. Baker diagnosed clinical pneumoconiosis based on a positive x-ray and a significant history of coal mine dust exposure. Director's Exhibits 12, 15. Dr. Baker also diagnosed chronic bronchitis due to coal dust exposure, based on claimant's history of cough, sputum production and wheezing; and chronic obstructive pulmonary disease (COPD) due to coal dust exposure, based on pulmonary function study results that revealed a moderate obstructive defect, and the absence of a smoking history. *Id.* Drs. Hippensteel and Rosenberg both opined that claimant does not have coal workers' pneumoconiosis or any pulmonary or respiratory impairment attributable to coal dust exposure. Employer's Exhibits 1, 3, 4, 5. The administrative law judge rationally discounted Dr. Baker's diagnosis of clinical pneumoconiosis because it was based on the doctor's positive interpretation of the March 19, 2007 x-ray, which the administrative law judge determined was inconclusive for pneumoconiosis, and because the administrative law judge found that the preponderance of the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 13; Director's Exhibits 12, 15. The administrative law judge also acted within his discretion in finding that Dr. Baker's diagnosis of legal pneumoconiosis was undermined and entitled to diminished weight, as he determined that the pulmonary function study on which Dr. Baker relied was invalid, and claimant's symptoms of coughing and wheezing are non-specific to coal dust

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by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *infra*, this amendment does not apply in the present case, as claimant failed to establish total respiratory disability under the criteria contained in 20 C.F.R. §718.204(b). Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is inapplicable.

[7] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

exposure. Further, the administrative law judge determined that Dr. Baker failed to consider other possible causes of claimant's chronic bronchitis, specifically hyperactive airways disease or allergic response as noted by Dr. Rosenberg, and claimant's obesity, as discussed by Dr. Hippensteel. *See Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (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, 1-22 (1987); Decision and Order at 14; Director's Exhibits 12, 15; Employer's Exhibits 1, 5. As substantial evidence supports the administrative law judge's determination to discredit the opinion of Dr. Baker, the only physician to diagnose the existence of either clinical or legal pneumoconiosis, we affirm the administrative law judge's finding that claimant is "unable to prove the presence of clinical or legal pneumoconiosis through the preponderance of the probative medical opinions under 20 C.F.R. §718.202(a)(4)." Decision and Order at 15; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175.

Evaluating the evidence relevant to the issue of total disability pursuant to Section 718.204(b)(2)(i), the administrative law judge accurately reviewed the four newly submitted pulmonary function studies of record, and acted within his discretion in finding that they all produced invalid results due to claimant's lack of effort, based on the opinions of the reviewing pulmonary specialists, Drs. Hippensteel, Rosenberg, and Renn. Decision and Order at 19; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Specifically, the administrative law judge determined that while the January 30, 2007 study conducted by Dr. Roatsey, Director's Exhibit 27, noted "good effort cooperation,"[8] there was a sufficient basis for the validity concerns raised by Drs. Renn, Rosenberg, and Hippensteel, as the associated tracings confirmed that only one of the three forced expiration maneuvers lasted seven seconds.[9] Decision and Order at 17. The March 19, 2007 study, Director's Exhibit 12, was conducted by Dr. Baker, who indicated that

[8] The quality standards for pulmonary function studies require a notation of the miner's understanding and cooperation. 20 C.F.R. §718.103.

[9] The January 30, 2007 pulmonary function study, Director's Exhibit 27, was invalidated by Drs. Renn, Rosenberg, and Hippensteel. Dr. Renn noted several problems with the study, including a failure to maintain maximal effort throughout the entire FVC maneuver, failure to maintain the FVC maneuver beyond six seconds, and non-correlation of the FVC maneuvers. Director's Exhibit 28. Dr. Rosenberg noted that ten trials were attempted, but that the shape of the curves showed that the efforts were incomplete, thereby invalidating the study. Employer's Exhibit 3. Dr. Hippensteel found that this study was invalid due to suboptimal effort, noting that claimant underwent at least ten attempts to establish consistency, but there was still a greater than ten percent variation in vital capacity results. Employer's Exhibit 1.

although not all tracings were reproducible, the three best values obtained were within five percent of each other, suggesting that the studies were representative of claimant's pulmonary function. The administrative law judge noted that this study was validated by Dr. Michos, who did not address the technician's notations of "fair cooperation with good understanding" and "question maximum effort; tracings inconsistent." Director's Exhibit 12. Crediting the contrary consensus of Drs. Renn, Rosenberg, and Hippensteel, whose opinions were in agreement with the observations and concerns of the technician, as supported by the tracings, the administrative law judge permissibly determined that the March 19, 2007 study was invalid.[10] Decision and Order at 18; *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge properly credited Dr. Hippensteel's invalidation of the pulmonary function study that he conducted on August 29, 2007, Employer's Exhibit 1, reporting "widely variable efforts and low peak effort on tracings underestimating [claimant's] true function, but no evidence of obstruction is present," and "MVV is reduced with widely variable tidal volumes making it invalid; Lung volumes are normal." Employer's Exhibit 1. Lastly, although Dr. Craven[11] provided no further comments to the technician's notation of "good effort cooperation" on the pulmonary function study that he conducted on January 21, 2008, Claimant's Exhibit 3, the administrative law judge determined that the significant variation in the test results provided sufficient documentary basis for Dr. Hippensteel's opinion that claimant's efforts were variable, as supported by Dr. Rosenberg's opinion that the study revealed incomplete efforts based on the shape of the curves.[12] Decision and Order at 18-19; Employer's Exhibit 4 at 18; Employer's Exhibit 5 at 13. In the absence of

[10] The March 19, 2007 study was invalidated by Dr. Renn, who noted several problems, including a failure to maintain maximal effort throughout the entire FVC maneuver, failure to maintain the FVC maneuver for the requisite six seconds, and unsatisfactory start of expiration. Director's Exhibit 26. Dr. Rosenberg also invalidated the study, noting that eight trials were attempted but that the efforts were incomplete, based on the shape of the curves. Employer's Exhibit 3. Further, Dr. Hippensteel invalidated the study, based on the variability in the volume loops. Employer's Exhibit 5 at 16.

[11] Dr. Craven is the Clinical Director of Stone Mountain Health Services, and is Board-certified in family practice. Claimant's Exhibit 3.

[12] The report summary of the January 21, 2008 study indicated that five tests were performed, but that zero were acceptable and zero were reproducible. Dr. Rosenberg invalidated this study, noting that it revealed incomplete efforts, based on the shape of the curves. Employer's Exhibit 4 at 18. Dr. Hippensteel also invalidated the study, noting an almost ten percent variability in the FEV_1 results, flow volume loops showing no peak to the flow, and peak effort at only twenty-six percent of predicted. Employer's Exhibit 5 at 13.

conforming, valid pulmonary function studies, due to claimant's inadequate effort, we affirm the administrative law judge's finding that claimant failed to carry his burden pursuant to Section 718.204(b)(2)(i). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

We also affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), (iii), as the administrative law judge correctly determined that the two newly submitted blood gas studies of record, conducted on March 19, 2007 and August 29, 2007, produced non-qualifying values,[13] Decision and Order at 19, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 15.

Lastly, in finding that the weight of the evidence was insufficient to support a finding of total respiratory disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge accurately summarized and compared the newly submitted medical opinions of Drs. Baker, Hippensteel, and Rosenberg. Decision and Order at 8-13. The administrative law judge rationally determined that Dr. Baker's opinion, that claimant was totally disabled with a "Class III impairment," reflecting a "26-50% impairment of the whole person," was insufficient to establish total disability because it was based on the pulmonary function study of March 19, 2007, which the administrative law judge found to be invalid. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103, 106 (1994). Decision and Order at 20; Director's Exhibits 12, 15. The administrative law judge rationally found that the contrary opinions of Drs. Hippensteel and Rosenberg, that claimant was not disabled from a pulmonary standpoint and was capable of performing his usual coal mine employment, were the most persuasive and were entitled to greater weight, as they were better supported by the objective evidence of record and "presented a well documented assessment of claimant's pulmonary capacity." *See Clark*, 12 BLR at 1-155; Decision and Order at 20-21; Employer's Exhibits 1, 3, 4, 5. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), they are affirmed.

Since claimant failed to establish total disability pursuant to Section 718.204(b)(i)-(iv) in this subsequent claim and in his earlier claims, we hold that application of the recent amendments to the Act would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4). Further, because claimant failed to present new evidence sufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or

[13] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values contained in Appendix 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)(ii).

total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See White*, 23 BLR at 1-3. Consequently, we affirm the administrative law judge's denial of benefits.

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