BRB No. 09-0632 BLA

LEO KORMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/28/2010
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Leo Korman, Throop, Pennsylvania, *pro se*.

Rita A. Roppolo (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, appeals the Decision and Order Denying Benefits (2008-BLA-05773) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on a subsequent claim filed on August 27, 2007, 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 found that the newly submitted evidence established a total respiratory disability at 20 C.F.R. §718.204(b) and, thus, a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[1]

[1] When 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

Adjudicating the claim on merits at 20 C.F.R. Part 718, the administrative law judge determined that the former administrative law judge's finding of 4.5 years of coal mine employment was reasonable and supported by the record. Considering all of the relevant evidence of record, both old and new, the administrative law judge found that claimant failed to establish any element of entitlement. *See* 20 C.F.R. §§718.202, 718.203, 718.204. Benefits were, accordingly, denied.[2]

Claimant appeals, without the assistance of counsel, contending that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order Denying Benefits.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of totally disabling pneumoconiosis in cases where the miner has established fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). By Order issued on March 30, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments in this claim. In response to this Order, claimant, without the assistance of counsel, contends that he is totally disabled. The Director contends that, although the amendments apply to this claim based on its post-January 1, 2005 filing date, because claimant "has never alleged more than four-plus years of coal mine employment," the Section 411(c)(4) presumption cannot be invoked, "and the Board may therefore decide this appeal without regard to the amendments." Director's Brief at 2.

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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 (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, filed on May 16, 1984, was denied by Administrative Law Judge George G. Pierce on July 30, 1987, because claimant failed to establish any element of entitlement. Consequently, in order to have his subsequent claim reviewed on the merits, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

[2] This case was decided on the record pursuant to claimant's request and the agreement of the Director, Office of Workers' Compensation Programs (the Director). Decision and Order at 2.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence and is in accordance with law.[3] *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 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, 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).

After consideration of the administrative law judge's Decision and Order Denying Benefits and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed. Considering all of the evidence of record on total disability, the administrative law judge found that none of the valid pulmonary function studies was qualifying and that none of the blood gas studies was qualifying. The administrative law judge also found that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 13-14. Thus, the administrative law judge properly found that total respiratory disability was not established at Section 718.204(b)(2)(i)-(iii). 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

Turning to Section 718.204(b)(2)(iv), the relevant evidence of record consists of the following medical opinion evidence. In a 1984 report, Dr. Biancarelli reported that claimant had a respiratory disability and shortness of breath that caused him to retire, but did not state whether claimant could do his coal mine employment. Director's Exhibit 1. In a 1987 report, Dr. Levinson opined that claimant did not have a respiratory disability that would keep him from performing coal mine employment. Director's Exhibit 1. Subsequently, in 2007, Dr. Levinson opined that claimant's pulmonary impairment was "quite mild" and felt that it would not, in and of itself, preclude him from performing coal mine employment. Director's Exhibit 8. In 2008, Dr. Talati opined that claimant had a

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner was last employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

mild pulmonary impairment that would preclude him from performing his last coal mine employment.[4] Director's Exhibit 20.

Considering these opinions, the administrative law judge permissibly found that the 1984 and 1987 reports of Drs. Biancarelli and Levinson were not reliable indicators of claimant's physical condition, due to the fact that they were more than twenty years old. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, the administrative law judge permissibly accorded little weight to Dr. Levinson's 2007 opinion, because Dr. Levinson relied on an invalidated pulmonary function study and did not sufficiently address claimant's physical condition. *See Stark*, 9 BLR at 1-37. Finally, the administrative law judge properly accorded little weight to Dr. Talati's opinion, because it did not reflect that the doctor was familiar with the exertional requirements of claimant's usual coal mine employment, because the doctor relied on a finding of seven years of coal mine employment, instead of the 4.5 years established on the record, and because the weight of the non-qualifying objective evidence did not support Dr. Talati's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*). Thus, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish a total respiratory disability at Section 718.204(b)(2)(iv).[5] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Clark*, 12 BLR at 1-153.

[4] In his report of coal mine employment history, claimant wrote that he extracted coal and sorted rock. Director's Exhibit 4. All of the physicians of record describe claimant's usual coal mine employment as that of a coal loader. Director's Exhibits 1, 8, 20.

[5] The Director contends that the administrative law judge erred in finding that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d), by finding that the new evidence established a total respiratory disability at 20 C.F.R. §718.204(b). However, the Director contends that this error is harmless because the administrative law judge subsequently weighed all of the evidence of record, regarding total disability on the merits, and found that total disability was not established at Section 718.204(b). The administrative law judge, when considering the newly submitted evidence, should have weighed all of the relevant new evidence, instead of merely crediting affirmative evidence, without critically examining the evidence. We agree with the Director, however, that this error is harmless because the administrative law judge weighed and evaluated all of the relevant evidence of record and properly found that it did not establish total disability at Section 718.204(b) on the merits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because the administrative law judge properly found that total disability was not established at Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, benefits cannot be awarded in this case. *Anderson*, 12 BLR at 1-112. Further, in light of our affirmance of the administrative law judge's finding that total disability was not established, we hold that invocation of the Section 411(c)(4) presumption is unavailable.[6] 30 U.S.C. §921(c)(4).

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

[6] Moreover, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.