BRB No. 09-0669 BLA

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| WILLIAM Y. STEELE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| POND CREEK MINING COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| A. T. MASSEY | ) | DATE ISSUED: 05/25/2010 |
| | ) | |
| 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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, 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 appeals the Decision and Order Denying Benefits (2008-BLA-5808) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on a subsequent claim[1] filed on August 23, 2007, pursuant to the provisions of Title IV 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 both that claimant "worked in the coal mines for fifteen years" and that the parties stipulated to "at least ten years" of coal mine employment. Decision and Order at 3 and 5. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish any element of entitlement at Part 718 and failed, therefore, to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in not finding legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), based on the new opinion of Dr. Shamma-Othman. Claimant also contends that the administrative law judge should have found total respiratory disability established at 20 C.F.R. §718.204(b)(iv), based on the new opinions of Drs. Shamma-Othman and Zaldivar. Employer responds, urging affirmance of the administrative law judge's Decision and Order Denying Benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law,[2] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed two previous claims. Claimant filed his first claim on August 3, 1993. That claim was denied on January 19, 1994, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on April 22, 1998. That claim was denied on September 3, 1998, for failure to establish any element of entitlement and, therefore, a material change in conditions at 20 C.F.R. §725.309(d)(2000). Director's Exhibit 2.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

Where a miner files a claim for benefits more than one year after the 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 claim was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Consequently, claimant has to submit new evidence establishing at least one of the elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

On March 23, 2010, amendments to the Black Lung Benefits 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 April 7, 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 again contends that the administrative law judge erred in finding that the evidence did not establish total respiratory disability. Claimant also contends that since a finding of fifteen years of coal mine employment would entitle claimant to invocation of the Section 411(c)(4) presumption, the case should be remanded to allow the administrative law judge to make a specific finding as to the length of claimant's coal mine employment. The Director contends, *inter alia*, that, "if the Board affirms the administrative law judge's finding that total disability has not been established, invocation of the presumption is precluded and the Board may affirm the denial of benefits."[3] Director's Brief at 2.

Considering the issue of total respiratory disability at 20 C.F.R. §718.204(b), and whether a change in an applicable condition of entitlement was established at Section 725.309(d), the administrative law judge first found that claimant's usual coal mine

[3] In light of our disposition of this case, employer's request for an extension to file a supplemental brief is moot.

employment was as a general laborer and roof bolter, which required heavy lifting, including the lifting of rock, roof bolts, plates, and jacks. Decision and Order at 5; Hr. Tr. 11-13. The administrative law judge found that total respiratory disability could not be established at 20 C.F.R. §718.204(b)(2)(i), as none of the newly submitted qualifying pulmonary function studies was valid. The administrative law judge also found that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(ii), as the weight of the new blood gas studies was non-qualifying. Additionally, the administrative law judge found that total respiratory disability could not be established at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence that claimant suffered from cor pulmonale with right-sided congestive heart failure. Turning to the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accorded diminished weight to the opinion of Dr. Castle, who opined that it was "possible" that claimant was totally disabled, because the opinion was equivocal. The administrative law judge accorded diminished weight to the opinion of Dr. Shamma-Othman as unreasoned, because she failed to cite to any objective evidence, data, or findings on physical examination, to support her opinion that claimant was totally disabled. Instead, the administrative law judge accorded the greatest weight to the opinion of Dr. Zaldivar, because he unequivocally opined that claimant could perform his usual coal mine employment and he cited to objective medical data that supported his opinion. The administrative law judge, therefore, found that the newly submitted medical opinion evidence failed to establish total respiratory disability at Section 718.204(b)(2)(iv). Further, considering all of the new evidence together, the administrative law judge concluded that claimant failed to establish a total respiratory disability, overall, at Section 718.204(b), and failed, therefore, to establish a change in an applicable condition of entitlement at Section 725.309(d).

However, claimant contends that the administrative law judge should have found total respiratory disability established at Section 718.204(b)(2)(iv), based on the opinions of Drs. Shamma-Othman and Zaldivar.[4] We disagree. First, contrary to claimant's contention, the administrative law judge properly found that the opinion of Dr. Zaldivar, that claimant retained the respiratory capacity to perform his usual coal mine employment, could not establish total disability at Section 718.204(b)(2)(iv).[5] 20 C.F.R.

[4] The administrative law judge's finding that Dr. Castle's opinion is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Dr. Zaldivar noted that, as a general laborer, claimant crawled, carried, pushed, moved, and pulled, including crawling 100 feet seven hours a day, lifting 40 to 50 pounds two hours a day and carrying 40 to 50 pounds. Dr. Zaldivar also noted that, as a roof bolter, claimant was involved in heavy work, including crawling 120 feet and lifting 40 to 50 pounds. Decision and Order at 9; Employer's Exhibit 1.

§718.204(b)(2)(iv); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Second, contrary to claimant's contention, the administrative law judge properly accorded diminished weight to the opinion of Dr. Shamma-Othman, that claimant has a moderately severe respiratory impairment, as Dr. Shamma-Othman did not cite to objective study evidence, data, or physical findings, to support her opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We affirm, therefore, the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b)(2)(iv), based on the newly submitted medical opinion evidence. Further, we affirm the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b)(2)(i)-(iii), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, because the administrative law judge properly found that total respiratory disability was not established at Section 718.204(b), claimant is not entitled to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Further, the administrative law judge properly found that claimant could not establish a change in an applicable condition of entitlement at Section 725.309(d), based on a finding of total respiratory disability at Section 718.204(b) or invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis.[6]

Finally, we consider whether claimant has established a change in an applicable condition of entitlement at Section 725.309(d), based on a finding of pneumoconiosis at Section 718.202(a). Claimant does not challenge the administrative law judge's finding that the newly submitted evidence failed to establish clinical pneumoconiosis at Section 718.202(a)(1)-(4).[7] Rather, claimant contends that the administrative law judge should have found legal pneumoconiosis established at Section 718.202(a)(4), based on the newly submitted opinion of Dr. Shamma-Othman.[8] Claimant contends that the administrative law judge erred in finding that Dr. Shamma-Othman did not find legal

[6] Claimant is not entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), because he failed to establish total respiratory disability at 20 C.F.R. §718.204. Therefore, we need not consider the administrative law judge's findings concerning the length of claimant's coal mine employment. *See* 30 U.S.C. §921(c)(4); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] The administrative law judge's finding that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(4) is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[8] The administrative law judge's finding that the opinions of Drs. Castle and Zaldivar did not establish either clinical or legal pneumoconiosis at Section 718.202(a)(4) is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

pneumoconiosis because Dr. Shamma-Othman's opinion, that claimant had chronic obstructive pulmonary disease (COPD) due to a combination of smoking and coal dust exposure, is sufficient to establish legal pneumoconiosis. Contrary to claimant's contention, however, Dr. Shamma-Othman did not attribute claimant's COPD to both smoking and coal dust exposure. Rather, she attributed claimant's clinical pneumoconiosis, *i.e.*, coal workers' pneumoconiosis, to coal dust exposure and attributed claimant's COPD to smoking. Consequently, we affirm the administrative law judge's finding that Dr. Shamma-Othman has not found legal pneumoconiosis and that her opinion cannot, therefore, support a finding of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201. Accordingly, we affirm the administrative law judge's findings that clinical and legal pneumoconiosis have not been established at Section 718.202(a), and that a change in an applicable condition of entitlement has not been established at Section 725.309(d).

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