BRB No. 12-0515 BLA

ROLAND MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/14/2013
	)	
UNION CARBIDE CORPORATION	)	
	)	
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 of Administrative Law Judge Michael P. Lesniak, United States Department of Labor.

Roland Mullins, Lizemore, West Virginia, *pro se*.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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 (2011-BLA-5377) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on April 15, 2010.[1]

[1] Claimant initially filed a claim for benefits on January 31, 2001. Director's Exhibit 1. The district director denied the claim on February 11, 2002, because claimant

The administrative law judge noted that Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

After crediting claimant with 18.44 years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. 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 raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). The Board 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the

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did not establish any of the elements of entitlement. *Id.* Claimant took no further action until he filed the current subsequent claim.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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 did not establish any element of entitlement. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3).

The Existence of Pneumoconiosis

Section 718.202(a)(1)

The administrative law judge correctly found that there are no new positive x-ray interpretations in the record.[3] Decision and Order at 3-4. Consequently, we affirm the administrative law judge's finding that the new x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2), (3)

Because there is no biopsy evidence of record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Moreover, claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306.[4]

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal

[3] The record contains four interpretations of two new x-rays taken on May 27, 2010 and March 30, 2011. Dr. Meyer, a B reader and Board-certified radiologist, and Dr. Gaziano, a B reader, interpreted the May 27, 2010 x-ray as negative for pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 3. Dr. Tarver, a B reader and Board-certified radiologist, and Dr. Zaldivar, a B reader, interpreted the March 30, 2011 x-ray as negative for pneumoconiosis. Employer's Exhibits 2, 4.

[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. Because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that there are no new medical opinions in the record supportive of a finding of clinical or legal pneumoconiosis. Decision and Order at 7. The record contains the new medical opinions of Drs. Gaziano, Zaldivar, and Castle. Dr. Gaziano opined that claimant does not suffer from any type of pulmonary disease. Director's Exhibit 17. Dr. Zaldivar opined that there is no evidence of clinical or legal pneumoconiosis. Employer's Exhibit 1. Dr. Castle also opined that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 5. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability

The administrative law judge correctly noted that all of the new pulmonary function and arterial blood gas studies, namely the studies conducted on May 27, 2010 and March 30, 2011, are non-qualifying.[6] Decision and Order at 8; Director's Exhibit 17; Employer's Exhibit 2. Consequently, we affirm the administrative law judge's findings that the new evidence does 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 8.

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 supports a finding of total

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

[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).

disability. The administrative law judge correctly stated that all of the physicians who submitted new medical opinions, namely Drs. Gaziano, Zaldivar, and Castle, opined that claimant does not suffer from a totally disabling pulmonary impairment.[7] Decision and Order at 8; Director's Exhibit 17; Employer's Exhibits 1, 5. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence does 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.[8]

[7] Dr. Gaziano did not diagnose a totally disabling pulmonary impairment. Director's Exhibit 17. Dr. Zaldivar stated that claimant has "no pulmonary impairment" and that he is capable, from a pulmonary standpoint, of performing his previous coal mine employment. Employer's Exhibit 1. Dr. Castle opined that claimant retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 5.

[8] In light of our affirmance of the administrative law judge's finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), we also affirm his finding that claimant is unable to invoke the Section 411(c)(4) rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 8.

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