BRB No. 12-0528 BLA

ANTHONY J. CILIBERTO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POPPLE BROTHERS	)	DATE ISSUED: 05/20/2013
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph F. Saporito (Saporito, Saporito & Falcone), Pittston, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05843) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on October 13, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant filed an initial claim on December 22, 1979, which was denied by Administrative Law Judge Chester Shatz on July 18, 1986, for failure to establish any of

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with thirty-seven years of coal mine employment, based on a stipulation by the parties, and found that claimant worked nineteen years in underground coal mines. The administrative law judge determined that the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis or total disability and, thus, found that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant does not have a totally disabling respiratory or pulmonary impairment, the administrative law judge also found that claimant is not entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act.[2] Accordingly, benefits were denied.

On appeal, claimant asserts that he established total disability due to pneumoconiosis, based on the opinion of Dr. Gibbons, his treating physician. Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a response.

---

the requisite elements of entitlement. Director's Exhibit 1. That denial was affirmed by the Board on appeal. *See Ciliberto v. Popple Brothers*, No. 87-0380 BLA (Aug. 29, 1988) (unpub.). Claimant filed a second claim on February 16, 1996, which was denied by Administrative Law Judge Robert D. Kaplan on November 19, 1997, because claimant did not satisfy the requirements of 20 C.F.R. §725.309 (2000). Director's Exhibit 2. Claimant appealed and the Board affirmed the denial of benefits. *Ciliberto v. Popple Brothers,* BRB No. 98-0476 BLA (Dec. 16, 1998) (unpub.). The United States Court of Appeals for the Third Circuit also denied claimant's petition for review of the Board's decision. *Ciliberto v. Popple Brothers,* No. 99-1118 (3d Cir. Nov. 10, 1999) (unpub.). Claimant filed a third claim for benefits on January 11, 2001, which was denied by Judge Kaplan on June 6, 2003. Director's Exhibit 3. Judge Kaplan found that the newly submitted evidence was insufficient to establish any of the elements of entitlement and denied benefits pursuant to 20 C.F.R. §725.309. Claimant appealed and the denial was affirmed by the Board. *Ciliberto v. Popple Brothers Coal Co.*, BRB No. 03-0664 BLA (June 23, 2004) (unpub.). Claimant took no further action in pursuit of benefits until filing the current claim on October 13, 2009. Director's Exhibit 4.

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

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.[3] 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).

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."[4] 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). In this case, claimant failed to establish any of the requisite elements of entitlement in his prior claims. Director's Exhibits 1, 2. Therefore, claimant is required to establish, based on the newly submitted evidence, at least one element in order to obtain a merit review of his subsequent claim.

I. The Existence of Pneumoconiosis

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge found that the weight of the x-ray evidence is negative pursuant to 20 C.F.R. §718.202(a)(1).[5] The administrative law judge noted that the record does not

[3] This case arises within the jurisdiction of the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[4] In order to establish entitlement to benefits in this miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] The administrative law judge noted that there were two x-rays of record dated December 8, 2009, and May 10, 2010. The December 8, 2009 x-ray was read as positive by Dr. Gaia, a Board-certified radiologist, and as negative by Drs. Scott and Wheeler, dually qualified as Board-certified radiologists and B readers. Director's Exhibit 9; Employer's Exhibits 2, 3. Based on the radiological qualifications of the physicians, the administrative law judge found the December 8, 2009 x-ray was negative. Decision and Order at 16. Because the May 10, 2010 x-ray had only one reading, which was negative,

contain any biopsy evidence for evaluation under 20 C.F.R. §718.202(a)(2), and that claimant was not entitled to any of the applicable presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id*. at 16-17. The administrative law judge also found that there was no reasoned medical opinion evidence to establish pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 17.

Initially, we affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3), as claimant does not identify any specific error committed by the administrative law judge in evaluating the evidence under those subsections. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Relevant to 20 C.F.R. §718.202(a)(4), claimant contends that he established the existence of pneumoconiosis, based on the opinion of Dr. Gibbons, his treating physician. Claimant's Brief at 7.

The record reflects that claimant did not submit treatment records from Dr. Gibbons. However, in a letter addressed to claimant's attorney, dated May 4, 2007, Dr. Gibbons stated:

> [Claimant] was operated on on [December 6, 2003] and had coronary artery bypass grafting at that time. During that surgery, Dr. Deepak Singh noted that there was a significant amount of anthracotic pigmentation and, in fact, there was a note of multiple areas where his left lung was extremely hard. This is all consisted [sic] with anthrasilicotic type of pigmentation deposits.
>
> Also, at the time of surgery it was noted that his lung was extremely adherent to the chest wall and it took a fair amount of dissection to peel the lung from the chest wall. This was due to dense anthrasilicotic type of pigmentation and adhesions. Thus, it is my opinion that [claimant] suffers from anthrasilicosis.

Director's Exhibit 10. During a deposition conducted October 12, 2011, Dr. Gibbons testified that he began treating claimant in 1979 and saw him in the office about every two to three months. Claimant's Exhibit 1 at 7. He testified that claimant complained of shortness of breath and a productive cough. *Id*. Dr. Gibbons defined anthrasilicosis as "fibrotic changes that occur in the lung in association with people who have been

---

the administrative law judge concluded that the weight of the x-ray evidence was negative for pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id.*; *see* Employer's Exhibit 1. Accordingly, the administrative law judge found that the overall weight of the x-ray evidence is negative for pneumoconiosis. Decision and Order at 16.

exposed for over a prolonged period of time to coal mining." Claimant's Exhibit 1 at 4. A copy of Dr. Singh's surgical report was attached to the deposition.

In weighing Dr. Gibbons' opinion, the administrative law judge considered the factors set forth in 20 C.F.R. §718.104(d)[6] and determined that Dr. Gibbons has an "excellent basis of knowledge from which to draw conclusions about the Claimant's pulmonary condition." Decision and Order at 13. Although the administrative law judge considered Dr. Gibbons' opinion to be "credible," she also found that he did not provide a reasoned and documented opinion on the issue of the existence of pneumoconiosis.[7] *Id*.; *see* 20 C.F.R. §718.104(d)(5). The administrative law judge specifically found that Dr. Gibbons based his diagnosis of anthrasilicosis, "on the surgeon's report of anthracotic pigmentation" and "adhesions." Decision and Order at 21. The administrative law judge observed correctly that under the regulations "the existence of anthracotic pigment, by

---

[6] The regulation at 20 C.F.R. §718.104(d)(5) provides:

> In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of the miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d)(5).

[7] The definition of clinical pneumoconiosis is set forth at 20 C.F.R. §718.201(a)(1):

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

itself, does not establish pneumoconiosis." Decision and Order at 21; *see* 20 C.F.R. §718.202(a)(2). The administrative law judge also permissibly determined that the surgical description of adhesions, cited by Dr. Gibbons to support his opinion, was "too vague" to satisfy the regulatory definition of clinical pneumoconiosis, which requires "deposition of particulate matter and fibrotic reaction of lung tissue." Decision and Order at 21, *quoting* 20 C.F.R. §718.201; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Consequently, in light of the administrative law judge's permissible determinations that the surgical findings do not satisfy the definition of pneumoconiosis, we affirm her conclusion that Dr. Gibbons' diagnosis of anthracosilicosis is not well-reasoned and is entitled to little weight at 20 C.F.R. §718.202(a)(4). *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

In consideration of the two remaining medical opinions, the administrative law judge properly found that Dr. Talati's diagnosis of clinical pneumoconiosis, "based on a single [positive] X-ray that is at odds with the weight of the X-ray evidence," is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[8] Decision and Order at 20; *see Clark*, 12 BLR at 1-155; Director's Exhibit 9. Because Dr. Levinson did not diagnose pneumoconiosis,[9] his opinion does not aid claimant in satisfying his burden of proof. Employer's Exhibits 4, 7. Therefore, we affirm the administrative law judge's findings at 20 C.F.R §718.202(a)(4), and her overall determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis.

II. Total Disability

In addressing whether claimant is totally disabled, the administrative law judge weighed two newly submitted pulmonary function studies dated January 11, 2010 and May 10, 2010. Decision and Order at 6; *see* Director's Exhibit 9; Employer's Exhibit 4. She found that the January 11, 2010 study is non-qualifying for total disability, while the

[8] Dr. Talati performed an examination of claimant on behalf of the Department of Labor on January 11, 2010. Director's Exhibit 9.

[9] Dr. Levinson, examined claimant on May 10, 2010, prepared a report dated October 11, 2010, and testified at a deposition on April 7, 2011. Employer's Exhibits 4, 7.

May 10, 2010 study has qualifying values.[10] Decision and Order at 6. In resolving the conflict in the evidence, the administrative law judge observed:

> [T]he technician for the test administered on May 10, 2010 noted the Claimant's effort on the test was "poor." Dr. Levinson, under whose aegis this test was administered, remarked that the test was "performed with less than maximal effort" and that the study "does not appear to indicate [the Claimant's] maximal pulmonary function capacities."

Id. at 7, *quoting* Employer's Exhibit 4. The administrative law judge concluded that the May 10, 2010 study is "invalid," based on claimant's "poor effort" and, thus, found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that claimant did not establish total disability, as the two arterial blood gas studies, dated February 17, 2010 and May 10, 2010, are non-qualifying. Decision and Order at 8; *see* Director's Exhibit 9; Employer's Exhibit 4. In addition, because there is no evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge determined that he is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Gibbons,[11] Talati and Levinson. Decision and Order at 8-12; *see* Director's Exhibits 9, 10; Claimant's Exhibit 1; Employer's Exhibits 4, 7. The administrative law judge noted that Dr. Gibbons has been claimant's treating physician for thirty years and found his testimony credible. Decision and Order at 13. However, she also noted:

---

[10] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] Dr. Gibbons testified that claimant had mild dyspnea while in his office and would be "huffing and puffing a little bit just from coming in from the parking lot and into the office, or he would be mildly dyspneic at rest when he was sitting there if he had time to rest afterwards." Claimant's Exhibit 1 at 11. Dr. Gibbons opined that claimant was totally disabled "[b]ecause if you have difficulty walking from your car to my examining room, I think it would be very difficult for you to be working on any type of lifting, bending, pulling, or walking." *Id*. at 14.

> Dr. Gibbons does not cite any medical tests or other objective data in support of his conclusion; rather, he reports only his personal observations that the Claimant is dyspneic on exertion and, at times, dyspneic at rest as well.

Id. Conversely, the administrative law judge found that Drs. Talati and Levinson[12] provided reasoned and documented opinions that claimant is not totally disabled, explaining their medical conclusions in light of the results of claimant's pulmonary function studies, the arterial blood gas studies and the physical examination findings. *Id*. The administrative law judge concluded that the "weight of Dr. Gibbons' opinion is not greater than the weight of the two well-documented opinions of Dr. Talati and Dr. Levinson." *Id*. Accordingly, the administrative law judge found that claimant did not establish total disability, based on the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Weighing all of the evidence together, the administrative law judge concluded that claimant did not prove a totally disabling respiratory or pulmonary impairment and that he is unable to invoke the amended Section 411(c)(4) presumption. *Id*.

As claimant does not identify any specific error committed by the administrative law judge in rendering her findings at 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Cox*, 791 F.2d at 447, 9 BLR at 2-48-49; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. With respect to 20 C.F.R. §718.204(b)(2)(iv), claimant generally asserts that Dr. Gibbons' opinion is sufficient to establish that he is totally disabled. Contrary to claimant's assertion, the administrative law judge acted within her discretion in finding that Dr. Gibbons' opinion was less credible, on the issue of total disability, for lack of documentation, in comparison to the opinions of Drs. Talati and Levinson, who specifically explained, based on objective test results, why claimant is not totally

[12] Dr. Talati opined that claimant gave "sub-optimal effort" during his January 11, 2010 pulmonary function study. Director's Exhibit 9. He indicated that the pulmonary function study showed mild restriction and that the arterial blood gas study results were "normal," showing oxygen improvement with exercise. *Id*. Dr. Talati opined that claimant is not totally disabled. *Id*. Dr. Levinson opined that claimant does not have any respiratory or pulmonary impairment. Employer's Exhibit 4. He specifically testified that claimant "performed with less than maximal effort" on the May 10, 2010 pulmonary function test and, therefore, opined that the test did not indicate claimant's maximum pulmonary function capacities. Employer's Exhibit 7. Dr. Levinson further testified that claimant's May 10, 2010 arterial blood gas study showed "excellent oxygenation." *Id*.

disabled. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; Decision and Order at 13.

The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and her overall determination that claimant does not have a totally disabling respiratory or pulmonary impairment.

Because claimant failed to establish either the existence of pneumoconiosis or total disability, we affirm the administrative law judge's finding that claimant did not demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Furthermore, as claimant did not establish a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant is not entitled to benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge