BRB No. 06-0511 BLA

JIMMY RAY PERDUE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P-F MINING COMPANY	)	
	)	DATE ISSUED: 11/28/2006
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 - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Jimmy Ray Perdue, Bluefield, West Virginia, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order - Rejection of Claim (04-BLA-6695) of Administrative Law Judge Edward Terhune Miller on a miner's subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Initially, the administrative law judge noted that the parties stipulated to the miner having "at least fifteen years of coal mine employment," Hearing Transcript at 30-31. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response to this appeal. The Director contends that a remand is required because the administrative law judge erred in his consideration of Dr. Gaziano's opinion pursuant to Section 718.204(b)(2)(iv).

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, 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).

---

[1]Claimant filed his present claim for benefits on March 8, 2002. Director's Exhibit 4. The miner's first claim for benefits, filed on April 23, 1996, was finally denied by a Department of Labor (DOL) claims examiner on September 18, 1996. Director's Exhibit 1. The miner's second claim for benefits, filed on October 30, 1997, was finally denied by a DOL claims examiner on April 7, 1998. Director's Exhibit 2.

[2]Claimant was unrepresented by counsel before the administrative law judge. The administrative law judge identified the issues in this case and gave claimant the opportunity to object to, and admit evidence, and to testify at the hearing. Hearing Transcript at 11-44. Therefore, we hold that the hearing was properly conducted. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

The instant claim, which is claimant's third claim, was filed on March 8, 2002. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) 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). Claimant's second claim was denied because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis.

The new x-ray evidence consists of three readings of two x-rays dated May 30, 2002 and June 23, 2004. Dr. Gaziano, a B reader,[3] interpreted the 2002 x-ray as positive for the existence of pneumoconiosis whereas Dr. Binns, a B reader and a Board-certified radiologist, found this x-ray to be negative for the existence of pneumoconiosis. Additionally, Dr. Castle, a B reader, interpreted the 2004 x-ray as negative for the existence of pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that claimant failed to establish the existence of pneumoconiosis because "[a] preponderance of negative readings by a dually qualified physician and by a B reader outweighs the positive x-ray interpretation by a B reader." Decision and Order at 4. We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the new x-ray evidence because it is supported by substantial evidence.[4] *See Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S.

[3]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[4]Additionally, the administrative law judge noted that the most recent x-ray, taken in 2004, was interpreted as negative for the existence of pneumoconiosis. The administrative law judge stated that because "pneumoconiosis is a progressive disease, there is also discretion to assign greater weight to the more recent evidence of record." Decision and Order at 4. The administrative law judge's statement that the progressive nature of pneumoconiosis is a reason to accord more weight to the most recent x-ray in this case is irrational because the 2004 x-ray was interpreted as negative, which is inconsistent with the view that pneumoconiosis may be a progressive disease. However, because the administrative law judge's Section 718.202(a)(1) finding is supported by substantial evidence, we deem harmless any error the administrative law judge may have

135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345-46 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy or autopsy evidence. Moreover, since there is no evidence of complicated pneumoconiosis and the instant case involves a living miner's claim filed on March 8, 2002, the administrative law judge properly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the new medical opinion evidence consisting of the opinions of Drs. Gaziano and Castle. Dr. Gaziano found the existence of coal workers' pneumoconiosis whereas Dr. Castle did not. Director's Exhibit 15; Employer's Exhibit 1. The administrative law judge stated that Dr. Gaziano "noted mild wheezing" on examination of claimant, "interpreted Claimant's chest x-ray as positive for pneumoconiosis," and performed pulmonary function and blood gas studies, which produced non-qualifying[5] values. Decision and Order at 5. In considering Dr. Castle's opinion, the administrative law judge stated that Dr. Castle determined that "claimant did not have significant radiographic change or physiologic findings from [the objective tests] sufficient to diagnose coal workers' pneumoconiosis" and that Dr. Castle "noted the absence of what he suggested was a typical mixed irreversible obstructive and restrictive impairment characteristic of coal workers' pneumoconiosis." *Id.* The administrative law judge found that Dr. Gaziano "has provided no reasoning or analysis that suggests any findings other than reliance on the positive x-ray reading." *Id.* at 6. Therefore, the administrative law judge determined that because Dr. Gaziano's opinion "lacks adequate reasoning and documentation, it does not establish the existence of pneumoconiosis under § 718.202(a)(4)." *Id.* In contrast, the administrative law judge found that Dr. Castle's opinion "is better reasoned and documented than Dr. Gaziano's" because "Dr. Castle provided at least some rationale in support of his conclusion." *Id.*

---

made in his consideration of the negative reading of the 2004 x-ray. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

An administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge permissibly found Dr. Castle's opinion to be better reasoned and documented than the opinion of Dr. Gaziano, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) based on the new medical opinion evidence.[6] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Maddaleni*, 14 BLR at 1-140; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-811 (1984).

Regarding total respiratory disability, the administrative law judge considered the newly submitted pulmonary function studies[7] and blood gas studies of record and properly found that claimant failed to demonstrate total respiratory disability pursuant to

---

[6]Employer notes that the Director, Office of Workers' Compensation Programs (the Director), has not challenged the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer, therefore, asserts if the Board affirms the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, then it should also affirm the denial of benefits. Employer's assertion is incorrect. Because claimant's second claim was denied based upon his failure to prove the existence of pneumoconiosis and total disability due to pneumoconiosis, claimant may also reach the merits of his case by demonstrating that the new evidence establishes total respiratory disability. *See* 20 C.F.R. §725.309(d); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[7]The administrative law judge noted that claimant also submitted a pulmonary function study dated May 8, 1993, but he properly declined to consider this study by stating that "[o]nly newly submitted evidence can form the basis for showing a change in an applicable condition of entitlement under § 725.309(d)." Decision and Order at 6-7 n.7; *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997).

Section 718.204(b)(2)(i) and (b)(2)(ii) inasmuch as none of the tests yielded qualifying values. *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Additionally, the administrative law judge properly found that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iii) inasmuch as the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) based on the new evidence.

The record contains two new medical opinions relevant to the issue of total disability at Section 718.204(b)(2)(iv). The administrative law judge considered these two new opinions by Drs. Gaziano and Castle. In his opinion, under cardiopulmonary diagnoses, Dr. Gaziano recorded "#1 coal workers' pneumoconiosis #2 Hypertensive cardiovascular disease." Director's Exhibit 15. Regarding the etiology of these cardiopulmonary diagnoses, Dr. Gaziano noted "#1 coal mining #2 – non occupational factors" and regarding impairment, Dr. Gaziano noted "unable to work in coal mines." *Id.* In answering the question regarding the extent to which the cardiopulmonary diagnoses contribute to claimant's impairment, Dr. Gaziano recorded "#1 mild impairment #2 moderate impairment." *Id.* In reviewing his opinion, the administrative law judge stated that "Dr. Gaziano opined that the Claimant was unable to return to his coal mining employment, although [this physician found] Claimant's pneumoconiosis only caused a mild impairment." Decision and Order at 7. The administrative law judge found that Dr. Gaziano's:

> report does not reflect more than a miniscule understanding of the nature and scope of Claimant's actual work history or the extent of any heavy labor involved.[8] He found that the Claimant's hypertensi[ve] cardiovascular disease caused a moderate impairment. It is unclear from Dr. Gaziano's report whether he found that the mild impairment caused by the Claimant's pulmonary condition is, in and of itself, total [sic] disabling. Subsection 718.204(b)(2)(iv) requires not simply a finding that the claimant cannot return [to] his prior employment in the coal mines, but a finding that the Claimant's pulmonary condition alone prevents such a return.

[8]Dr. Gaziano noted that claimant was an underground miner and "ran buggy [illegible] machine." Director's Exhibit 15. The administrative law judge stated that Dr. Gaziano's "brief entry regarding claimant's coal mine employment discloses neither the scope nor the extent of any heavy labor." Decision and Order at 5 n.3. Dr. Castle noted that claimant's last coal mine employment was as a "greaser," which involved heavy labor. Employer's Exhibit 1. Claimant testified that his last coal mine work as a "greaser" required heavy manual labor. Hearing Transcript at 28-29.

Id.

Conversely, the administrative law judge found Dr. Castle's opinion to be "unambiguous" because this physician opined that claimant's mild respiratory impairment "does not constitute a respiratory disability." *Id.* The administrative noted Dr. Castle's findings that claimant retains the respiratory capacity to perform his previous coal mine employment from a "purely pulmonary point of view" and that it is possible that claimant is disabled from his hypertensive cardiovascular disease which is unrelated to his coal mine employment. Employer's Exhibit 1. The administrative law judge found Dr. Castle's opinion to be "more persuasive" and concluded that the new medical opinion evidence fails to establish total respiratory disability. Decision and Order at 8. In doing so, the administrative law judge noted that "Dr. Castle's opinion is consistent with the objective evidence of record." *Id.* Additionally, the administrative law judge found Dr. Gaziano's opinion that claimant is totally disabled to be "ambiguous" because he referred to claimant's respiratory impairment as mild and because "[i]t is unclear to what extent Dr. Gaziano considered other nonpulmonary impairments." *Id.*

The Director contends that a remand is required because the administrative law judge erred in his consideration of Dr. Gaziano's opinion pursuant to Section 718.204(b)(2)(iv). First, the Director asserts that contrary to the administrative law judge's statement, it is irrelevant whether Dr. Gaziano understood the exertional requirements of claimant's last coal mine employment. In so arguing, the Director maintains that by finding that claimant is "unable to work in coal mines," Dr. Gaziano was of the opinion that claimant was unable to perform *any* type of coal mine work, regardless of whether it was sedentary or strenuous, and, therefore, that there was no need for this physician to consider the specific duties of claimant's last coal mine work. Second, the Director contends that in considering Dr. Gaziano's opinion, the administrative law judge should have focused on whether this physician "unambiguously concluded that [claimant] has a totally disabling respiratory impairment resulting from both pulmonary (pneumoconiosis) and non-pulmonary (hypertensive cardiovascular disease) causes." Director's Brief at 2. The Director notes that while the Act requires that a miner's disability be entirely pulmonary in nature, it does not require that it be entirely attributable to pulmonary diseases. The Director cites to Section 718.204(a)[9] as

[9]In pertinent part, 20 C.F.R. §718.204(a) states:

> Any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease

stating that "[a] pulmonary condition can combine with a non-pulmonary condition to result in a compensable pulmonary disability." *Id.* The Director, therefore, argues that the administrative law judge's finding that "[i]t is unclear from Dr. Gaziano's report whether he found that the mild impairment caused by the Claimant's pulmonary condition is, in and of itself, total [sic] disabling," is not affirmable.

For the reasons articulated by the Director, we agree that it is necessary to remand this case to the administrative law judge to reconsider Dr. Gaziano's opinion and reweigh the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv). As the Director states in his brief, if, on remand, the administrative law judge "finds Dr. Gaziano's opinion ambiguous regarding whether [this physician] diagnosed an entirely pulmonary disability," then the administrative law judge should remand this case to the district director to allow for the development of a new pulmonary evaluation addressing each element of entitlement, as required under Section 413(b) of the Act, 30 U.S.C. §923(b). *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994). If, after further evidentiary development, this case is again forwarded to the Office of Administrative Law Judges, then the administrative law judge must reconsider whether claimant has demonstrated that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d), in light of all the evidence developed since the denial of claimant's prior claim, including any evidence developed in conjunction with the new pulmonary evaluation by the Director. If claimant establishes a change in an applicable condition of entitlement, he is entitled to consideration of the merits of his claim, based on all the evidence of record.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

> causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge