BRB No. 10-0205 BLA

DONALD R. McINTOSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STURGEON MINING COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 11/09/2010
	)	
LIBERTY MUTUAL INSURANCE 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 of a Subsequent Claim – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Donald R. McIntosh, Beattyville, Kentucky, *pro se*.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order of a Subsequent Claim – Denial of Benefits (2006-BLA-6040) of Administrative Law Judge Larry S. Merck, with respect to a claim filed on November 1, 2005, 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).[1] After crediting claimant with "about eight years" of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Decision and Order at 7. The administrative law judge concluded, based on the newly submitted evidence, that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c), and, therefore, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

By letter, dated November 28, 2009, claimant notified the Board that he wanted to appeal the denial of benefits. Employer filed a response brief, urging affirmance of the administrative law judge's Decision and Order. Claimant subsequently submitted a letter, dated January 21, 2010, in which he described his previous coal mine employment and existing medical issues and asked the Board to award him benefits. Employer responded, arguing that the letter was untimely if it was meant as an appellate brief. In the alternative, employer objected to "the self serving statements and hearsay" and stated that it "presents no probative statement of how the [a]dministrative [l]aw [j]udge erred in the Decision and Order below." Employer's Response to Claimant's Letter at 2. The Director, Office of Workers' Compensation Programs (the Director), did not file a response.

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain

[1] Claimant filed his initial claim on May 12, 1997, which was denied by the district director on August 25, 1997, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action until he filed the present claim. Director's Exhibit 3.

claims.[2] *McIntosh v. Sturgeon Mining Co., Inc.*, BRB No. 10-0205 BLA (Sept. 13, 2010)(unpub. Order). The Director and employer have responded.

The Director states that there is no need to address the impact of Section 1556 on this case, because the administrative law judge found that claimant had "about eight years" of coal mine employment and claimant only alleged seven years of coal mine employment in his claim application. Director's Letter Brief at 2. Therefore, the Director asserts that claimant did not satisfy the pre-requisite fifteen years of coal mine employment necessary for invoking the statutory presumption of total disability due to pneumoconiosis. Employer concurs with the Director that the amendments do not apply because claimant did not establish or allege fifteen years of coal mine employment. We agree with the Director and employer, that Section 1556 has no impact on the resolution of the claim in this case, because claimant has not established or alleged that he has the fifteen years of qualifying coal mine employment necessary to invoke the statutory presumption set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence.[3] *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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.[4] 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).

[2] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

[3] Based upon our application of this standard of review, employer's arguments regarding claimant's letter, dated January 21, 2010, are rendered moot.

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In order to establish entitlement to benefits in a living miner's claim under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. 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*).

In addition, in this subsequent claim, claimant must establish 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 failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one element of entitlement to obtain a review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

I. 20 C.F.R. §718.202(a)(1)-(4)

In determining whether claimant established, based on the newly established evidence, the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the interpretations of two x-rays, dated January 5, 2006 and October 11, 2007, and the x-ray readings in claimant's treatment records. Dr. Wicker, who has no special radiological qualifications, interpreted the January 5, 2006 x-ray as negative for pneumoconiosis.[5] Director's Exhibit 13. Dr. Broudy, a B-reader, interpreted the October 11, 2007 x-ray as negative for pneumoconiosis. Director's Exhibit 39 at 70.

The administrative law judge accurately determined that these x-rays were negative for pneumoconiosis. Decision and Order at 11. The administrative law judge also permissibly gave little weight to the x-ray interpretations in claimant's treatment records because he determined that they were not taken for the purpose of diagnosing and classifying pneumoconiosis and did not reveal the presence of pneumoconiosis. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 11; Director's Exhibits 15, 16, 39. Therefore, we affirm the administrative law

[5] Dr. Barrett, a Board-certified radiologist and B-reader, interpreted this x-ray for quality purposes only. Director's Exhibit 14.

judge's conclusion that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6] Decision and Order at 11.

The administrative law judge also rationally determined that there was no autopsy or biopsy evidence at 20 C.F.R. §718.202(a)(2) and that none of the presumptions at 20 C.F.R. §718.202(a)(3) applied. Decision and Order at 11-12. Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3).

In determining whether pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Wicker, Broudy, and Jarboe and claimant's treatment records. Dr. Wicker examined claimant on January 5, 2006, at the request of the Department of Labor, and determined that claimant had no evidence of pneumoconiosis, based on a negative chest x-ray. Director's Exhibit 13. Dr. Wicker diagnosed chronic obstructive pulmonary disease (COPD), with some evidence of small airway disease and a suggestion of restrictive disease, based on the pulmonary function study. *Id*. In the section of Form CM-988 regarding the etiology of the diagnosed conditions, Dr. Wicker indicated, "chronic bronchitis is noted on the chest x-ray/COPD. Cigarette abuse is noted in [claimant's] history." *Id*.

Dr. Broudy examined claimant on October 11, 2007. Director's Exhibit 39. Dr. Broudy diagnosed obesity, with mild restrictive ventilatory defect, and chronic bronchitis due to cigarette smoking, but found no evidence of coal workers' pneumoconiosis. *Id*.

Dr. Jarboe prepared a report, dated January 10, 2009, based on a review of medical records, and determined that there was no evidence of clinical coal workers' pneumoconiosis. Director's Exhibit 39. Dr. Jarboe also found that "the most likely cause" of claimant's respiratory impairment was his significant smoking history and his obesity. *Id*.

The hospital and treatment records contain references to black lung or pneumoconiosis and statements that claimant has COPD. Director's Exhibits 15, 16, 39.

[6] Pursuant to 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).

In addition, in an interpretation of a CT scan dated June 19, 2008, Dr. Abadilla, found "scarring at the bases likely from coal workers' pneumoconiosis and a right lower lobe density that is likely also [due] to scarring." Director's Exhibit 39. Dr. Abadilla also stated that "scarring in the lung bases would be atypical for coal workers' pneumoconiosis." *Id*.

Upon considering the newly submitted medical opinions, the administrative law judge acted within his discretion in giving little weight to Dr. Wicker's and Dr. Broudy's respective conclusions, that claimant does not have clinical pneumoconiosis, because they were based only on negative x-ray interpretations and, thus, their opinions were not well-reasoned. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 14-15. With respect to the existence of legal pneumoconiosis, the administrative law judge rationally found that the opinions of Drs. Wicker and Broudy, that claimant's COPD/bronchitis is solely the result of cigarette smoking, are entitled to little weight, because they are conclusory and, therefore, unreasoned.[7] *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); Decision and Order at 14, 16. In addition, the administrative law judge acted within his discretion in granting full probative weight to Dr. Jarboe's opinion, that claimant does not have either clinical or legal pneumoconiosis, as it is supported by the objective evidence, and claimant's employment and smoking histories, and is adequately explained. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 18-19.

Regarding the newly submitted treatment records, we hold that the administrative law judge permissibly found that Dr. Abadilla's interpretation of the June 19, 2008 CT scan is equivocal, because she stated that the scarring at the base of claimant's lungs was both "likely from coal workers' pneumoconiosis" and "atypical for coal workers' pneumoconiosis." Director's Exhibit 39; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Additionally, the administrative law judge acted within his discretion in giving little weight to the remainder of claimant's hospitalization and treatment records at 20 C.F.R. §718.202(a)(4), because the references to black lung or

[7] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

pneumoconiosis are conclusory and none of the opinions relates claimant's COPD to his coal mine employment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 20.

In light of the administrative law judge's reasonable determination that Dr. Jarboe's opinion, that claimant does not have clinical or legal pneumoconiosis, is entitled to the greatest weight, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis, based on the newly submitted evidence, at 20 C.F.R. §718.202(a)(4). In addition, based on our affirmance of the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's determination, based on the newly submitted evidence considered as a whole, that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 20.

II. 20 C.F.R. §718.204(b)(2)(i)-(iv), (c)

In addressing the issue of whether claimant established the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge considered the newly submitted pulmonary function studies, blood gas studies, medical opinions and treatment records.

The pulmonary function studies and blood gas studies performed by Dr. Wicker on January 5, 2006, and Dr. Broudy on October 11, 2007, were all non-qualifying.[8] Director's Exhibits 13, 39. In addition, none of the pulmonary function studies or the blood gas studies in claimant's treatment records produced qualifying results. Director's Exhibits 15, 39. Therefore, the administrative law judge accurately determined that claimant did not establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 21-22. Further, the administrative law judge permissibly found that claimant did meet his burden at 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 22.

Regarding the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), Dr. Wicker opined that claimant's "[r]espiratory capacity appears to be adequate to perform

[8] 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).

his previous occupation in the coal [tipple]." Director's Exhibit 13. Dr. Broudy also determined that, based on the objective medical evidence, claimant retains the respiratory capacity to perform his previous coal mine employment or a similarly situated position. Director's Exhibit 39. Further, Dr. Jarboe concluded that claimant retains the respiratory capacity to perform his last coal mine employment, or a similar position, because claimant only has a mild impairment and he has no impairment of gas exchange. *Id*.

As none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment, we hold that the administrative law judge properly determined that claimant did not meet his burden at 20 C.F.R. §718.204(b)(2)(iv). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 23. Consequently, we affirm the administrative law judge's finding that, based on the newly submitted evidence, claimant did not establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2).

We also affirm the administrative law judge's determination that disability causation could not be established at 20 C.F.R. §718.204(c), in light of his findings at 20 C.F.R. §718.204(b)(2). Thus, we affirm the administrative law judge's conclusion that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3; s*ee Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order of a Subsequent Claim – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge