BRB No. 06-0348 BLA

JACKIE LEE PARSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOUR CORNERS CORPORATION	)	
	)	DATE ISSUED: 10/31/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6123) of Administrative Law Judge Edward Terhune Miller awarding benefits on a 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). The administrative law judge accepted the parties' stipulation to thirty years of coal mine employment.[1] Decision and Order at 3;

[1] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Hearing Transcript at 8. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2, 4. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 4-7; Director's Exhibit 1. Considering the record *de novo*, the administrative law judge found that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b)(2), (c)(1). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in failing to thoroughly review and address all of the medical opinion evidence in finding the existence of pneumoconiosis, total disability, and disability causation established. Claimant responds asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to employer's appeal.[3]

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. 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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. 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*).

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[2] Claimant's initial claim for benefits, filed on June 8, 1998, was denied by the district director on September 15, 1998 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed this claim on July 22, 2002. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment determination, and his findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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." 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 claimant did not establish the existence of pneumoconiosis or that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(holding under the former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three new medical opinions. Dr. Rasmussen diagnosed claimant with pneumoconiosis, Dr. Mullins stated that claimant had a "CX-ray consistent with coal dust exposure" from coal mine employment, and Dr. Hippensteel opined that claimant does not have pneumoconiosis, but suffers from impairments due solely to smoking. Director's Exhibit 14 at 4; Director's Exhibit 25 at 3-4; Claimant's Exhibit 2 at 3-4. The administrative law judge found that Dr. Rasmussen's opinion merited greater weight than Dr. Hippensteel's opinion, because it was supported by the preponderance of the better-qualified x-ray readings, which the administrative law judge had found supported a finding of pneumoconiosis. Decision and Order at 4-5, 7. The administrative law judge further determined that Dr. Mullins's diagnosis was "suggestive of pneumoconiosis . . . ." Decision and Order at 7. Based on this weighing of the evidence, the administrative law judge concluded that the newly submitted medical opinions established the existence of pneumoconiosis.

Employer contends that the administrative law judge erred in relying upon the radiographic evidence when weighing the medical opinion evidence. Employer's Brief at 5. We disagree. The administrative law judge properly evaluated the medical opinions and x-ray evidence together to determine whether the existence of pneumoconiosis was established. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). The administrative law judge permissibly found that Dr. Hippensteel's opinion merited less weight because it was based on the doctor's own negative x-ray reading, which the administrative law judge had found outweighed by the x-rays readings of better qualified physicians. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge determined that because the newly submitted x-ray and medical opinion evidence

established the existence of pneumoconiosis, claimant established a change in an applicable condition of entitlement. Decision and Order at 7; *see* 20 C.F.R. §725.309(d) *White*, 23 BLR at 1-3. Substantial evidence supports this finding, which we affirm.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), employer argues that the administrative law judge erred in finding that claimant is totally disabled because he did not consider Dr. Ranavaya's opinion. Employer's Brief at 6-7. Employer's contention lacks merit. The administrative law judge specifically addressed Dr. Ranavaya's 1998 opinion diagnosing claimant with a minimal impairment. Decision and Order at 9. The administrative law judge reasonably found Dr. Ranavaya's seven year-old assessment "less probative" than the more recent medical evidence. Decision and Order at 9; *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). We therefore reject employer's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4]

Pursuant to 20 C.F.R. §718.204(c)(1), employer contends that the administrative law judge erred in failing to discuss the opinions of Drs. Ranavaya and Mullins. This contention is without merit. On the issue of disability causation, the administrative law judge found that Dr. Rasmussen's opinion, that both smoking and pneumoconiosis contributed to claimant's totally disabling impairment, was more persuasive than Dr. Hippensteel's contrary opinion.[5] Dr. Ranavaya's 1998 opinion diagnosing a minimal impairment did not address whether pneumoconiosis contributed to claimant's total disability, and, as just discussed, the administrative law judge had already discounted the opinion because of its age. Similarly, the administrative law judge determined that Dr. Mullins's report, finding no impairment, was not "carefully reasoned" and was therefore outweighed. Decision and Order at 10. Finding no merit in employer's assertion that the administrative law judge overlooked relevant evidence as to the cause of claimant's total disability, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1).

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[4] Employer does not challenge the administrative law judge's additional findings that all of the contrary, probative evidence weighed together established that claimant is totally disabled from performing the heavy labor required by his job as a bridge operator. Decision and Order at 3, 9-10. Those findings are therefore affirmed. *Skrack*, 6 BLR at 1-711.

[5] The administrative law judge's credibility determination with respect to the opinion of Dr. Hippensteel is unchallenged on appeal and is therefore affirmed. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge