BRB No. 09-0362 BLA

R.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIPESTONE CREEK MINING COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 10/26/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

R.W., Sesser, Illinois, *pro se*.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5653) of Administrative Law Judge Jeffrey Tureck denying 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). This case involves a subsequent claim filed on May 23, 2005.[1] After crediting claimant with approximately

[1] Claimant initially filed a claim for benefits on April 10, 1989. Director's Exhibit 1. The district director denied benefits on September 19, 1989, because claimant did not establish any of the elements of entitlement. *Id.* On November 16, 1989, claimant requested a sixty day extension in which to file a request for a hearing. *Id.* The district director granted the extension on November 16, 1989. *Id.* However, by letter dated October 19, 1990, the district director advised the parties that, because the Department of

twelve 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)(1)-(4). The administrative law judge, therefore, found that the applicable condition of entitlement had not changed since the date upon which the denial of claimant's prior claim became final. 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.[3] 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 to be whether the Decision and Order below is supported by substantial evidence. *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. 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 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

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Labor had not received any communication from claimant, his 1989 claim was deemed abandoned and the denial of his 1989 claim was final. *Id.*

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

[3] Claimant specifically contends that the hearing was "very unfair" because he was not represented by counsel. Claimant's Brief at 2. At the hearing, the administrative law judge informed claimant of his right to be represented by counsel of his choice, at no cost to him. Hearing Transcript at 5. When asked whether he wanted to proceed without an attorney, claimant replied in the affirmative. *Id.* at 5-6. Because the administrative law judge informed claimant that he had a right to representation and that he would suffer no economic loss as a result of representation, and claimant chose to proceed without counsel, we reject claimant's contention that he was not provided with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304, 1-307 (1984).

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*).

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 he did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis and he denied the claim, without considering whether the new evidence established total disability, the other element of entitlement that was decided against claimant previously. 20 C.F.R. §725.309(d)(2); Director's Exhibit 1. The administrative law judge's oversight is harmless, as the record, in its entirety, contains no evidence that claimant has pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Without proof of pneumoconiosis, claimant cannot establish his entitlement to benefits.

Pneumoconiosis

Section 718.202(a)(1)

The administrative law judge correctly found that there are no new positive x-ray interpretations in the record.[4] Decision and Order at 3. The x-ray evidence submitted in

[4] The record contains five interpretations of four new x-rays taken on June 10, 2004, August 15, 2005, May 8, 2006, and September 26, 2007.

Dr. Wiot, a B reader and Board-certified radiologist, and Dr. Burr, a Board-certified radiologist, interpreted claimant's May 8, 2006 x-ray as negative for pneumoconiosis. Director's Exhibits 15, 24. Dr. Gaziano interpreted this x-ray for quality purposes only. Director's Exhibit 15. Dr. Wiot also interpreted an August 15, 2005 x-ray and a September 26, 2007 x-ray as negative for pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 8.

connection with claimant's prior claim was uniformly negative.[5] Consequently, we affirm the administrative law judge's finding that the 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, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 3. Furthermore, claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[6]

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[7] 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 3. The record contains the new medical opinions of Drs. Pineda, Repsher, and Tuteur. Dr. Pineda opined that claimant does not have any evidence of coal workers' pneumoconiosis. Director's Exhibit 15. Dr. Repsher opined that there is no evidence of coal workers' pneumoconiosis or any other lung disease caused by claimant's coal dust exposure. Director's Exhibit 27; Employer's Exhibit 10 at 29. Dr. Tuteur opined that claimant does

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Claimant's hospitalization records include Dr. Sodd's interpretation of a June 10, 2004 x-ray. Dr. Sodd's interpretation of this x-ray makes no mention of pneumoconiosis. Employer's Exhibit 2.

[5] Dr. Cole, a B reader and Board-certified radiologist, interpreted a July 10, 1989 x-ray as negative for pneumoconiosis. Director's Exhibit 1. Dr. Martin, a physician without any special radiological qualifications, also interpreted this x-ray as negative for pneumoconiosis. *Id.*

[6] 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. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[7] "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).

not suffer from coal workers' pneumoconiosis or any other coal mine dust-related disease process. Employer's Exhibits 5, 9 at 55. In the sole medical report that was submitted in claimant's prior claim, Dr. Rao diagnosed idiopathic hypertension. Director's Exhibit 1. Dr. Rao did not diagnose coal workers' pneumoconiosis or any other lung disease related to coal dust exposure. *Id.* 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).

Although the administrative law judge did not consider the previously submitted evidence, this evidence is insufficient as a matter of law to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 1. Because the medical evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order denying 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