BRB No. 11-0233 BLA

BRADLEY JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEATHERWOOD PROCESSING COMPANY c/o JAMES RIVER SERVICE COMPANY	)	DATE ISSUED: 10/28/2011
	)	
and	)	
	)	
JAMES RIVER COAL 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Richard A. Seid (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 the Decision and Order Denying Benefits (09-BLA-5321) of Administrative Law Judge John P. Sellers, III (the administrative law judge) on a subsequent claim[1] filed on April 15, 2008, 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). The administrative law judge credited claimant with at least forty years of coal mine employment and found that the medical evidence, developed since the denial of claimant's previous claim, failed to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b).[2] The administrative law judge found, therefore, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the new x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Claimant further contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide him with a complete, credible pulmonary evaluation, because the administrative law judge found that Dr. Rasmussen's opinion was unreasoned. Employer responds, urging affirmance of the denial of benefits. In response, the Director contends that claimant was provided with a complete pulmonary evaluation.

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

[1] Claimant filed his previous claim for benefits on January 14, 2003. That claim was finally denied on November 27, 2006.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3] The record indicates that claimant's last coal mine employment occurred in Tennessee. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). The administrative law judge found that claimant's prior claim was denied for failure to establish the existence of pneumoconiosis or total respiratory disability. Consequently, he found that to obtain review of the merits of the current claim, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the five readings of three new x-rays. The administrative law judge correctly found that there were two positive readings for the existence of pneumoconiosis, and three negative readings. The administrative law judge noted that a dually-qualified radiologist and a B reader found x-rays to be positive for the existence of pneumoconiosis, while two dually-qualified radiologists and a B reader found x-rays to be negative. Director's Exhibits 11, 13; Employer's Exhibits 1, 2, 3.

Specifically, the administrative law judge found that the February 18, 2008 x-ray was read as positive for the existence of pneumoconiosis by Dr. Miller, a dually-qualified radiologist and as negative by Dr. Kendall, a dually-qualified radiologist.[4] Director's Exhibit 11; Employer's Exhibit 2. Regarding the May 28, 2008 x-ray, the administrative law judge found that it was read as positive for pneumoconiosis by Dr. Rasmussen, a B

[4] A dually-qualified reader is both a B reader and a Board-certified radiologist. A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

reader, but as negative by Dr. Wiot, a dually-qualified radiologist.[5] Employer's Exhibit 1. Further, the administrative law judge found that the August 20, 2009 x-ray was read as negative by Dr. Jarboe, a B reader.

In conclusion, the administrative law judge properly found that, "[c]onsidered as a whole . . . the weight of the recent x-ray evidence fail[ed] to establish the existence of pneumoconiosis." *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; Decision and Order at 13. Claimant's argument that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is, therefore, rejected. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by the new x-ray evidence at Section 718.202(a)(1), and that claimant could not, therefore, establish a change in an applicable condition of entitlement at Section 718.309(d), based on a finding of pneumoconiosis.

Pursuant to Section 718.204(b)(2)(iv), contrary to claimant's assertion, the administrative law judge properly determined that the opinions of Drs. Augustine, Rasmussen and Jarboe did not establish total respiratory disability, because none of the physicians opined that claimant was totally disabled from a respiratory or pulmonary standpoint. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); Decision and Order at 15; Director's Exhibits 12, 13; Employer's Exhibit 3. We also reject claimant's general argument that, because pneumoconiosis is a progressive and irreversible disease, it should be concluded that claimant is totally disabled. *See White*, 23 BLR at 1-7 n.8; Claimant's Brief at 5-6. Therefore, we affirm the administrative law judge's finding that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv) and, therefore, a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Finally, claimant contends that the Director violated his statutory obligation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 21-22. We disagree. The Director is only required to provide a miner with a

[5] The administrative law judge also found that the May 28, 2009 x-ray was read for quality only by Dr. Barrett, a Board-certified radiologist and B reader. Director's Exhibit 13.

complete pulmonary evaluation, not a dispositive one. The Department of Labor meets its statutory obligation under 30 U.S.C. §923(b) when it pays for an examining physician who performs all of the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), addresses every element of entitlement, and specifically links each conclusion in his medical opinion to those medical tests. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *Newman v. Director, OWCP*, 745 F.2d 1162, 1168 (8th Cir. 1984). As Dr. Rasmussen performed all necessary testing and addressed every element of entitlement, Director's Exhibit 13, the Director's statutory obligation in this case was discharged, and we reject claimant's contention.

Consequently, we affirm the administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) and 718.204(b), and his consequent finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).[6]

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

[6] Because claimant has not established total respiratory disability, he is not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis. 30 U.S.C. §921(c)(4).