BRB No. 06-0128 BLA

TOMMIE T. SAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES,	)	
INCORPORATED	)	DATE ISSUED: 09/19/2006
	)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Robert D. Whitfield, Chicago, Illinois, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5669) of Administrative Law Judge Robert D. Kaplan 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).[1] This case involves a subsequent claim filed on December 7,

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

2001.[2] After crediting claimant with thirty-four years and one month of coal mine

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on December 26, 1973. Director's Exhibit 1. In a Decision and Order dated March 18, 1981, Administrative Law Judge James R. Howard credited claimant with thirty-nine years of coal mine employment and found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). *Id.* Judge Howard further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b). *Id.* Accordingly, Judge Howard awarded benefits. *Id.* By Decision and Order dated October 31, 1985, the Board vacated Judge Howard's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). *Sams v. Jim Walter Resources, Inc.*, BRB No. 81-0709 BLA (Oct. 31, 1985) (unpublished). The Board also vacated Judge Howard's findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) and remanded the case for further consideration. *Id.* In a Decision and Order on Remand dated October 10, 1986, Administrative law Judge Parlen L. McKenna found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Director's Exhibit 1. Judge McKenna also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. *Id.* Accordingly, Judge McKenna denied benefits. *Id.* By Decision and Order dated August 25, 1988, the Board affirmed Judge McKenna's denial of benefits. *Sams v. Jim Walter Resources, Inc.*, BRB No. 86-2856 BLA (Aug. 25, 1988) (unpublished). On January 16, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the Board's Decision and Order denying benefits. *Sams v. Jim Walter Resources, Inc.*, No. 88-7655 (11th Cir. Jan. 16, 1990) (unpublished). There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on March 16, 1994. Director's Exhibit 1. The district director denied benefits on July 13, 1994 and August 26, 1994. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a third claim on May 28, 1996. Director's Exhibit 1. In a Decision and Order dated July 19, 1999, Administrative Law Judge Gerald M. Tierney found, *inter alia*, that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.*; *see* 20 C.F.R. §§718.202, 718.204 (2000). There is no indication that claimant took any further action in regard to his 1996 claim.

Claimant filed a fourth claim on December 7, 2001. Director's Exhibit 3.

employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the newly submitted pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). Weighing all of the newly submitted evidence together, the administrative law judge found that it was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1996 claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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.[3]

The Board 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).

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[4] has changed since the date upon which the order denying the prior claim became final. *Id.* Administrative Law Judge Gerald M. Tierney

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[3]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

denied claimant's 1996 claim because he found that the evidence was insufficient to establish any of the elements of entitlement. *See* Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] We disagree. The record contains newly submitted medical opinions from Drs. Hasson, Goldstein and Fino. Dr. Hasson found no evidence of coal workers' pneumoconiosis. Director's Exhibit 11. Although Dr. Hasson also diagnosed hypertensive cardiovascular disease and arteriosclerotic cardiovascular disease, he did not attribute these diseases to claimant's coal dust exposure. *Id.* Consequently, these diagnoses do not constitute a finding of "legal" pneumoconiosis. 20 C.F.R. §718.201(a)(2). The administrative law judge, therefore, properly found that Dr. Hasson's opinion does not support a finding of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4). Decision and Order at 8.

Dr. Goldstein opined that claimant suffered from dyspnea attributable to his "body stature" and "probably cardiac disease." Employer's Exhibit 1. Dr. Goldstein did not diagnose coal workers' pneumoconiosis or any chronic lung disease or impairment arising out of coal mine employment. Dr. Fino found that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Fino further opined that there was no evidence that claimant suffered from a coal mine dust related pulmonary condition. *Id.* The administrative law judge, therefore, properly found that the opinions of Drs. Goldstein and Fino are also insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] Because there is no newly submitted medical opinion evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[5]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) is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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).

[6]Claimant's reliance upon 20 C.F.R. §718.203(b) to provide a rebuttable presumption that his respiratory impairment is attributable to his coal dust exposure is misplaced. Section 718.203 addresses the cause of a miner's pneumoconiosis. It is only relevant after a miner has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202.

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] As previously noted, the record contains newly submitted medical opinions from Drs. Hasson, Goldstein and Fino. Claimant specifically argues that the administrative law judge erred in finding Dr. Hasson's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Hasson opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 11. In considering Dr. Hasson's opinion, the administrative law judge stated:

> Although the March 7, 2002 pulmonary function study is qualifying under the regulations, Dr. Hasson considered the result of the test along with his physical examination of Claimant and the results of the arterial blood gas study and found that the medical evidence only supported an opinion that Claimant had a "moderate" impairment. Consequently, I infer that Dr. Hasson was of the opinion that Claimant was not totally disabled. I find that Dr. Hasson's opinion that Claimant was not totally disabled is reasoned and documented.

Decision and Order at 12.

The administrative law judge erred in finding that Dr. Hasson's opinion supported a finding that claimant was not totally disabled. A physician need not phrase his conclusion in terms of "total disability" in order to establish a totally disabling respiratory or pulmonary impairment. *Black Diamond Coal Mining Co. v. Benefits Review* Board, 758 F.2d 1532, 7 BLR 2-109 (11th Cir. 1985). Dr. Hasson diagnosed a moderate pulmonary impairment, an assessment which could support a finding of total disability, depending upon the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.,* 13 BLR 1-46 (1986)(*en banc*); Director's Exhibit 11. Thus, the administrative law judge should have determined the nature of claimant's usual coal mine work and compared the exertional requirements of that work with Dr.

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[7]Because no party challenges the administrative law judge's finding that the newly submitted pulmonary function study evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), this finding is affirmed. *Skrack*, *supra*. We similarly affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). *Id.*

Hasson's opinion as to claimant's work capability.[8] Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration. In light of this finding, we also vacate the administrative law judge's finding that claimant failed to establish that an applicable condition of entitlement has changed since the denial of his 1996 claim. 20 C.F.R. §725.309.

On remand, should the administrative law judge find the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*). Should the administrative law judge find the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Under these circumstances, the administrative law judge is required to consider claimant's 2001 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[8]Before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, he must identify the employment that is or was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is the miner's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge