BRB No. 06-0358 BLA

JAMES E. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STOKER MINING COMPANY	)	DATE ISSUED: 09/25/2006
	)	
and	)	
	)	
OLD REPUBLIC 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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James E. Moore, Printer, Kentucky, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel, the Decision and Order – Denying Benefits (04-BLA-5706) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] Claimant's initial claim for benefits was filed on October 4, 1984, which was denied by Administrative Law Judge W. Ralph Musgrove on December 14, 1988, finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Based on claimant's March 12, 2002 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. He credited claimant with nine years and seven months of coal mine employment, based on the parties' stipulation that claimant was employed from July 1973 through February 1983.[2] The administrative law judge found the evidence developed since the prior denial insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to establish the element of entitlement previously adjudicated against claimant. 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

Claimant appealed the denial to the Board, which vacated the administrative law judge's denial of benefits and remanded the case for further consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Moore v. Turner-Elkhorn Mining Co.*, BRB No. 88-4386 BLA (Aug. 29, 1990)(unpub.); Director's Exhibit 1. On remand, Judge Musgrove again found the medical opinion evidence insufficient to establish the existence of pneumoconiosis and, consequently, denied benefits. Director's Exhibit 1. By Decision and Order dated November 19, 1992, the Board affirmed the administrative law judge's finding that the medical evidence failed to establish the existence of pneumoconiosis, and, thus, claimant failed to establish entitlement to benefits. *Moore v. Turner-Elkhorn Mining Co.*, BRB No. 91-0961 BLA (Nov. 19, 1992)(unpub.); Director's Exhibit 1. Claimant filed six motions for reconsideration of the Board's November 1992 Decision and Order, each of which was denied by the Board. By Order dated March 9, 1998, the Board held that claimant's February 19, 1998 letter seeking appeal of the denial was an appeal to the United States Court of Appeals for the Sixth Circuit. *Moore v. Turner-Elkhorn Mining Co.*, BRB No. 91-0961 BLA (Mar. 9, 1998)(Order)(unpub.). Consequently, the case was forwarded to the Sixth Circuit, which denied claimant's appeal for lack of jurisdiction. *Moore v. Turner-Elkhorn Mining Co.*, No. 98-3248 (6th Cir. June 22, 1998)(unpub.); Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. 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, 1-202 (1989)(*en banc*).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *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 failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge noted accurately that none of the readings of the newly submitted x-rays of record was positive for the existence of pneumoconiosis.[3] Decision and Order at 7, 10; Director's Exhibits 12, 13;

[3] The record contains Dr. Tweel's "0/1 q" reading of the January 29, 2003 x-ray and Dr. Barrett's interpretation of this film provided for quality purposes only. Director's Exhibits 12, 13. In addition, the record contains Dr. Dahhan's negative interpretation of the May 3, 2003 film and Dr. Broudy's negative interpretation of the January 24, 2005 film. Employer's Exhibits 1, 3.

Employer's Exhibits 1, 3. As the administrative law judge correctly noted, the record contains four readings of three x-ray films, of which three were interpreted as negative for the existence of pneumoconiosis and the fourth interpretation was provided only for purposes of establishing the quality of the January 29, 2003 film.[4] We therefore affirm the administrative law judge's finding that the x-ray evidence fails to support a finding of pneumoconiosis pursuant Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (a)(3), the administrative law judge accurately determined that there were no biopsy results to be considered, and that none of the presumptions listed at Section 718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. Decision and Order at 10. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

Moreover, we hold that substantial evidence supports the administrative law judge's finding that based on his consideration of the opinions of Drs. Tweel, Broudy, and Dahhan, the "preponderance of this evidence does not meet Claimant's burden of establishing pneumoconiosis" pursuant to Section 718.202(a)(4). Decision and Order at 11. Specifically, the administrative law judge was within his discretion in finding that the opinion of Dr. Tweel, stating that "no definite coal workers' pneumoconiosis, but suggestion in right lower lobe," is equivocal and, thus, not supportive of a finding that claimant suffers from pneumoconiosis. Decision and Order at 11; Director's Exhibit 12; *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In addition, the administrative law judge reasonably found that the opinions of Dr. Dahhan, that there is no evidence of occupational pneumoconiosis or other occupationally acquired lung disease, and Dr. Broudy, that there is no evidence that claimant has coal workers' pneumoconiosis, silicosis, or any chronic lung disease caused by coal dust exposure, weigh against a finding of pneumoconiosis. Decision and Order at 11; Employer's Exhibits 1, 3, 4; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

As the administrative law judge permissibly discounted the opinion of Dr. Tweel, the only medical opinion diagnosing pneumoconiosis, we affirm the administrative law

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[4] The record also contains a negative reading of the January 29, 2003 x-ray by Dr. Wiot. Employer's Exhibit 2. However, the administrative law judge found that this reading exceeds the limitations for submission of evidence pursuant to 20 C.F.R. §725.414(a)(2)(i) and, thus, held that it would not be considered. Decision and Order at 6.

judge's' finding that the preponderance of the evidence does not meet claimant's burden of establishing the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In reviewing the administrative law judge's Decision and Order – Denying Benefits, the Board has considered the contentions raised in claimant's January 21, 2006 letter. However, we find no merit in claimant's contentions which warrant vacating the administrative law judge's denial of benefits.[5] In his letter of appeal, claimant challenges the validity of the objective studies administered by Drs. Dahhan and Broudy. Because claimant bears the burden of establishing entitlement to benefits under Part 718, *see Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988) (claimant bears the burden of proving his entitlement under the applicable regulations, even where employer offers no defense), we need not address the specifics of claimant's allegations regarding the opinions of Drs. Dahhan and Broudy because even if these reports and accompanying objective studies were discredited, claimant has not submitted substantive evidence supportive of his burden of establishing entitlement to benefits. Therefore, error, if any, in the weighing of these opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Moreover, we hold that claimant's contention that he was not provided time to submit evidence lacks merit. A review of the record, as well as the hearing transcript, does not indicate that claimant sought additional time to submit substantive evidence. Rather, at the hearing claimant sought to again argue the validity of the medical opinion evidence. The administrative law judge allowed claimant the opportunity to object to employer's evidence, but stated that if claimant wished to argue about the weight to be accorded the medical evidence, he should do so in his post-hearing brief. Hearing Transcript at 19-20. Because claimant does not address any specific, substantive evidence which he intended to develop, or that the administrative law judge declined to permit him to develop, we decline to set aside the administrative law judge's denial of benefits to allow for further development of the evidence.

As the administrative law judge's finding that the evidence submitted since the prior denial did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), is supported by substantial evidence and is in accordance with law, claimant

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[5] We reject claimant's contention that employer's counsel used Department of Labor letterhead in its communications with claimant. Rather, as explained by the district director in a letter dated December 5, 2002, Director's Exhibit 21, and also by the administrative law judge, in a letter dated February 8, 2005, employer's counsel, in captioning the case, set forth the office in the department which had jurisdiction of the claim.

has not established a change in the applicable condition of entitlement previously adjudicated against claimant. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18. Consequently, we affirm the denial of benefits in this subsequent claim.

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