BRB No. 08-0193 BLA

R.G.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 09/29/2008
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

R.G.R., Vansant, Virginia, *pro se*.[1]

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5350) of Administrative Law Judge Linda S. Chapman 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

[1] Brenda Yates, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

subsequent claim filed on January 30, 2006.[2] After crediting claimant with 33.16 years of coal mine employment,[3] 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 none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 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. 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 living miner's claim, 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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[2] Claimant initially filed a claim for benefits on February 17, 1995. Director's Exhibit 1. In a Decision and Order dated April 28, 1997, Administrative Law Judge Robert G. Mahony found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Mahony denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Mahony's denial of benefits. *[R.R.] v. Island Creek Coal Co.*, BRB No. 97-1195 BLA (Apr. 8, 1998) (unpub.). Claimant subsequently filed several requests for modification, all of which were denied because of claimant's failure to establish the existence of pneumoconiosis. The most recent denial was in the form of a Proposed Decision and Order issued by the district director on March 25, 2004. *Id.* There is no indication that claimant took any further action in regard to his 1995 claim.

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 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*).

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*).

Section 725.309

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 miner's prior claim was denied because he did not establish that he suffered from pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he suffers from pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Section 718.202(a)(1)

The administrative law judge initially addressed whether the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered nine x-ray interpretations of five x-rays taken on March 21, 2006, July 25, 2006, November 7, 2006, January 18, 2007, and March 28, 2007. The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10-11.

While Dr. Forehand, a B reader, interpreted the March 21, 2006 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Wiot, a B reader and Board-certified radiologist interpreted the same x-ray as negative for pneumoconiosis.[4] Director's Exhibit 16. The administrative law judge acted within her discretion in crediting Dr. Wiot's negative interpretation of the March 21, 2006 x-ray, over Dr. Forehand's positive interpretation, based upon Dr. Wiot's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 11. The administrative law judge, therefore, permissibly found that this x-ray was negative for pneumoconiosis. *Id.*

[4] Dr. Barrett, a B reader and Board-certified radiologist, interpreted the March 21, 2006 x-ray for quality purposes only. Director's Exhibit 15.

Dr. Alexander, a B reader and Board-certified radiologist, interpreted the July 25, 2006 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, and Dr. Meyer, an equally qualified physician, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 8. Because equally qualified physicians interpreted the July 25, 2006 x-ray as both positive and negative for pneumoconiosis, the administrative law judge properly found that the interpretations of this x-ray were "in equipoise," and that this x-ray did not support a finding of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 12.

While Dr. Alexander, a B reader and Board-certified radiologist, interpreted the November 7, 2006 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, Dr. Castle, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge acted within her discretion in crediting Dr. Alexander's positive interpretation of the November 7, 2006 x-ray, over Dr. Castle's negative interpretation, based upon Dr. Alexander's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 12. The administrative law judge, therefore, permissibly found that this x-ray was positive for pneumoconiosis. *Id.*

The two most recent x-rays of record, taken on November 18, 2007 and March 28, 2007, were interpreted as negative for pneumoconiosis.[5] The administrative law judge, therefore, properly found that these x-rays were negative for pneumoconiosis. Decision and Order at 12.

Considering the new x-rays both individually and as a group, the administrative law judge found that they did not establish the existence of pneumoconiosis:

> Considering the x-rays one by one, there is only one positive x-ray, the interpretation of the November 7, 2006 x-ray by Dr. Alexander. However, the x-rays performed both before and after do not establish pneumoconiosis. Considering the x-ray interpretations as a group, there are two positive interpretations by dually qualified physicians, one positive interpretation by a B reader, two negative interpretations by B readers, and one reading with no findings of pneumoconiosis. At best, considered as a

[5] Dr. Hippensteel, a B reader, interpreted claimant's January 18, 2007 x-ray as negative for pneumoconiosis, Employer's Exhibit 2, and Dr. McReynolds, a physician with no special radiological qualifications, interpreted claimant's March 28, 2007 x-ray, taken during a hospitalization, as showing "a normal chest with old granulomatous disease." Employer's Exhibit 5.

group, I find that these interpretations are equivocal, and thus not sufficient to establish the existence of pneumoconiosis.

Decision and Order at 12.

In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did 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 12. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[6] *Id.*

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).

In considering whether the new medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge reviewed the reports of Drs. Forehand, Castle, and Hippensteel. The administrative law judge permissibly found that Dr. Forehand's diagnosis of coal workers' pneumoconiosis was not well

[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 also 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).

reasoned because it was based in part upon a positive x-ray interpretation that was called into question by the administrative law judge's earlier finding that the x-ray evidence did not support a finding of pneumoconiosis.[8] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 12; Director's Exhibit 13; Employer's Exhibit 4.

The administrative law judge properly found that neither the opinions of Drs. Castle and Hippensteel,[9] nor claimant's treatment and hospitalization records,[10] supported a finding of clinical pneumoconiosis. Decision and Order at 12-13; Claimant's Exhibits 5, 7; Employer's Exhibits 1, 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *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).

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[8] In addition, as noted above, the administrative law judge permissibly found that the March 21, 2006 x-ray that Dr. Forehand interpreted as positive for pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Forehand's opinion. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

[9] Dr. Castle opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Hippensteel opined that there was insufficient evidence to make a diagnosis of coal workers' pneumoconiosis. Employer's Exhibits 2, 6 at 18.

[10] The record contains Dr. Robinette's treatment notes. Although Dr. Robinette's notes from October 3, 2006 include a diagnosis of coal workers' pneumoconiosis, the administrative law judge properly found that Dr. Robinette's opinion was not sufficiently reasoned because the doctor "did not include any objective findings to support [his] diagnosis of pneumoconiosis." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155; (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 12; Claimant's Exhibit 7.

Claimant's hospitalization records contain a discharge summary completed by Dr. Patel on March 29, 2007. Dr. Patel's final diagnoses included coal workers' pneumoconiosis. Claimant's Exhibit 5. However, because Dr. Patel provided no explanation for his diagnosis, other than history, the administrative law judge properly found that the doctor's diagnosis was not sufficiently reasoned. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

The administrative law judge next considered whether Dr. Forehand's opinion supported a finding of legal pneumoconiosis. During his April 16, 2007 deposition, Dr. Forehand testified that claimant suffered from "legal pneumoconiosis" based upon Dr. Forehand's finding of an "obstructive ventilatory pattern." Employer's Exhibit 4 at 6. Dr. Forehand opined that claimant's obstructive airway disease was due to both smoking and coal dust exposure. *Id.* at 20-22. Dr. Forehand's opinion, if credited, could support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). However, the administrative law judge discredited Dr. Forehand's opinion because she found that the doctor did not explain the basis for his conclusion that claimant's obstructive airway disease was due in part to his coal dust exposure. Contrary to the administrative law judge's characterization, Dr. Forehand provided an explanation for his opinion, stating that his conclusion regarding the relative contributions of claimant's cigarette smoking and coal dust exposure to claimant's obstructive airway disease was based upon the timeline of these two exposures. Dr. Forehand noted that claimant's cigarette smoking and coal dust exposure began at approximately the same time, when claimant was twenty years old. Employer's Exhibit 4 at 21. Although claimant stopped smoking twenty years later, Dr. Forehand noted that claimant continued in coal mine employment for an additional nineteen years.[11] *Id.* After noting that he could not determine which factor, cigarette smoking or coal dust exposure, was more important in contributing to claimant's airway disease, Dr. Forehand stated:

> [I]f [claimant's] early problems were due to cigarette smoking and he started having airway disease early on from cigarette smoking then you can imagine what that coal mine dust was doing to that already injured lung. I mean if he was susceptible to coal dust . . . and he had inflamed airways then you put coal dust on top of that for 38 years and you know that's aggravating whatever lung disease was already there.

Employer's Exhibit 4 at 21-22.

Dr. Forehand concluded that:

> [These] two risk factors started at the same time and it played out until 1994. So I don't see the logic of trying to say, well, this is all cigarette smoke. I do in some cases but in this case I don't. I didn't have any information to do that.

[11] Dr. Forehand noted further that claimant's coal mine employment was "of interest" because it began in 1956, before dust controls were mandated in the mines, and because part of claimant's work was at the mine face. Employer's Exhibit 4 at 7.

Id. at 22.

Substantial evidence does not support the administrative law judge's finding that Dr. Forehand did not provide any explanation for his opinion that claimant's obstructive airway disease was due in part to his coal dust exposure. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Consequently, we must vacate the administrative law judge's finding that the new medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration by the administrative law judge. On remand, when reconsidering whether the new medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[12] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the new medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she must weigh all of the relevant new evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the new evidence establishes the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2006 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's 1995 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[12] Drs. Castle and Hippensteel opined that claimant's airway obstruction was unrelated to his coal mine employment, but was due to smoking and possible asthma. Employer's Exhibits 1, 2.

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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge