BRB No. 11-0180 BLA

JIMMIE R. ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROSE ANN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 09/21/2011
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Jimmie R. Robinson, Pikeville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2008-BLA-05041) of Administrative Law Judge Alan L. Bergstrom

on a subsequent claim filed on September 29, 2005,[1] 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 found that claimant established 7.5 years of coal mine employment, but found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant failed, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Benefits were, accordingly, denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

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 Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[2] 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, a claimant must establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that pneumoconiosis is totally disabling. 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

[1] Claimant filed his first claim for benefits on July 13, 1976. The claim was denied on January 22, 1980, for failure to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, or that pneumoconiosis was totally disabling. Director's Exhibit 1; *see* 20 C.F.R. §§718.202, 718.203, 718.204.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 7. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit to this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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, that pneumoconiosis arose out of coal mine employment, or that pneumoconiosis was totally disabling. Director's Exhibit 1-125. Consequently, in order to obtain a review of the merits of this claim, claimant had to submit new evidence establishing, as a threshold matter, the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Length of Coal Mine Employment

In finding that claimant established only 7.5 years of coal mine employment, the administrative law judge credited claimant's Social Security Earnings record in light of the conflicting evidence of record on the issue. The administrative law judge acknowledged that claimant stated that he had sixteen years of coal mine employment on his application for benefits, but found that claimant estimated that he had twenty years of coal mine employment on deposition. Further, the administrative law judge noted that claimant reported twenty-six years of coal mine employment to Dr. Dahhan, but reported only fourteen years to Dr. Broudy. In light of these inconsistencies, we conclude that the administrative law judge acted rationally in finding that claimant established only 7.5 years of coal mine employment, based on his Social Security Earnings record.[3] *See Kephart v. Director, OWCP*, 8 BLRL 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985).

Pneumoconiosis – 20 C.F.R. §718.202

Considering the evidence relevant to the existence of pneumoconiosis, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1), as none of the new x-rays was interpreted as positive for pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 17; Director's Exhibits 11, 14; Employer's Exhibits 1, 2. Pursuant to Section 718.202(a)(2) and (3), the administrative law judge properly found that the existence of pneumoconiosis was not established thereunder, as there was no biopsy evidence in the record and none of the presumptions referred to in Section 718.202(a)(3) was applicable. 20 C.F.R. §718.202(a)(2), (3).

[3] Because fewer than fifteen years of coal mine employment were established, claimant is not entitled to the presumption of totally disabling pneumoconiosis provided by the 2010 amendments, which reinstated the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Considering the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that clinical pneumoconiosis was not established thereunder, as there was "no disagreement amongst the reporting doctors" that "[c]laimant [did] not suffer from clinical pneumoconiosis." 20 C.F.R. §§718.201(a)(2); 718.202(a)(4); Decision and Order at 18.

Turning to the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly accorded greater weight to the opinion of Dr. Dahhan, that claimant did not have a pulmonary impairment, and the opinion of Dr. Broudy, that claimant's mild pulmonary impairment was due to smoking, because they were better reasoned than the opinion of Dr. Mettu, who found that claimant's respiratory impairment was significantly or substantially caused by coal mine employment. *See* 20 C.F.R. §718.201(a)(1); Decision and Order at 18-19. Specifically, the administrative law judge properly found that Dr. Mettu's opinion was less credible because he relied on an inaccurate length of coal mine employment history, namely sixteen years of coal mine employment. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984). Further, the administrative law judge found that Dr. Mettu's opinion was not credible because, even when Dr. Mettu was asked about the etiology of claimant's respiratory impairment based on eight years of coal mine employment, he stated that claimant's respiratory impairment was "significantly or substantially caused by coal dust exposure" without discussing the reasoning for his finding. *See Clark v. Director, OWCP*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 18. The administrative law judge also found Dr. Mettu's lack of reasoning especially troubling, in light of the doctor's failure to discuss the impact of claimant's smoking history on his respiratory impairment. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 18.

Instead, the administrative law judge found the contrary opinions of Drs. Dahhan and Broudy to be more credible. The administrative law judge properly credited the opinion of Dr. Dahhan, that claimant did not have a respiratory impairment, because it was supported by the normal results on claimant's diagnostic testing and the normal findings on physical examination of claimant. *See Clark*, 12 BLR at 1-155. The administrative law judge also properly credited the opinion of Dr. Broudy, that claimant's mild chronic obstructive airways disease was due to smoking, not coal mine employment. The administrative law judge noted that Dr. Broudy's opinion was especially credible because it was based, not only on the doctor's own findings on examination and history, but also on the doctor's review of claimant's other medical data. *See* 20 C.F.R. §718.201(c); *Clark*, 12 BLR at 1-155. The administrative law judge, therefore, properly found that the new medical opinion evidence failed to establish the existence of legal pneumoconiosis. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982).

In conclusion, the administrative law judge properly found that because the new evidence failed to establish the existence of pneumoconiosis at Section 718.202, the other elements of entitlement could not be established pursuant to Sections 718.203 and 718.204. The administrative law judge, therefore, properly found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).[4]

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

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4] We also affirm the administrative law judge's finding that claimant's "fiancée" would not be entitled to augmented benefits. *See* 20 C.F.R. §725.210; Decision and Order at 20; Hearing Transcript at 16.