BRB No. 11-0382 BLA

DONALD R. HENLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COWIN AND COMPANY, INCORPORATED	)	DATE ISSUED: 07/31/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand - Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand - Award of Benefits (2004-BLA-5607) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent claim filed on July 15, 2002, 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).[1] This case is before the Board for a fourth time.[2] In the Board's most recent Decision and Order, the Board vacated his finding that the evidence, as a whole, was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Henley v. Cowin & Co., Inc.*, BRB No. 09-0638 BLA, slip op. at 8-9 (May 25, 2010) (unpub.). The Board remanded the case for further consideration of the relevant evidence of record. *Id*. at 9-10.

In the administrative law judge's Decision and Order on Third Remand, the administrative law judge found, based upon a weighing of all relevant evidence, that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R.§718.304 and, therefore, was not entitled to the irrebuttable presumption. The administrative law judge further determined, however, that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, a change in an applicable condition of entitlement pursuant to

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because claimant's initial and subsequent claims were filed prior to January 1, 2005. Director's Exhibit 3.

[2] In its first Decision and Order in this case, the Board considered employer's appeal of an award of benefits on a duplicate claim filed on July 15, 2002. The Board vacated the award of benefits and remanded the case for reconsideration of the evidence at 20 C.F.R. §718.304. *Henley v. Cowin & Co., Inc.*, BRB No. 05-0788 BLA (May 30, 2006) (unpub.). The administrative law judge awarded benefits on remand and employer appealed. The Board again vacated the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and remanded the case for further consideration. *Henley v. Cowin & Co., Inc.*, BRB No. 07-0993 BLA (Sept. 29, 2008) (unpub.). The administrative law judge determined on remand that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a)-(c) and awarded benefits. Upon consideration of employer's appeal, the Board affirmed the administrative law judge's finding that the preponderance of the newly submitted x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), but vacated his finding that the evidence, as a whole, was sufficient to invoke the irrebuttable presumption at 20 C.F.R. §718.304, and to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The Board remanded the case for reconsideration of the evidence relevant to 20 C.F.R. §718.304. *Henley v. Cowin & Co., Inc.*, BRB No. 09-0638 BLA (May 25, 2010) (unpub.).

20 C.F.R. §725.309(d). Upon weighing all of the evidence together, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in relying on Dr. Shantha's opinion to find legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.[3]

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.[4] 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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 under 20 C.F.R. §718.202(a) and that his totally disabling impairment was caused by pneumoconiosis under 20 C.F.R. §718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence

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[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 17, 19, 23.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Slatick v. Director, OWCP*, 698 F.2d 433, 5 BLR 2-49 (11th Cir. 1983); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

establishing one of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also U.S. Steel Mining Co. v. Director, OWCP*, [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004) (holding under former provision that claimant must establish one of the elements of entitlement that was previously resolved against him).

Employer contends that the administrative law judge erred in determining that claimant established the existence of legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4), based on the opinion of Dr. Shantha. Employer also asserts that the administrative law judge failed to account for the evidence that supports a finding that claimant has sarcoidosis, rather than legal pneumoconiosis.

Employer's allegations of error are without merit. In considering Dr. Shantha's opinion pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted the physician's Board-certification in pulmonary diseases, and found that he was aware of claimant's work history and that he never smoked. Decision and Order on Third Remand at 16. The administrative law judge accurately reviewed the treatment notes of Dr. Shantha, the underlying documentation, and the physician's explanations for his conclusion, and found that Dr. Shantha rendered two diagnoses:

> First, in light [of] the February [27,] 2002 CT scan, Mr. Henley had sarcoidosis. Second, considering his clinical presentation and histories, as well as the pulmonary function test showing significantly decreasing FEV1, Dr. Shantha concluded Mr. Henley also had legal coal workers' pneumoconiosis.

Id.; Claimant's Exhibit 5. The administrative law judge then acted within his discretion as fact-finder in determining that Dr. Shantha's diagnosis of legal pneumoconiosis was documented and reasoned. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989). The administrative law judge also rationally determined that the probative value of Dr. Shantha's diagnosis of legal pneumoconiosis was unaffected by the radiological evidence of sarcoidosis, because Dr. Shantha did not rely on this evidence in reaching his conclusion. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Moreover, the administrative law

[5] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease "arising out of coal mine employment," is "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

judge permissibly found that, although the predominant diagnosis in the evidence submitted with the prior claim was sarcoidosis, Dr. Shantha's assessment, rendered approximately a decade later, is more probative. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); Decision and Order on Third Remand at 20.

Accordingly, we affirm the administrative law judge's finding that Dr. Shantha's opinion is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[6] *See Jones*, 386 F.3d at 991, 23 BLR at 2-237. We also affirm, therefore, the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).[7] *See White*, 23 BLR at 1-3. Because we have affirmed the administrative law judge's credibility determinations on the issue of legal pneumoconiosis, and he relied upon them to conclude that claimant is totally disabled due to pneumoconiosis, we also affirm the administrative law judge's determination that claimant satisfied his burden of proof under 20 C.F.R. §718.204(c).

[6] The administrative law judge's determination that the opinions of Drs. Forehand and Mehta were entitled to little weight on the issue of the existence of legal pneumoconiosis was a reasonable one, as these physicians focused on whether claimant's pulmonary symptoms were related to clinical pneumoconiosis or sarcoidosis. *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); Decision and Order on Third Remand at 16-19. With respect to Dr. Rasmussen's opinion, that claimant has complicated pneumoconiosis, and a totally disabling respiratory impairment caused by coal dust exposure, the administrative law judge rationally discredited the diagnosis of complicated pneumoconiosis, as it was based on evidence that is not in the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); Decision and Order on Third Remand at 16; Director's Exhibit 10.

[7] We also affirm the administrative law judge's determination that his finding of legal pneumoconiosis necessarily subsumed the inquiry of whether claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). *See* 20 C.F.R. §§718.201(a)(2), 718.203; *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Accordingly, the administrative law judge's Decision and Order on Third Remand – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge