BRB No. 10-0641 BLA

JERRY M. HUNLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BROWNIES CREEK COLLIERIES/ SEABOARD SURETY COMPANY	)	
	)	
	)	DATE ISSUED: 06/22/2011
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Amended Decision and Order of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Jerry M. Hunley, Miracle, Kentucky, *pro se*.[1]

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel, the Amended Decision and Order (04-BLA-6575) of Administrative Law Judge Robert B. Rae denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

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

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). This case involves a subsequent claim filed on May 15, 2003.[2] In the initial decision, the administrative law judge credited claimant with at least ten years of coal mine employment,[3] and found that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, found that claimant did not "establish a material change in an applicable condition of entitlement." Amended Decision and Order at 21; *see* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

The Director, Office of Workers' Compensation Programs (the Director), moved for reconsideration, arguing that the administrative law judge erred in failing to address whether the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge agreed with the Director, and responded by issuing an Amended Decision and Order on July 8, 2010. After again finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge, therefore, found that claimant did not establish a "material change in condition." Amended Decision and Order at 20; *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 has not filed a response brief.[4]

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[2] Claimant filed two previous claims. Director's Exhibit 1. The first claim, filed on April 16, 1986, was denied by the district director on September 11, 1986, because claimant did not establish any of the elements of entitlement. *Id.* The second claim, filed on October 4, 1988, was denied by an administrative law judge on July 21, 1993, because claimant did not establish that he suffered from pneumoconiosis. *Id.* Thereafter, claimant filed two requests for modification, which the district director denied on October 30, 1996, and on November 7, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 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 (1989)(*en banc*).

[4] Section 1556 of Public Law No. 111-148 amended the Act with respect to the

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. *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 miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the 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 conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2),(3).

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 ten interpretations of four x-rays taken on March 24, 2003, July 8, 2003, January 21, 2005, and February 22, 2006. In weighing the x-ray evidence, the administrative law judge accurately noted that greater weight could be accorded to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Amended Decision and Order at 6.

While Drs. Alexander and Miller, each dually qualified as a B reader and Board-certified radiologist, interpreted the March 24, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 14; Claimant's Exhibit 2, two equally qualified physicians, Drs. Poulos and Kendall, interpreted this x-ray as negative for the disease. Director's Exhibit 40. Because equally qualified physicians disagreed as to whether the

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entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim, because it was filed before January 1, 2005.

March 24, 2003 x-ray established the existence of pneumoconiosis, the administrative law judge permissibly found their readings were "in equipoise," and that, therefore, the March 24, 2003 x-ray did not support a finding of pneumoconiosis. *See Sheckler*, 7 BLR at 1-131; Amended Decision and Order at 17.

Dr. Paranthaman, a B reader, interpreted the Department of Labor-sponsored, July 8, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 12. This x-ray was also read by two other physicians. Dr. Kendall, a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis, Director's Exhibit 40, while Dr. Alexander, an equally qualified physician, interpreted the x-ray as positive for the disease.[5] Director's Exhibit 15. After noting that the two best qualified physicians, Drs. Kendall and Alexander, disagreed as to whether the x-ray established the existence of pneumoconiosis, the administrative law judge reasonably found that, in light of the additional negative interpretation rendered by Dr. Paranthaman, a B reader, the weight of the evidence regarding the July 8, 2003 x-ray was negative for pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Amended Decision and Order at 7.

Dr. Cappiello, a B reader and Board-certified radiologist, interpreted the January 21, 2005 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Because there were no other interpretations of this x-ray, the administrative law judge found that the January 21, 2005 x-ray was positive for pneumoconiosis. Amended Decision and Order at 18.

Finally, although Dr. Dahhan, a B reader, interpreted the February 22, 2006 x-ray as negative for pneumoconiosis, Director's Exhibit 40, Dr. Ahmed, a B reader and Board-certified radiologist, interpreted this x-ray as positive for pneumoconiosis. Claimant's Exhibit 2. The administrative law judge acted within his discretion in crediting Dr. Ahmed's positive interpretation over Dr. Dahhan's negative interpretation, based upon Dr. Ahmed's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler*, 7 BLR at 1-131; Amended Decision and Order at 18. The administrative law judge, therefore, found that the February 22, 2006 x-ray supported a finding of pneumoconiosis. *Id.*

After finding that the new x-ray evidence was "split evenly for the presence or absence of pneumoconiosis," the administrative law judge declined to accord additional weight to the positive January 21, 2005 and February 22, 2006 x-rays based on their recency, because he found that they were not conducted a "substantial amount of time"

[5] Dr. Barrett, a B reader and Board-certified radiologist, reviewed the July 8, 2003 x-ray for its film quality only. Director's Exhibit 13.

after the March 24, 2003 and July 8, 2003 x-rays. Amended Decision and Order at 18. Additionally, the administrative law judge, citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), found that the new x-ray evidence did not differ qualitatively from the x-ray evidence that was submitted in claimant's 1988 denied claim, and, therefore, could not establish a "material change in conditions" based on a "qualitatively different record in accordance with the *Sharondale* standard." *Id.* at 15, 18. The administrative law judge found that the new x-ray evidence was "in equipoise," and, therefore, did not establish the existence of pneumoconiosis by a preponderance of the evidence. *Id.* at 17.

The administrative law judge applied an incorrect standard in his consideration of the new x-ray evidence. The precedent of the United States Court of Appeals for the Sixth Circuit relied on by the administrative law judge construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3. Consequently, the administrative law judge erred in conducting a qualitative comparison of the old and new x-ray evidence pursuant to 20 C.F.R. §725.309.

The administrative law judge also mischaracterized the new x-ray evidence by stating that it was "split evenly for the presence or absence of pneumoconiosis." Amended Decision and Order at 18. The administrative law judge found that the readings of the March 24, 2003 x-ray were in equipoise, that the July 8, 2003 x-ray was negative for pneumoconiosis, and that the January 21, 2005 and February 22, 2006 x-rays were positive for pneumoconiosis. Although the administrative law judge found that the conflicting readings of the March 24, 2003 x-ray were in equipoise, and thus did not prove the presence of pneumoconiosis, he did not determine that the March 24, 2003 x-ray was negative for pneumoconiosis. The administrative law judge therefore erred in treating the March 24, 2003 x-ray as a negative x-ray.

Finally, the administrative law judge declined to accord additional weight to the more recent x-ray evidence. An administrative law judge may, but need not, credit more recent x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). Thus, the administrative law judge was not required to credit the 2005 and 2006 positive x-rays over the 2003 x-rays. However, in this case, the administrative law judge did not explain why he determined that the over two-year gap separating the negative x-ray and the two positive x-rays in this case was not a "substantial amount of time," and

therefore, had no bearing on the weight he accorded them. Different lengths of time between early negative and later positive x-rays have been deemed relevant to the application of the later evidence rule.[6] In this case, absent an explanation from the administrative law judge, it is not clear why he found that the over two-year gap between the negative and the positive x-ray evidence was not significant. *See* 20 C.F.R. §718.201(c).

In light of the above-referenced errors, we vacate 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).

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). Amended Decision and Order at 18. Moreover, claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[7]

The administrative law judge also considered whether four new medical opinions established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). [8]

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[6] *See e.g. Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986) (positive x-rays were one, two, and three years more recent than the earlier negative x-ray); *Pate v. Ala. By-Products Corp.*, 6 BLR 1-636, 1-639 (1983) (positive x-ray was three years more recent than earlier negative x-ray); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666, 1-668 (1983) (positive x-ray was seven months more recent); *Edwards v. Director, OWCP*, 6 BLR 1-265, 1-266 (1983) (holding that an administrative law judge erred in not addressing a five-year gap between a negative x-ray and a later positive x-ray); *cf. Martin v. Director, OWCP*, 6 BLR 1-535, 1-537 (1983) (holding that an administrative law judge declined to give greater weight to a positive x-ray that was two months more recent).

[7] 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 inapplicable. *See* 20 C.F.R. §718.306.

[8] "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).

A finding of clinical pneumoconiosis is also sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1).

Dr. Paranthaman diagnosed emphysema and chronic bronchitis, and opined that these conditions "are *probably* due to cigarette smoking for [twenty-eight] years and . . . *could have been* aggravated by coal dust exposure for [ten and one-half] years, if documented." Director's Exhibit 12 (emphasis added). The administrative law judge permissibly found that Dr. Paranthaman's opinion was too "vague and equivocal" to constitute a diagnosis of legal pneumoconiosis. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Amended Decision and Order at 19.

Dr. Baker also diagnosed chronic obstructive pulmonary disease and chronic bronchitis. Claimant's Exhibit 3. Dr. Baker opined that "the predomina[nt] cause of claimant's symptoms is *probably* his cigarette smoking but [that] there is a significant contribution from his coal dust exposure as well. And *perhaps* the coal dust exposure and cigarette smoking are synergistic in causing his airway disease and chronic bronchitis." *Id.* (emphasis added). The administrative law judge permissibly found that Dr. Baker's opinion was not well-reasoned, noting that the doctor provided no explanation for attributing claimant's lung disease to his coal mine dust exposure. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Amended Decision and Order at 19-20. Neither Dr. Dahhan nor Dr. Castle diagnosed legal pneumoconiosis.[9] Director's Exhibit 40. Because it is based on substantial evidence, the administrative law judge's finding, that the new medical evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed.

In light of our decision to vacate the administrative law judge's finding that the new x-ray evidence did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), 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 x-ray evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), claimant will have established a change in the applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be

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However, the only new medical opinion evidence supportive of a finding of clinical pneumoconiosis is Dr. Baker's November 28, 2005 report. Claimant's Exhibit 3. The administrative law judge found that Dr. Baker's diagnosis of clinical pneumoconiosis was entitled to "very little weight" because it was based on an x-ray interpretation that is not in the record. Amended Decision and Order at 19.

[9] Dr. Dahhan found no evidence of a pulmonary or respiratory condition caused by coal mine dust exposure. Director's Exhibit 40. Although Dr. Castle diagnosed bronchial asthma, he did not attribute the condition to claimant's coal mine dust exposure. *Id.*

required to consider claimant's 2003 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 prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Accordingly, the administrative law judge's Amended 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

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

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REGINA C. McGRANERY
Administrative Appeals Judge