BRB No. 05-0441 BLA

CALLAS G. MUSIC	)	
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Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/30/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Callas G. Music, Nippa, Kentucky, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM**:**

Claimant appeals the Decision and Order (04-BLA-5538) of Administrative Law Judge Robert D. Kaplan 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 subsequent claim filed on August 26, 2002.[1]

[1]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on January 28, 1986. Director's Exhibit 1. The district director denied the claim on June 20, 1986. *Id.* There is no indication that claimant took any further action in regard to his 1986 claim.

After crediting claimant with twelve years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

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).

Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[2] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on

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Claimant filed a second claim on October 23, 1992. Director's Exhibit 2. The district director denied the claim on April 13, 1993. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a third claim on June 20, 1996. Director's Exhibit 3. The district director denied the claim on September 20, 1996. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim.

Claimant filed a fourth claim on August 26, 2002. Director's Exhibit 5.

[2]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

claimant's 1996 claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 3.

The administrative law judge initially addressed whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record only contains one newly submitted x-ray interpretation. Dr. Poulos, a B reader and Board-certified radiologist, interpreted claimant's November 14, 2002 x-ray as negative for pneumoconiosis.[3] Director's Exhibit 12. Because the only newly submitted x-ray interpretation is negative for pneumoconiosis,[4] we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as 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 5. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[5] *Id.*

The administrative law judge next considered whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis. A

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[3]The administrative law judge noted that Dr. Barrett also interpreted claimant's November 14, 2002 x-ray for film quality only. Decision and Order at 5; Director's Exhibit 12.

[4]In the pursuit of his 2002 subsequent claim, claimant submitted Dr. Musgrave's June 29, 1992 report. In this report, Dr. Musgrave referenced an x-ray interpretation. *See* Director's Exhibit 13. Although Dr. Musgrave did not identify the date of the x-ray, he indicated that the film had a profusion of 1/2, a reading considered positive for pneumoconiosis. *Id.* However, because this x-ray interpretation was developed prior to the denial of claimant's 1996 claim, it cannot support a change in an applicable condition of entitlement.

[5]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 the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

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),[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The record contains a medical report from Dr. Mettu. Dr. Mettu examined claimant on November 14, 2002. In his report dated November 19, 2002, Dr. Mettu diagnosed chronic bronchitis which he attributed primarily to claimant's coal mine employment. Director's Exhibit 12. Dr. Mettu's opinion, if credited, is sufficient to support a finding of "legal" pneumoconiosis. However, the administrative law judge properly discredited Dr. Mettu's diagnosis of chronic bronchitis because the doctor failed to provide any reasoning or rationale for his conclusion that claimant suffered from the disease. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7; Director's Exhibit 12. Because there is no other newly submitted medical opinion evidence supportive of a finding of pneumoconiosis,[7] we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also considered whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Because the administrative law judge properly found that the only newly submitted pulmonary function and arterial blood gas studies of record are non-qualifying,[8] we affirm the administrative law judge's findings that the newly submitted evidence is

[6]"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).

[7]In a report dated June 29, 1992, Dr. Musgrave diagnosed "marked cardiac arrythmia [sic]" and arthritis of the spine. Director's Exhibit 13. Dr. Musgrave did not diagnose pneumoconiosis or attribute any of claimant's diagnoses to his coal dust exposure. Moreover, because this evidence was developed prior to the denial of claimant's 1996 claim, it cannot support a change in an applicable condition of entitlement in any event.

[8]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).[9] Decision and Order at 8.

Because there is no newly submitted evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability, the administrative law judge considered Dr. Mettu's medical report. In his report dated November 19, 2002, Dr. Mettu opined that claimant does not suffer from any pulmonary impairment. Director's Exhibit 12. Dr. Mettu further opined that claimant retains the physical capacity to perform the work of a coal miner. *Id.* The administrative law judge found that Dr. Mettu's opinion that claimant is not totally disabled is reasoned and well documented. Decision and Order at 8. The record does not contain any newly submitted medical opinion evidence supportive of a finding of total disability.[10] We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of the our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

[9] The newly submitted evidence includes a pulmonary function study conducted on November 14, 2002 and an arterial blood gas study conducted on November 14, 2002. *See* Director's Exhibit 12.

[10]Claimant submitted Dr. Musgrave's June 29, 1992 report. As previously noted, because this report was developed prior to the denial of claimant previous 1996 claim, it cannot support a finding of a change in an applicable condition of entitlement. Moreover, Dr. Musgrave's opinion does not support a finding of a totally disabling respiratory or pulmonary impairment. Although Dr. Musgrave indicated that claimant was restricted in his activities "due to limited cardio pulmonary [sic] reserve and limitation of motion of the spine (spinal arthritis)," the doctor did not express an opinion as the extent of the restriction. *See* Director's Exhibit 13.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge