BRB No. 09-0857 BLA

HOMER R. PREECE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/30/2010
	)	
BILL MONT COAL COMPANY, INCORPORATED	)	
	)	
	)	
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 Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan, South Williamson, Kentucky, for claimant.

Paul E. Jones and James W. Herald III (James, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-06103) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent claim filed 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] The administrative law judge accepted the parties' stipulation to twenty-eight years of coal mine employment and found that the evidence submitted since the previous denial was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge determined that claimant did not establish a change in an applicable condition of entitlement pursuant 20 C.F.R. §725.309(d) and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not responded to claimant's appeal of the denial of benefits. [2]

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[3] In

[1] Claimant's first claim for benefits, filed on May 19, 2000, was denied by Administrative Law Judge Rudolf L. Jansen on December 19, 2001 because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1. The Board affirmed Judge Jansen's denial of benefits. *Preece v. Bill Mont Coal Co.*, BRB No. 02-0291 BLA (Dec. 20, 2002). Claimant's appeal of the Board's decision was denied by the United States Court of Appeals for the Sixth Circuit. *Preece v. Bill Mont Coal Company, Inc.*, No. 03-3253 (6th Cir. Dec. 3, 2003). Claimant did not further pursue his 2000 claim. Claimant filed his subsequent claim on September 29, 2005. Director's Exhibit 3.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 10, 13.

[3] Relevant to this miner's claim, Section 1556 reinstated the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the

response, claimant alleges that because the administrative law judge credited claimant with over fifteen years of coal mine employment, and Dr. Kowalti opined that claimant was totally disabled, he is entitled to the rebuttable presumption set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Claimant requests, therefore, that the Board vacate the denial of benefits and remand the case for further consideration and submission of additional evidence. Employer responds, arguing that the recent amendments do not apply to this claim, as the evidence is insufficient to establish total disability. Employer reiterates that the denial of benefits should be upheld. The Director alleges that, based on the filing date of claimant's claim, the amended version of Section 411(c)(4) applies, but maintains that the case does not need to be remanded unless the Board does not affirm the denial of benefits. In order to determine whether remand for consideration of the applicability of the amendments, therefore, we must first address the administrative law judge's consideration of the newly submitted evidence.

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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

If 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);

Act, 30 U.S.C. §921(c)(4), for miners who have fifteen years or more of coal mine employment and are suffering from a totally disabling respiratory or pulmonary impairment. The amended version of Section 411(c)(4) applies to claims filed on or after January 1, 2005.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

White v. New White Coal Co., Inc., 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 either the existence of pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(b)(2). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either element of entitlement to trigger consideration of his claim on the merits. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

In challenging the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations. The administrative law judge considered eight readings of four x-rays.[5] Decision and Order at 4-5, 11. Dr. Narra, a B reader, read the September 27, 2007 x-ray as positive, while Dr. Wheeler, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis.[6] Claimant's Exhibit 2; Employer's Exhibit 2. The October 12, 2007 film was read as positive for pneumoconiosis by Dr. Narra and as negative by Dr. Dahhan, who is a B reader. Claimant's Exhibit 4; Employer's Exhibit 1. The November 9, 2005 x-ray was read as negative by Drs. Smith and Wheeler, both of whom are dually qualified radiologists and B readers. The November 15, 2005 film was read as negative for pneumoconiosis by Dr. Broudy, a B reader. Director's Exhibits 12, 16-18.

The administrative law judge determined that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1), as the preponderance of readings by highly qualified physicians was negative for the disease. The administrative law judge's finding is rational and supported by substantial evidence. Under Section 718.202(a)(1), "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Contrary to claimant's allegation, the administrative law judge did not merely rely on the numerical superiority of the readings. In accordance with Section 718.202(a)(1), he reasonably relied on the qualifications of the readers to resolve the conflict in the x-ray interpretations to find that the preponderance of the x-ray readings is negative for the existence of pneumoconiosis. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th

[5] Dr. Barrett read the November 9, 2005 x-ray for quality purposes only. Director's Exhibit 13.

[6] The administrative law judge noted that Dr. Narra is also Board-eligible in radiology. Decision and Order at 4, n. 7.

Cir. 1993); Decision and Order at 11. We affirm, therefore, the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant also alleges that, because Dr. Kowalti's opinion establishes that he has a totally disabling respiratory impairment, he is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4), 30 U.S.C. 921(c)(4). We disagree, as the administrative law judge rationally determined that the newly submitted evidence, including Dr. Kowalti's opinion, is insufficient to establish total disability pursuant to Section 718.204(b). The administrative law judge correctly found that there is no evidence in the record of complicated pneumoconiosis pursuant to Section 718.204(b)(1). Decision and Order at 13. In addition, the administrative law judge accurately determined that all of the newly submitted pulmonary function and blood gas studies yielded non-qualifying values under Section 718.204(b)(2)(i), (ii).[7] Decision and Order at 5, 13-14; Director's Exhibits 12, 14, 18-17; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge also correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure sufficient to establish total disability at Section 718.204(b)(2)(iii).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Kowalti, Broudy, Dahhan and Hussain. Decision and Order at 12, 14. The administrative law judge noted that Dr. Kowalti was the only physician who diagnosed a pulmonary impairment.[8] Decision and Order at 12; Claimant's Exhibit 1. The administrative law judge acted within his discretion as fact-finder in concluding that the credibility of Dr. Kowalti's opinion was impaired by "his heavy reliance" on a pulmonary function study that did not reflect claimant's level of cooperation or comprehension. Decision and Order at 12; *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987). The administrative law judge also determined correctly that Dr. Kowalti did not explicitly opine whether claimant "lacked the ability to perform his usual coal mine work" or engage in similar gainful employment. Decision and Order at 14; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*).

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[7] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i)-(ii).

[8] Dr. Kowalti diagnosed chronic obstructive pulmonary disease, based on the March 16, 2006 pulmonary function study, which Dr. Kowalti described as showing a decrease in FEV1 consistent with a mild pulmonary defect. Claimant's Exhibit 1.

In contrast, the administrative law judge rationally accorded greater weight to the opinions of Drs. Broudy, Dahhan and Hussain, that claimant is not totally disabled, since he found them to be reasoned, as they were supported by the underlying documentation.[9] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 14; Director's Exhibits 17, 18; Employer's Exhibit 1. The administrative law judge acted within his discretion, therefore, in concluding that the preponderance of the medical opinion evidence does not support a finding of total disability. *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 14.

Based upon his findings under Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally concluded that the newly submitted evidence of record, as a whole, did not demonstrate that claimant is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). *Shedlock v. Bethlehen Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 14. Therefore, we affirm the administrative law judge's determination, that the newly submitted evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2).

Because we have affirmed the administrative law judge's finding that claimant did not prove that he is totally disabled, a prerequisite to the invocation of the rebuttable presumption of total disability due to pneumoconiosis, we need not remand this case for consideration of the applicability of the amended version of Section 411(c)(4). In addition, based upon our affirmance of the administrative law judge's determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis or total disability, we must also affirm his finding that claimant has not demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d). Entitlement to benefits in this subsequent claim, therefore, is precluded. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

[9] Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Director's Exhibit 18. Dr. Dahhan opined that there is no evidence of pulmonary impairment and/ or disability. Employer's Exhibit 1. Dr. Hussain opined that claimant had "no impairment." Director's Exhibit 17.

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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REGINA C. McGRANERY
Administrative Appeals Judge