

BRB No. 05-0900 BLA

RAYMOND DARRIS ARMS)
)
 Claimant-Petitioner)
)
 v.)
)
 DOMINION COAL CORPORATION) DATE ISSUED: 08/15/2006
)
 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 on Remand of Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Raymond Darris Arms, Cedar Bluff, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (03-BLA-6066) of Administrative Law Judge Linda S. Chapman 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 April 18, 2001¹ and is before the Board for the second time.²

¹The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on October 30, 1974. Director's Exhibit 1. The district director denied benefits on September 11, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1974 claim.

In the initial decision, 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). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). 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.

By Decision and Order dated February 24, 2005, the Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *Arms v. Dominion Coal Corp.*, BRB No. 04-0633 BLA (Feb. 24, 2005) (unpublished). The Board also affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). *Id.* The Board, however, vacated the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.* The Board also vacated the administrative law judge's finding that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* Consequently, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §725.309; *i.e.*, that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final, and the Board remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which

Claimant filed a second claim on April 18, 2001. Director's Exhibit 3.

²Claimant's 2001 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 1974 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 has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's initial 1974 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease) and (2) that claimant was totally disabled by the disease. Director's Exhibit 1.

claimant's prior claim became final. 20 C.F.R. §725.309. 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, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In her initial decision, the administrative law judge found that all of the x-ray evidence of record was negative for pneumoconiosis. Decision and Order at 9. The administrative law judge, therefore, found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.* The Board, however, noted that in considering the newly submitted x-ray evidence, the administrative law judge failed to acknowledge Dr. Alexander's positive interpretation of claimant's October 1, 2001 x-ray. *Arms*, slip op. at 3. The Board, therefore, vacated the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge reconsidered whether the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of four interpretations of two x-rays taken on October 1, 2001 and July 9, 2002. In considering the newly submitted x-ray evidence, the administrative law judge noted that although Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's October 1, 2001 x-ray as positive for pneumoconiosis, Dr. Scott, an equally qualified physician, interpreted this x-ray as negative for the disease. Decision and Order on Remand at 2; Director's Exhibits 23, 27. The administrative law judge found the interpretations of claimant's October 1, 2001 x-ray to be "in equipoise" and, therefore, insufficient to support a finding of pneumoconiosis.³ See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order on

³Dr. Forehand, a B reader, also interpreted claimant's October 1, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 14. Dr. Navani interpreted this x-ray for film quality only. See Director's Exhibit 13.

Remand at 2. The administrative law judge further noted that Dr. Hippensteel, the only physician to render an interpretation of claimant's July 9, 2002 x-ray, found that the film was negative for pneumoconiosis. Decision and Order on Remand at 2; Director's Exhibit 36. Because it is supported by substantial evidence, 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) is affirmed.

In her initial decision, the administrative law judge found that the pulmonary function study evidence presented "conflicting results." Decision and Order at 11. The administrative law judge, therefore, found that the newly submitted pulmonary function study evidence was "at best in equipoise" and, therefore, insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* The Board, however, noted that the administrative law judge failed to consider the results of claimant's July 3, 1997 and August 31, 2000 pulmonary function studies. *Arms*, slip op. at 4. The Board, therefore, vacated the administrative law judge's finding that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge reconsidered whether the newly submitted pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains the results of four newly submitted pulmonary function studies conducted on July 3, 1997, August 31, 2000, October 1, 2001 and July 9, 2002.⁴ In her consideration of the newly submitted pulmonary function studies, the administrative law judge accorded less weight to claimant's qualifying July 9, 2002 pre-bronchodilator results because Dr. Hippensteel, the administering physician, reported that the study underestimated claimant's true function due to effort problems. Decision and Order on Remand at 3; Director's Exhibit 36. The administrative law judge accurately noted that the post-bronchodilator portion of the study produced non-qualifying values. Decision and Order on Remand at 2.

⁴Where there are substantial differences in the recorded heights among the pulmonary function studies of record, the administrative law judge must make a factual finding to determine claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In the initial decision, the administrative law judge rationally concluded that claimant's actual height is 67 inches. Decision and Order at 10.

Claimant's August 31, 2000 and October 1, 2001 pulmonary function studies produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibits 12, 25. Although the pre-bronchodilator values of claimant's July 3, 1997 and July 9, 2002 pulmonary function studies are qualifying, the post-bronchodilator values are non-qualifying. Director's Exhibits 25, 36.

The administrative law judge noted that the pre-bronchodilator values of claimant's July 3, 1997 study are qualifying and that the post-bronchodilator values are non-qualifying. Decision and Order on Remand at 2; Director's Exhibit 25. The administrative law judge further noted that Dr. Iosif, who administered the July 3, 1997 pulmonary function study, administered a study three years later, on August 31, 2000, that produced non-qualifying values both before and after the administration of a bronchodilator. *Id.* The administrative law judge stated that the only other newly submitted pulmonary function study, a study conducted on October 1, 2001, also produced non-qualifying values both before and after the administration of a bronchodilator. *See* Director's Exhibit 12. The administrative law judge found that the preponderance of the pulmonary function study evidence is non-qualifying and, therefore, insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

In light of 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),⁵ we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement have changed since the date of the denial of the prior claim. 20 C.F.R. §725.309. Consequently, claimant's entitlement to benefits is precluded.

⁵The Board previously affirmed 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)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). *See Arms v. Dominion Coal Corp.*, BRB No. 04-0633 BLA (Feb. 24, 2005) (unpublished).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge