BRB No. 04-0562 BLA

DOYLE HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/28/2005
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM**:**

Claimant appeals the Decision and Order (03-BLA-5602) of Administrative Law Judge Robert L. Hillyard 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).[1] This case involves a subsequent claim filed on February 5, 2001.[2] After crediting claimant with thirteen 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 total disability 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 1994 claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the administrative law judge erred in admitting x-ray and medical opinion evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, noting his

[1] The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on March 8, 1994. Director's Exhibit 1. In a Decision and Order dated January 25, 1996, Administrative Law Judge Frank D. Marden, after crediting claimant with thirteen years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Accordingly, Judge Marden denied benefits. *Id.* By Decision and Order dated January 29, 1997, the Board affirmed Judge Marden's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Hoskins v. Shamrock Coal Co.*, BRB No. 96-0626 BLA (Jan. 29, 1997) (unpublished). The Board, therefore, affirmed Judge Marden's denial of benefits. *Id.*

Claimant filed a second claim on February 5, 2001. Director's Exhibit 3.

agreement with claimant's contention that the administrative law judge erred in admitting evidence in excess of the limitations set forth at 20 C.F.R. §725.414. The Director, however, contends that the administrative law judge's error in this regard is harmless.[3]

The Board 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 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 1994 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[4] has changed since the date upon which the order denying the prior claim became final. *Id.* Administrative Law Judge Frank D. Marden denied benefits on claimant's 1994 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge properly found that all of the newly submitted x-ray interpretations of record are negative

[3]Because no party challenges 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) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

[4]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).

for the existence of pneumoconiosis.[5] Decision and Order at 12; Director's Exhibits 9, 11; Employer's Exhibits 1, 3, 5, 7. Consequently, the newly submitted x-ray evidence is insufficient as a matter of law to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6]

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant notes that Drs. Hussain and Chaney each diagnosed chronic obstructive pulmonary disease. However, because neither Dr. Hussain nor Dr. Chaney attributed claimant's chronic obstructive pulmonary disease to his coal dust exposure,[7] their diagnoses do not support a finding of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibits 8, 9. Moreover, as was the case with the newly submitted x-ray evidence, the newly submitted medical opinion evidence is insufficient as a matter of law to establish the existence of

[5]Dr. Hayes, a Board-certified radiologist and B reader, and Dr. Hussain, a physician with no special radiological qualifications, interpreted claimant's January 9, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 9; Employer's Exhibit 1. Dr. Broudy, a B reader, interpreted claimant's April 15, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Dr. Halbert, a B reader and Board-certified radiologist, and Dr. Rosenberg, a B reader, interpreted claimant's July 31, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibits 5, 7.

[6]Because the newly submitted x-ray evidence is insufficient as a matter of law to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we need not address claimant's specific arguments regarding the administrative law judge's consideration of the evidence under this subsection. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]Dr. Hussain attributed claimant's chronic obstructive pulmonary disease to his "tobacco smoking." Director's Exhibit 9. Dr. Hussain further opined that claimant did not suffer from an occupational lung disease caused by his coal mine employment. *Id.* Although Dr. Chaney diagnosed chronic obstructive pulmonary disease in several progress reports, he offered no etiology for his diagnosis. *See* Director's Exhibit 8.

pneumoconiosis.[8] *See* 20 C.F.R. §718.202(a)(4).

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant argues that the administrative law judge erred in finding Dr. Hussain's opinion insufficient to establish total disability. We disagree. Although Dr. Hussain opined that claimant suffered from a moderate impairment, the administrative law judge properly noted that Dr. Hussain further opined that claimant retained the respiratory capacity to perform the work of a coal miner. Decision and Order at 10; Director's Exhibit 9. The administrative law judge, therefore, properly found that Dr. Hussain's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 16. The administrative law judge also properly found that Drs. Broudy, Repsher and Rosenberg opined that claimant retained the respiratory capacity to perform his usual coal mine employment.[9] *Id.* Consequently, the newly submitted medical opinion evidence is insufficient as a matter

[8]Dr. Broudy opined that there was no evidence that claimant suffered from coal workers' pneumoconiosis or any other lung disease associated with the inhalation of coal mine dust. Director's Exhibit 10. Dr. Repsher found no objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 11. Dr. Repsher further opined that claimant did not have any respiratory impairment that had arisen from his coal mine employment. *Id.* Dr. Rosenberg opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 7.

Because the newly submitted medical opinion evidence is insufficient as a matter of law to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we need not address claimant's specific arguments regarding the administrative law judge's consideration of the evidence under this subsection. *See Larioni, supra*.

[9]Dr. Broudy opined that there was no evidence of any disabling respiratory or pulmonary impairment. Director's Exhibit 10. Dr. Repsher opined that claimant was not disabled from a respiratory standpoint. Employer's Exhibit 11. Dr. Repsher opined that claimant retained the physiological capacity to perform the work of an underground coal miner. *Id.* Dr. Rosenberg opined that, from a pulmonary standpoint, claimant could perform his previous coal mining job. Employer's Exhibit 7.

of law to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

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), we affirm the administrative law judge's finding that claimant failed to establish that an applicable element of entitlement has changed since the date of the denial of the prior claim.[11] 20 C.F.R. §725.309.

[10]Because the newly submitted medical opinion evidence is insufficient as a matter of law to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we need not address claimant's specific arguments regarding the administrative law judge's consideration of the evidence under this subsection. *See Larioni, supra*.

[11]Claimant argues that the administrative law judge erred in admitting x-ray and medical opinion evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. However, because claimant's newly submitted evidence, even when considered without regard to employer's evidence, is insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we hold that, under the facts of this case, the administrative law judge's failure to adhere to the evidentiary limitations set forth at 20 C.F.R. §725.414 is harmless error. *See Larioni*, *supra*.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge