BRB No. 10-0657 BLA

ALVIN K. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLAMING SUN COAL COMPANY	)	DATE ISSUED: 07/26/2011
	)	
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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Alvin K. Jones, Whitley City, Kentucky, *pro se*.

Rodney E. Buttermore, Jr., (Buttermore & Boggs), Harlan, Kentucky, for employer.

Sarah M. Hurley (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (09-BLA-05459) of Administrative Law Judge Robert B. Rae on a subsequent claim filed on May 2, 2007, 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). The

administrative law judge found that claimant established "at least" ten years of coal mine employment. The administrative law judge also found that the newly submitted evidence was insufficient to establish any element of entitlement under 20 C.F.R. Part 718 and was, therefore, insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] Benefits were, accordingly, denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, arguing that if the Board vacates or reverses the administrative law judge's finding that total disability was not established, it must vacate the administrative law judge's denial and remand the case for consideration pursuant to Section 411(c)(4), as claimant "alleged" fifteen years of coal mine employment. *See* 30 U.S.C. §921(c)(4).[2]

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

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[1] Claimant filed his first claim for benefits on April 2, 1985. That claim was denied on January 11, 1988, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 8, 1996. That claim was denied for the same reason. *Id*. On July 31, 2001, claimant filed his third claim for benefits. That claim was also denied for failure to establish any element of entitlement, as was claimant's request for modification on October 28, 2004. Director's Exhibit 2.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. *See* 20 C.F.R. §718.204(b).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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*).

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*).

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 failed to establish any element of entitlement. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d)(2), (3).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that pneumoconiosis was not established at Section 718.202(a) the administrative law judge properly concluded that the new x-ray evidence was negative. Specifically, the administrative law judge properly determined that the July 3, 2007 x-ray was negative because the x-ray, although read as consistent with CWP (coal workers' pneumoconiosis) by Dr. Ahmed, a Board-certified radiologist, was reread as negative by Dr. Kendall, who is both a Board-certified radiologist and a B reader. *See* 20 C.F.R. §718.202(a)(1). Further, the administrative law judge properly determined that the September 10, 2007 x-ray was negative for pneumoconiosis because it was only read as negative. 20 C.F.R. §718.202(a)(1). Accordingly, we affirm the administrative law judge's finding that the new evidence did not establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1) and could not, therefore, establish a change in an applicable condition of entitlement at Section 725.309 on that basis.

Turning to the medical opinion evidence, the administrative law judge properly found that it failed to establish the existence of either clinical or legal pneumoconiosis. Specifically, the administrative law judge properly discounted the opinion of Dr. Fernandes, diagnosing both clinical and legal pneumoconiosis, because her findings were based entirely on Dr. Ahmed's reading of the July 3, 2007 x-ray, which was reread as

negative by Dr. Kendall, a better qualified radiologist. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Moreover, the administrative law judge properly found that Dr. Fernandes's finding of legal pneumoconiosis was not based on the weight of the medical evidence and was not well-reasoned or well-documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Instead the administrative law judge properly accorded greater weight to the opinions of Drs. Broudy and Dahhan, who found that claimant did not have either clinical or legal pneumoconiosis, because they were better supported by the underlying data.[4] *See Clark*, 12 BLR at 1-155; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). Consequently, the administrative law judge's finding that the new evidence did not establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and, thereby, a change in an applicable condition of entitlement at Section 725.309 on that basis is affirmed.

In finding that total pulmonary or respiratory disability was not established by the new evidence at Section 718.204(b), the administrative law judge properly concluded that the new pulmonary function and blood gas studies did not establish total disability because they were non-qualifying. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 10. Turning to the new medical opinions of Drs. Fernandes, Broudy and Dahhan at Section 718.204(b)(2)(iv), the administrative law judge properly found that these opinions were insufficient to establish total disability because all of the doctors found that claimant did not have a totally disabling respiratory impairment.[5] 20 C.F.R. §718.204(b); *Gee v. W.G. Moore and Sons*, 9 BLR 104 (1986); Decision and Order at 10. Consequently, we affirm the administrative law judge's finding that the new evidence failed to establish total disability at Section 718.204(b), and a change in an applicable condition of entitlement at Section 725.309 on that basis.

As the administrative law judge properly found that the new evidence failed to establish either pneumoconiosis or total disability, he properly found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section

[4] Dr. Fernandes opined that claimant had coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to coal mine employment, based on x-ray. Director's Exhibit 21. Drs. Broudy and Dahhan found no evidence of coal workers' pneumoconiosis or respiratory impairment due to coal mine employment. Director's Exhibits 23, 44.

[5] Dr. Fernandes found that claimant was not totally disabled. Director's Exhibit 21. Dr. Broudy found that claimant's objective tests were normal, and that he retained "the respiratory capacity" to perform his usual coal mine employment. Director's Exhibit 23. Dr. Dahhan found that claimant had no significant pulmonary impairment and retained the ability to perform his usual coal mine employment. Director's Exhibit 44.

725.309. 20 C.F.R. §725.309. Further, because the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability based on the new evidence is affirmed, the Section 411(c)(4) presumption cannot be invoked in this case. *See* 30 U.S.C. §921(c)(4).

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