BRB No. 05-0832 BLA

HOMER R. BARTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TWO ROSE COAL COMPANY	)	
	)	DATE ISSUED: 04/17/2006
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Homer R. Bartley, Lookout, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (03-BLA-6128) of Administrative Law Judge Daniel F. Solomon

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[1] Susie Davis, president of the Kentucky Black Lung Coalminers & Widows Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

rendered on a subsequent claim[2] 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). The administrative law judge credited claimant with thirty-six years of coal mine employment.[3] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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 Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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.

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[2] Claimant's initial application for benefits, filed on July 10, 1987, was denied on March 31, 1998 by Administrative Law Judge J. Michael O'Neill because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed the denial of benefits on September 23, 1999. *Id*. Claimant filed his current application for benefits on December 10, 2001. Director's Exhibit 3.

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 6, 7, 12. 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, 1-202 (1989)(*en banc*).

§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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of two new x-rays. Dr. Hussain, who lacks radiological credentials, read the March 27, 2002 x-ray as "0/1" for pneumoconiosis, a reading which the administrative law judge correctly found is not evidence of pneumoconiosis. 20 C.F.R. §718.102(b); Director's Exhibit 10. Additionally, the administrative law judge noted that Dr. Wiot, who is a Board-certified radiologist and B reader, read the March 27, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. The November 22, 2003 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, a B reader. Employer's Exhibit 1. Based on these readings, the administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis. Substantial evidence supports this finding. It is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four new medical reports. Drs. Sundaram and Hussain diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Repsher concluded that he does not have pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 2; Employer's Exhibits 1, 3, 10, 11. The administrative law judge considered that Dr. Sundaram is claimant's treating physician, but permissibly discounted Dr. Sundaram's note diagnosing coal workers' pneumoconiosis because the note was "conclusory" and gave "no indication why [Dr. Sundaram] determined that pneumoconiosis is present." Decision and Order at 8; *see* 20 C.F.R. §718.104(d)(5); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Substantial evidence supports the administrative law judge's finding regarding Dr. Sundaram's diagnosis. Claimant's Exhibit 2. The administrative law judge additionally found that Dr. Hussain's opinion was not well reasoned because Dr. Hussain

"relied on a false assumption that his [0/1] x-ray reading . . . was positive for pneumoconiosis . . . ." Decision and Order at 8. There is substantial evidence to support this finding, as Dr. Hussain indicated that his diagnosis of pneumoconiosis was based on "x-ray findings, history of exposure." Director's Exhibit 10 at 5; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Moreover, the administrative law judge acted within his discretion as fact-finder in determining that the contrary opinions by Drs. Dahhan and Repsher were "better supported" by physical examination findings, negative x-rays, blood gas study results, and valid pulmonary function study results, and therefore merited "greater weight." Decision and Order at 8-9; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Because substantial evidence supports the administrative law judge's finding that the existence of pneumoconiosis was not established by the medical opinion evidence, we afffirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three new pulmonary function studies dated March 27, 2002, August 9, 2003, and November 22, 2003. Decision and Order at 4-5; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge correctly found that the March 27, 2002 pulmonary function study was non-qualifying[4] and was validated by a reviewing physician. Director's Exhibit 10. The administrative law judge reasonably found that the November 22, 2003 pulmonary function study was invalid because Dr. Dahhan, the physician who administered the study, reported that the study was invalid because claimant's effort was "poor." Employer's Exhibit 1 at 2; *see* 20 C.F.R. §718.103(c). The August 9, 2003 pulmonary function study administered by Dr. Sundaram produced the lowest results of the three studies. Claimant's Exhibit 1. However, the administrative law judge reasonably questioned the reliability of the August 9, 2003 study, because the contemporaneous study done on November 22 "produced better values" even though claimant gave a poor effort.[5] Decision and Order at 4; *see Baker v. North Am. Coal Corp*., 7 BLR 1-79, 1-80 (1984). Consequently, the administrative law judge gave "greatest weight" to the March 27, 2002 study to find that the pulmonary function study evidence did not establish total disability. Decision and

[4] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] Review of the record reveals no statement of claimant's understanding or cooperation on the August 9, 2003 pulmonary function study. Claimant's Exhibit 1; *cf*. 20 C.F.R. §718.103(b)(5).

Order at 4. Because substantial evidence supports the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), the finding is affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge summarized the results of two new blood gas studies dated March 27, 2002 and November 22, 2003. Director's Exhibit 10; Employer's Exhibit 1. Both blood gas studies were non-qualifying at rest and with exercise, and they were interpreted as "normal" by the physicians who administered them. Director's Exhibit 10 at 3; Employer's Exhibit 1 at 2. Consequently, although the administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(ii), there was no blood gas study evidence to support a finding of total disability under this section of the regulations.

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, that method of establishing total disability is inapplicable to this claim.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the record reflects that Drs. Hussain, Dahhan, and Repsher opined that claimant is not totally disabled. Drs. Dahhan and Repsher specified that claimant has no respiratory or pulmonary impairment and can perform his last coal mine employment or any job in the mines. Employer's Exhibit 1 at 3; Employer's Exhibit 3 at 5; Employer's Exhibit 10 at 9; Employer's Exhibit 11 at 32. Dr. Hussain opined that claimant has a "mild" impairment that is not totally disabling. Director's Exhibit 10 at 5.

By contrast, Dr. Sundaram wrote that claimant "is totally disabled due to SOB with limited activity." Claimant's Exhibit 2. The administrative law judge did not make a finding as to whether this statement supported a determination that claimant is totally disabled, because he incorrectly found that "[t]he determination of the existence of a totally disabling respiratory [impairment] is also predicated on a finding of pneumoconiosis," and he therefore concluded that claimant did not establish total disability. Decision and Order at 9. However, on this record as weighed by the administrative law judge, a remand is unnecessary. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed above, the administrative law judge found that Dr. Sundaram's two-sentence note, written on a prescription form, was "conclusory" and unexplained. Decision and Order at 8. Review of Dr. Sundaram's note as it pertains to total disability reveals no explanation or reference to any objective medical data.[6]

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[6] The record reflects that Dr. Sundaram's May 10, 2003 note predates the pulmonary function study he administered on August 9, 2003, and which the administrative law judge discounted as unreliable. Claimant's Exhibits 1, 2.

Claimant's Exhibit 2. As Dr. Sundaram's note has already been found conclusory by the administrative law judge, the outcome of a remand for reconsideration of the issue of total disability is foreordained. We therefore need not remand the case. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995). Accordingly, we affirm the administrative law judge's conclusion that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2).

Because claimant did not establish a change in one of the applicable conditions of entitlement, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge