

BRB No. 11-0497 BLA

DENNIS D. TAPP)
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 04/19/2012
)
 and)
)
 PEABODY INVESTMENTS,)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Dennis D. Tapp, Dawson Springs, Kentucky, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (09-BLA-5253) of Administrative Law Judge Joseph E. Kane denying benefits on a 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). This case involves claimant's request for modification of the denial of a subsequent claim filed on March 3, 2005.¹

Initially, Administrative Law Judge Daniel F. Solomon found that the medical evidence developed since the denial of the prior claim did not 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). Judge Solomon, therefore, determined that claimant failed to establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309, and he denied benefits.

Claimant timely requested modification. Director's Exhibit 69; *see* 20 C.F.R. §725.310. Because claimant submitted no additional medical evidence in support of his modification request, the district director forwarded the claim to the Office of Administrative Law Judges for a hearing on whether Judge Solomon's decision was based on a mistake in a determination of fact. Director's Exhibits 69, 72, 75.

During the eleven months that the case was awaiting a hearing before Administrative Law Judge Joseph E. Kane (the administrative law judge), the parties submitted no additional evidence. At the hearing on November 17, 2009, claimant appeared without a representative and requested a continuance so that he could attempt to obtain counsel. The administrative law judge granted a continuance. Thereafter, on December 4, 2009, the administrative law judge ordered claimant to show cause, within thirty days, why the case should not be decided on the record without a hearing, as no additional evidence had been submitted. Additionally, the administrative law judge ordered claimant to show good cause why the submission of additional evidence should be allowed at this late date. Three months later, claimant had not requested a hearing or indicated to the administrative law judge that he would submit any additional evidence. Accordingly, on March 4, 2010, the administrative law judge canceled the hearing and indicated that he would render a decision on the record.

In a Decision and Order issued on March 28, 2011, the administrative law judge credited claimant with 25.23 years of underground coal mine employment,² and reconsidered the subsequent claim record. The administrative law judge found that the

¹ Claimant's previous claim, filed on February 4, 2002, was finally denied because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1.

² The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. 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).

medical evidence developed since the denial of the prior claim did not establish the existence of pneumoconiosis or total disability, and thus, did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Cancellation of the Hearing

As an initial matter, we hold that the administrative law judge did not abuse his discretion in determining that a hearing was not necessary. Relevant to the facts of this case, Section 725.452(d) provides:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. §725.452(d).

By Order dated December 4, 2009, the administrative law judge notified the parties that, because claimant had not submitted any new evidence in support of his request for modification, an oral hearing was not necessary. The administrative law judge allowed claimant thirty days in which to show cause why he should be allowed to submit additional evidence, and in the absence of the submission of any such evidence, why the case should not be decided on the record, instead of proceeding to a hearing. Claimant did not respond. Mr. Bill Whittinghill, a benefits counselor at Muhlenberg Community Hospital, informed the administrative law judge that he had been erroneously listed as claimant's lay representative, and requested that the administrative law judge reconsider his Order. Letter to the Administrative Law Judge, December 21, 2009.

By Order dated March 4, 2010, the administrative law judge noted that neither claimant, nor anyone on his behalf, had indicated that any additional evidence would be submitted in support of his request for modification. The record reflects that no party requested a hearing in response to the administrative law judge's Order. The administrative law judge, therefore, reasonably determined that a hearing was not necessary, and acted within his discretion in canceling the hearing. 20 C.F.R. §725.452(d).

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). Consequently, to obtain review of the merits of his claim, claimant had to establish that he suffered from pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Claimant requested modification of Judge Solomon's denial of his subsequent claim based on a failure to establish a change in an applicable condition of entitlement, and he submitted no additional evidence on modification. Therefore, both the threshold issue and the relevant evidence before the administrative law judge were identical to those considered by Judge Solomon: whether the evidence developed since the denial of claimant's prior claim established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

Total Disability

In considering claimant's request for modification, the administrative law judge properly noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that

he or she is totally disabled due to pneumoconiosis.³ 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). In order to determine whether claimant could invoke the amended Section 411(c)(4) presumption, the administrative law judge considered whether the new evidence established total disability pursuant to 20 C.F.R. §718.204(b).

Section 718.204(b)(2)(i)

In considering whether the pulmonary function study evidence developed since the denial of the claimant's prior claim established total disability, the administrative law judge considered the results of five pulmonary function studies conducted on June 23, 2005, August 16, 2005, April 11, 2006, January 18, 2007, and October 10, 2007. Director's Exhibits 14, 16, 30, 38, 47.

Although the administrative law judge noted that the pulmonary function studies conducted on June 23, 2005, August 16, 2005, April 11, 2006, and January 18, 2007 produced qualifying values,⁴ he found that they were not reliable indicators of claimant's pulmonary function. Specifically, the administrative law judge found that Dr. Simpao's June 23 2005, pulmonary function study was invalidated by Dr. Fino, a Board-certified pulmonary specialist. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 9; Director's Exhibit 36. The administrative law judge permissibly accorded great weight to Dr. Fino's opinion, based on the doctor's credentials as a highly qualified pulmonary specialist,⁵ *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and found that the June 23, 2005 pulmonary function study results were unreliable due to claimant's poor effort. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 9.

³ In an April 7, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements, and to submit additional evidence. Employer and the Director, Office of Workers' Compensation Programs, submitted position statements. No party submitted any additional evidence.

⁴ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁵ Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 36. The record does not reveal that Dr. Simpao is Board-certified in any medical specialty.

Because Drs. Repsher and O'Bryan, the doctors who administered the August 16, 2005 and April 11, 2006 pulmonary function studies, questioned their reliability, the administrative law judge permissibly found that these studies were not reliable indicators of claimant's pulmonary function. Decision and Order at 9; Director's Exhibits 16, 30. The administrative law judge similarly found that the January 18, 2007 pulmonary function study was unreliable, noting that Dr. Baker, the physician who administered the study, acknowledged that it was "not optimal in terms of effort." Decision and Order at 9; Director's Exhibit 48. The administrative law judge further noted that Dr. Fino invalidated the January 18, 2007 pulmonary function study. Decision and Order at 9; Director's Exhibit 39.

Noting that the only reliable pulmonary function study, the study conducted on October 10, 2007, was non-qualifying, the administrative law judge found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because it is supported by substantial evidence, the administrative law judge's finding is affirmed.

Section 718.204(b)(2)(ii), (iii)

All three new arterial blood gas studies, conducted on April 18, 2005, August 16, 2005, and January 18, 2007, were non-qualifying. Director's Exhibits 14, 16, 38. We, therefore, affirm the administrative law judge's finding that the new arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 10. Additionally, because the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

Section 718.204(b)(2)(iv)

In considering whether the new medical opinion evidence established total disability, the administrative law judge considered the new medical opinions of Drs. Simpao, Baker, and Repsher. While Drs. Simpao and Baker opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibits 14, 38, Dr. Repsher opined that claimant was not totally disabled. Director's Exhibit 16. The administrative law judge permissibly discounted the opinions of Drs. Simpao and Baker, since they were based, in part, on the June 23, 2005 and January 18, 2007 pulmonary function studies, which had been demonstrated to be unreliable.⁶ *See Clark v. Karst-Robbins Coal Co.*, 12

⁶ Although Dr. Simpao also conducted the nonqualifying, October 10, 2007 pulmonary function study, Dr. Simpao's opinion that claimant was disabled from a

BLR 1-149, 1-155 (1989) (en banc); *Siegel*, 8 BLR 1-156; *Street*, 7 BLR at 1-67; Decision and Order at 11. The administrative law judge also permissibly accorded greater weight to Dr. Repsher's opinion, that claimant was not totally disabled from a pulmonary standpoint, because he found that it was better supported by the objective evidence of record. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 11; Director's Exhibit 16. Because it is based upon substantial evidence, the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). In light of our affirmance of this finding, we also affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); Decision and Order at 12.

The Existence of Pneumoconiosis

Section 718.202(a)(1)

In considering whether the x-ray evidence developed since the denial of the claimant's prior claim established the existence of pneumoconiosis, the administrative law judge considered seven interpretations of four x-rays taken on April 18, 2005, August 16, 2005, April 11, 2006, and January 8, 2007.

Because the April 18, 2005, August 16, 2005, and April 11, 2006 x-rays were uniformly interpreted as negative for pneumoconiosis, Director's Exhibits 14, 16, 30, the administrative law judge properly found that these x-rays are negative for the disease. Decision and Order at 6-7.

While Dr. Baker, a B reader, and Dr. Alexander, a B reader and Board-certified radiologist, interpreted the January 18, 2007 x-ray as positive for pneumoconiosis, Director's Exhibits 38, 46, Drs. Spitz and Wiot, each dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for the disease. Director's Exhibits 40, 61. Because a majority of the best-qualified physicians rendered negative interpretations of the January 18, 2007 x-ray, the administrative law judge permissibly

pulmonary standpoint predates this study. Consequently, Dr. Simpao's disability assessment could not have been based upon this study.

found that this x-ray is negative for pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7.

Because it is based on substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2), (3)

Because there is no biopsy evidence, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7. The administrative law judge also properly found that claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306.⁷ *Id.* at 7.

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),⁸ is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the new medical reports of Drs. Simpao, Baker, and Repsher.

Although Dr. Baker diagnosed clinical pneumoconiosis, the administrative law judge permissibly found that the January 18, 2007 x-ray that Dr. Baker interpreted as positive for pneumoconiosis was interpreted by a majority of better-qualified physicians as negative for pneumoconiosis, thus calling into question the reliability of Dr. Baker's opinion. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because no other physician diagnosed clinical pneumoconiosis, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of clinical pneumoconiosis.

⁷ Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. Because this claim is not a survivor's claim, the administrative law judge also properly found that the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

⁸ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Dr. Baker also diagnosed legal pneumoconiosis, in the form of a moderate restrictive defect due to coal mine dust exposure. Director's Exhibit 38. In addition, Dr. Simpao diagnosed "legal pneumoconiosis" due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 14. In contrast, Dr. Repsher opined that claimant does not suffer from any lung disease attributable to his coal mine dust exposure. Director's Exhibit 16. Because Drs. Baker and Simpao each based their diagnoses of legal pneumoconiosis in part on the results of unreliable pulmonary function study results, the administrative law judge permissibly found that their diagnoses of legal pneumoconiosis were not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Decision and Order at 13. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish 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), we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Consequently, we affirm the administrative law judge's denial of benefits.

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

JUDITH S. BOGGS
Administrative Appeals Judge