BRB No. 03-0768 BLA

KENNETH R. BREWER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/20/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5008) of Administrative Law Judge Gerald M. Tierney 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 claim filed on September 6, 2001.[2] After

[1]The Department of Labor 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

crediting claimant with three years of coal mine employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish 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 that claimant was totally disabled due to pneumoconiosis. The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1993 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). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, wherein he argues that the administrative law judge, in his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability, erred in his consideration of Dr. Ranavaya's opinion. The Director, therefore, contends that the case should be remanded to the administrative law judge for his reconsideration of Dr. Ranavaya's opinion.

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 1993 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[3] has changed since the date upon which the order

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(2002). Because this case was filed after January 19, 2001, all citations to the regulations refer to the amended regulations.

[2] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on May 11, 1993. Director's Exhibit 1. The district director denied the claim on October 18, 1993. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a second claim on September 6, 2001. Director's Exhibit 2.

[3] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the

denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1993 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically argues that the administrative law judge erred in not weighing all of the relevant newly submitted evidence together pursuant to 20 C.F.R. §718.202(a). In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

After finding that claimant was precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3),[4] 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) and (a)(4). Decision and Order at 3-4.

Claimant contends that the administrative law judge erred in finding the x-ray interpretations of Drs. Miller and Cappiello insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge noted that Dr. Cappiello, a B reader, interpreted claimant's April 15, 2002 x-ray as positive for pneumoconiosis. Decision and Order at 3; Claimant's Exhibit 1. However, the administrative law judge further noted that Dr. Miller, an equally qualified

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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).

[4] Because there is no biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

physician, interpreted this x-ray as negative for the disease.[5] Decision and Order at 3; Claimant's Exhibit 2. The administrative law judge accurately noted that the only other newly submitted x-ray evidence, Dr. Ranavaya's interpretation of claimant's October 23, 2001 x-ray, was negative for pneumoconiosis. Decision and Order at 3; Director's Exhibit 5. The administrative law judge, therefore, found that claimant had failed to prove, by a preponderance of the evidence, that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because this finding is supported by substantial evidence, it is affirmed.[6]

Since the administrative law judge, in this case, properly found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), his findings conform to the Fourth Circuit holding in *Compton*.

Claimant also argues 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).[7] The record contains only one newly submitted medical opinion. In a report dated October 23, 2001, Dr. Ranavaya opined that claimant suffered from a moderate pulmonary impairment which would prevent him from performing his usual coal mine employment. *Id.* In his consideration of whether Dr. Ranvaya's opinion

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[5] Dr. Miller interpreted claimant's April 15, 2002 x-ray as having a profusion of 0/1. Claimant's Exhibit 1. An 0/1 reading is not considered a positive x-ray interpretation under the regulations. *See* 20 C.F.R. §718.102(b) (A chest x-ray classified as 0/1 "does not constitute evidence of pneumoconiosis.").

[6] Because no party challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-4.

[7] The administrative law judge did not address whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). However, because the only newly submitted pulmonary function study and the only newly submitted arterial blood gas study, both conducted on October 23, 2001, are non-qualifying, the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii). Moreover, because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated that:

> Dr. Ranavaya does find that Claimant suffers from a moderate pulmonary impairment which would prevent him from performing his last coal mine job. However, Dr. Ranavaya does not elaborate as to the basis of that conclusion. The pulmonary function study associated with his exam was interpreted as showing reduced FEV1 and FEV values; however, Claimant's cooperation on that study was reported as fair as opposed to good. Regardless, Dr. Ranavaya clearly opined that Claimant's diagnosed condition is unrelated to occupational exposure to dust in coal mining. Claimant does not prove that he is totally disabled due to pneumoconiosis.

Decision and Order at 4.

The Director contends that the administrative law judge erred in not identifying the specific deficiencies in Dr. Ranavaya's opinion. Moreover, while the Director acknowledges that an administrative law judge may properly reject a physician's disability assessment that is based on defective clinical tests, the Director notes that, in this case, no physician invalidated the October 23, 2001 pulmonary function study relied upon by Dr. Ranavaya or otherwise indicated that the study's reliability was compromised by claimant's "fair" cooperation.[8] The Director also notes that the administrative law judge failed to consider the fact that the "Pulmonary Function Overview Report" includes an assessment of the October 23, 2001 pulmonary function

[8] The Director further notes that:

> In this regard, [S]ection 725.406(c) requires the district director to ensure that clinical tests conducted as part of the examination provided by the Department are in substantial compliance with the Part 718 quality standards. 20 C.F.R. §725.406(c). If the pulmonary function study (an effort dependent test) is defective because of the miner's lack of effort, the miner must be afforded one additional opportunity to produce a conforming study. *Id.* The district director has the discretion to obtain a physician's review of a questionable study. *Id.* In this case, the district director did not obtain an independent review of Dr. Ranavaya's pulmonary function study, nor did the district director schedule claimant for re-testing. Consequently, the district director presumably considered the test to be in substantial compliance with the quality standards despite the "fair" cooperation.

Director's Motion to Remand at 4 n.4.

study's technical acceptability as well as an interpretation of the test results. *See* Director's Exhibit 5.

Because the administrative law judge failed to provide an adequate explanation for questioning the validity of the October 23, 2001 pulmonary function study relied upon by Dr. Ranavaya, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.[9]

On remand, should the administrative law judge find that Dr. Ranavaya's opinion of total disability is credible, he is instructed to weigh all of the relevant newly submitted evidence together, both like and unlike, to determine whether the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). Should the administrative law judge find the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in a condition of entitlement under 20 C.F.R. §725.309. Under these circumstances, the administrative law judge would be required to consider claimant's 2001 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

However, should the administrative law judge, on remand, discredit Dr. Ranavaya's opinion, the Director concedes that the Department of Labor will have failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Consequently, should the administrative law judge, on remand, determine that Dr. Ranavaya's opinion is not credible, he has the discretion to "remand the claim to the district director with instructions to develop only such evidence as is required, or [to] allow the parties a reasonable time to obtain and submit such evidence, before the termination of [a] hearing." 20 C.F.R. §725.456(e).

[9] We note that the administrative law judge improperly combined his findings regarding the issue of total disability with the issue of the etiology of claimant's total disability. These are separate elements of entitlement. On remand, the administrative law judge is instructed to separately address whether the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge