BRB No. 04-0213 BLA

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| CLEOPHAS VARNEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| EASTERN COAL CORPORATION | ) | DATE ISSUED: 08/26/2004 |
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| and | ) | |
| | ) | |
| THE PITTSBURG CO./ACORDIA EMPLOYERS | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Cleophas Varney, Hardy, Kentucky, *pro se*.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-0449) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a duplicate claim[1] filed

[1] Claimant first filed for benefits on August 17, 1976; this claim was denied by the district director on December 22, 1983. Director's Exhibit 28. Claimant filed a second claim on May 19, 1993; this claim was denied by the district director on November 5,

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).[2] The administrative law judge initially credited claimant with twenty years of coal mine employment based on the parties' stipulation. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge considered whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000)[3] under the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 or a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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,

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1993 based on claimant's failure to establish any element of entitlement. Director's Exhibit 29. Claimant filed the current claim on December 12, 2000. Director's Exhibit 1. It was twice remanded to the district director for development of additional evidence. Based on a finding of complicated pneumoconiosis, the district director awarded benefits. Director's Exhibits 42, 44. Employer controverted the district director's determination and requested a hearing before the Office of Administrative Law Judges. A hearing was held before the administrative law judge on April 15, 2003.

[2] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2; 65 Fed. Reg. 80,057.

and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The regulation at 20 C.F.R. §725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309 (2000). The Sixth Circuit, within whose jurisdiction this claim arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held in *Ross* that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. In the instant case, claimant's prior claim was denied because the evidence failed to establish any element of entitlement. Director's Exhibit 29. Consequently, the newly submitted evidence must establish one of the elements of entitlement in order to demonstrate a material change in conditions under 20 C.F.R. §725.309 (2000) in the instant case.

With respect to the weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly found that this record contains only five readings of two x-rays. *See* Director's Exhibits 13, 14, 26, 36, 37. Since none of the x-ray interpretations of record are positive for the existence of pneumoconiosis, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

The administrative law judge next considered the biopsy evidence of record at 20 C.F.R. §718.202(a)(2). The biopsy evidence consists of a March 14, 2002 wedge biopsy by Dr. Combs, a pathology report by Dr. Dennis of the right upper lobe removed on March 16, 2002, and a review of pathology slides and other evidence by Dr. Caffrey. Dr. Combs diagnosed adenocarcinoma, scar formation and granulomatous inflammation. Director's Exhibit 36. Dr. Dennis found a "…greater than 2 cm. [mass], changes compatible with black lung or anthracosilicosis, moderate to severe…" and "progressive massive fibrosis…" *Id*. Dr. Caffrey disagreed, finding the evidence on the pathology slides insufficient to support a diagnosis of pneumoconiosis. Employer's Exhibit 4.

Weighing this evidence, the administrative law judge found that Dr. Caffrey's report "discusses the necessary findings" for a diagnosis of pneumoconiosis by biopsy and noted the absence of these findings on the pathology slides. Decision and Order at 11. The administrative law judge reasonably found Dr. Caffrey's report to be well-reasoned, well-documented and supported by the medical evidence, and thus accorded it greater weight than the contrary opinion by Dr. Dennis. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12.

Considering the evidence at Section 718.202(a)(3), under the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, the administrative law judge noted that Dr. Caffrey disagreed with Dr. Dennis's conclusion that the pathological evidence showed a macule formation greater than two centimeters in diameter. Dr. Caffrey determined that the pathological slides represented poorly differentiated adenocarcinoma with desmoplastic reaction. Employer's Exhibit 4. Dr. Rosenberg determined that Dr. Dennis's report was inconsistent because the tissue he described surrounding the nodule mass was not indicative of simple pneumoconiosis, and the mass was actually lung cancer. Employer's Exhibits 3, 7. Dr. Repsher opined that the nodule was inconsistent with complicated pneumoconiosis. Employer's Exhibits 1, 3. The administrative law judge weighed this evidence relevant to invocation of the presumption at Section 718.304, permissibly crediting the reports of Drs. Caffrey, Rosenberg, and Repsher, as he determined that they were well-reasoned and documented, over the contrary opinion of Dr. Dennis. Specifically, the administrative law judge found that Drs. Caffrey, Rosenberg, and Repsher "carefully discussed the necessary criteria for diagnosing complicated pneumoconiosis with a nodule and elaborated on why Dr. Dennis' description was insufficient and inconsistent with the medical evidence." *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); Decision and Order at 12.

Considering the medical opinion evidence of record at 20 C.F.R. §718.202(a)(4), the administrative law judge permissibly found that the opinions of Dr. Odom, in 1975, and Dr. Page, in 1976, were no more than restatements of x-ray interpretations, and, as such, were inadequate to establish the existence of pneumoconiosis thereunder. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Director's Exhibit 29. The administrative law judge found that Dr. Amissetty's opinion was too equivocal to be afforded probative weight. He stated that claimant has a mild pulmonary impairment related to smoking, but coal dust exposure could not be ruled out as a cause, Director's Exhibit 13-13. Decision and Order at 13. This was rational. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge then credited the consultative reports of Drs. Caffrey, Fino, Rosenberg, and Repsher, in which the physicians opined that claimant did not have pneumoconiosis, because he found them to be well-reasoned. *Fields*, 10 BLR at 1-21.

Turning to the issue of total disability, the administrative law judge correctly found that neither the pulmonary function studies nor the blood gas studies were qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii); Director's Exhibits 13, 26, 33, 33-14.

Further, the administrative law judge correctly found that inasmuch as the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability cannot be established on that basis at 20 C.F.R. §718.204(b)(2)(iii).

Turning to the physicians' opinions, the administrative law judge found that Drs. Odom and Page did not discuss the extent of claimant's total disability but only recommended against further coal dust exposure, and thus their opinions were insufficient to meet claimant's burden of proof to establish the existence of a totally disabling respiratory or pulmonary impairment preventing him from performing his usual coal mine employment or comparable work. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1986). Dr. Amissetty found a mild impairment primarily due to smoking, and Dr. Dahhan found a mild impairment due to smoking. Director's Exhibits 13-13, 26. Drs. Caffrey, Rosenberg, Fino, and Repsher each determined that claimant was not totally disabled from a respiratory standpoint. The administrative law judge properly found the opinions of Drs. Caffrey, Rosenberg, Fino, and Repsher to be well-reasoned and well-documented, as well as consistent with the medical evidence of record; he thus accorded them determinative weight. This was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly found that total respiratory or pulmonary disability is not established on the basis of the medical opinion evidence at 20 C.F.R. §718.204(b)(a)(iv).

Based on the foregoing, we affirm the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(4) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i) through (b)(2)(iv). We thus affirm the administrative law judge's finding that the evidence fails to establish a material change in conditions at 20 C.F.R. §725.309 (2000) as it is supported by substantial evidence. We affirm, therefore, the administrative law judge's denial of benefits in the instant duplicate claim.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge 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