BRB No. 05-0475 BLA

LEON BOKISH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 12/20/2005
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5719) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent 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). The administrative law judge found that the parties stipulated that claimant was a coal miner for thirty-four years, Decision and Order

at 2; Hearing Transcript at 5-6, and, based on the date of filing, adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718. In connection with claimant's previous claim which arose under 20 C.F.R. Part 727, the administrative law judge found that while claimant established entitlement to the interim presumption because he had established the existence of pneumoconiosis, 20 C.F.R. §727.203(a)(1), employer had rebutted the presumption by showing that claimant was not totally disabled due to pneumoconiosis, 20 C.F.R. §727.203(b)(3), and that claim was, accordingly, denied. The administrative law judge found, therefore, that the evidence submitted in connection with the subsequent claim must establish total disability as a prerequisite to establishing entitlement. Considering the evidence submitted in support of the subsequent claim, the administrative law judge found that it failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b), and, therefore, found that claimant failed to establish a change in an applicable element of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) responds, arguing that the administrative law judge erred in his consideration of the blood gas studies and the medical opinions on the issue of total disability, but does not respond to claimant's other arguments.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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*).

Pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304, claimant contends that the administrative law judge should have found the existence of complicated pneumoconiosis established based on Dr. Robinette's reading of the February 3, 2003 x-ray. Claimant contends that the administrative law judge acted improperly by considering all of the x-ray readings of record, dating from 1973, and finding that they outweighed Dr. Robinette's February 3, 2003 x-ray finding of

complicated pneumoconiosis because that finding shows that the administrative law judge does not believe that pneumoconiosis, contrary to the Act, is a progressive disease.

Because this is a subsequent claim, the administrative law judge is first required to determine whether a change in an applicable condition of entitlement has been established before addressing the merits of entitlement. 20 C.F.R. §725.309; *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). In making that determination, the administrative law judge must first consider and weigh evidence relevant to the element of entitlement previously adjudicated against claimant. *Id*. Only if the administrative law judge finds that the new evidence establishes a change in that element, is he to consider and weigh all the evidence of record, both old and new. *Id*.

Thus, in considering whether claimant established the existence of complicated pneumoconiosis, a finding which would entitle claimant to invocation of the irrebuttable presumption that his pneumoconiosis was totally disabling, the administrative law judge erred in weighing all the x-ray evidence of record, including x-ray evidence submitted prior to the previous denial, against Dr. Robinette's finding of complicated pneumoconiosis which was based on his reading of the February 3, 2003 x-ray. *Id*. The administrative law judge's finding that claimant failed to establish total disability, a change in an applicable condition of entitlement, and his denial of benefits must, therefore, be vacated. Accordingly, the case is remanded to the administrative law judge to consider whether the evidence submitted since the denial of the previous claim establishes the existence of complicated pneumoconiosis, and thereby, entitles him to the irrebuttable presumption that his pneumoconiosis is totally disabling. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. If the administrative law judge finds that claimant has established the presence of complicated pneumoconiosis and is, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis, claimant would be entitled to benefits. Should the administrative law judge find that claimant has not established the presence of complicated pneumoconiosis, then the administrative law judge must consider whether claimant has established total disability at Section 718.204(b)(2)(i)-(iv).

Claimant contends that the administrative law judge erred in finding that the newly submitted qualifying blood gas studies did not establish total disability.[1] In response, the Director argues that the administrative law judge's evaluation of the blood gas studies

[1] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

does not withstand scrutiny because he considered claimant's advanced age and the barometric pressure at which the tests were conducted to find that the tests were "virtually normal." Decision and Order at 6. The Director contends that inasmuch as age was considered during the development of the arterial blood gas tables, studies which result in qualifying values should be interpreted as showing total respiratory disability regardless of age, and that the administrative law judge erred, therefore, in crediting the opinions of Dr. Hippensteel and Dr. McSharry, who found that the qualifying studies were normal or only slightly abnormal when considered in light of claimant's advanced age and the barometric pressure at which the studies were performed.[2]

In considering the blood gas studies, the administrative law judge credited the opinions of Drs. Hippensteel and McSharry to find that, although the studies are generally qualifying as totally disabling, they are nonetheless virtually normal for a man of claimant's age and at the barometric pressure at which the tests were conducted, and that the studies represent cardiac impairment rather than a pulmonary impairment. As the Director contends, however, because age was taken into consideration in the development of the regulatory tables designating the values which are qualifying, 45 Fed.Reg. 13712 (Feb. 29, 1980); *see generally Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). The administrative law judge's finding that blood gas studies, which were qualifying under the regulatory table were not, in fact, qualifying when considering claimant's age is error. Accordingly, the case is remanded for the administrative law judge to reconsider the blood gas study evidence.

Claimant next contends that the administrative law judge erred in his consideration of the medical opinion evidence, *i.e.*, in crediting the opinions of Drs. Forehand and Robinette, that claimant was totally disabled by a respiratory impairment, as reasoned medical opinions. Specifically, claimant contends that the administrative law judge erred in finding that Dr. Forehand was not a pulmonary specialist when his qualifications were not contained in the record, and the administrative law judge failed to state whether, in reaching his conclusion, he had taken judicial notice of Dr. Forehand's qualifications or lack thereof. Further, claimant contends that the administrative law judge erred in discounting Dr. Forehand's opinion, based in part on qualifying blood gas study, because Dr. Hippensteel found claimant's qualifying blood gas studies to be only mildly abnormal. Additionally, claimant contends, for the same reason, that the administrative law judge erred in discrediting Dr. Robinette's opinion.

[2] The administrative law judge's finding that the newly submitted evidence fails to establish total disability at Section 718.204(b)(2)(i), (iii) based on the non-qualifying pulmonary function studies and the lack of evidence of cor pulmonale with right-sided congestive heart failure is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding that the newly submitted evidence did not establish a totally disabling respiratory or pulmonary impairment, the administrative law judge stated that Dr. Forehand's qualifications, other than his status as a B-reader, were not contained in the record. The administrative law judge further found his opinion, diagnosing total respiratory disability, worth little weight as it was poorly explained and inconsistent with the results of his examination as Dr. Forehand found claimant's pulmonary function study to be normal, the blood gas study at rest to be non-qualifying, but the blood gas study at exercise to be qualifying and showing hypoxemia. The administrative law judge specifically noted that, unlike Dr. Hippensteel, Dr. Forehand was not a pulmonary specialist, *i.e.*, Dr. Hippensteel was board-certified in pulmonary diseases. He found that Dr. Forehand's blood gas study results were normal for a man of claimant's age and could be no more than mildly abnormal as they resulted in higher values than the blood gas test he had conducted, which were only mildly abnormal. Decision and Order Denying Benefits at 4; Employer's Exhibits 6, 11, 14; Director's Exhibit 10. The administrative law judge also gave little weight to the opinion of Dr. Robinette, who was a Board-certified pulmonary specialist, because Dr. Robinette mistakenly believed that claimant had complicated pneumoconiosis and Dr. Robinette's discussion of claimant's pulmonary function studies do not match the values actually obtained, and the pulmonary function studies performed two months subsequently, for Dr. McSharry, produced higher, normal values. Decision and Order at 4-5; Claimant's Exhibit 1.

An administrative law judge may find that the results of a qualifying pulmonary function study are rendered suspect by the results of a non-qualifying study conducted only two months later. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Likewise, the administrative law judge may accord greater weight to the opinions of physicians with superior credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

In this case, however, the administrative law judge erred in finding Dr. Forehand's opinion unreliable because it was based on a mistaken finding of complicated pneumoconiosis, since the administrative law judge's rejection of Dr. Forehand's finding of complicated pneumoconiosis is in error. The administrative law judge also erred in rejecting the opinions of Drs. Robinette and Forehand for the reason that their opinions were based, in part, on qualifying blood gas studies which were found by other physicians to show only a mild abnormality, for the reasons discussed. Accordingly, we vacate the administrative law judge's finding that claimant failed to establish a change in a condition of entitlement because he failed to establish total disability. If, on remand, the administrative law judge finds that the new blood gas study and/or medical opinion evidence establishes total disability, and thereby, a change in a condition of entitlement, he must consider all the evidence, both old and new, to determine whether the essential elements of entitlement are established. *See Rutter*, 86 F.3d 1358, 20 BLR 2-227.

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

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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BETTY JEAN HALL
Administrative Appeals Judge