

BRB No. 06-0507 BLA

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| LEON BOKISH |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 02/27/2007 |
| |) | |
| CONSOLIDATION COAL COMPANY |) | |
| |) | |
| 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 on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (03-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). Claimant filed this claim for benefits on August 2, 2002. Director's Exhibit 3. This case is before the Board for the second time with respect to the administrative law judge's denial of benefits on claimant's subsequent claim. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, or total disability at 20 C.F.R. §718.204(b). Consequently, the administrative

law judge concluded that claimant did not establish a change in an applicable condition of entitlement, and he thus denied claimant's subsequent claim for benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's denial of benefits, and remanded the case to the administrative law judge for reconsideration. *Bokish v. Consolidation Coal Co.*, BRB No. 05-0475 BLA (Dec. 20, 2005)(unpub.). The Board held that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis pursuant to Section 718.304, because he mistakenly considered all the evidence of record instead of only the evidence submitted subsequent to the prior denial. The Board also held that the administrative law judge erred in finding that certain blood gas studies were nonqualifying, taking into account claimant's age, when they were actually qualifying pursuant to Section 718.204(b)(2)(ii). Lastly, the Board held that the administrative law judge erred in discounting the opinions of Drs. Forehand and Robinette, opinions supportive of claimant's position, because the administrative law judge found that they were based on nonqualifying blood gas studies, as they were actually qualifying, pursuant to Section 718.204(b)(2)(ii).

On remand, the administrative law judge again denied benefits, finding that claimant did not establish a change in an applicable condition of entitlement, as he was unable to establish total disability pursuant to Sections 718.304 and 718.204(b).

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.304 and 718.204(b). Employer responds in support of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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). Claimant’s prior claim was denied because he failed to establish total disability. Consequently, claimant had to submit new evidence establishing that he is totally disabled to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant first argues that the administrative law judge erred in finding that claimant does not have complicated pneumoconiosis pursuant to Section 718.304. Claimant asserts that the administrative law judge erred in finding that Dr. Robinette’s diagnosis of complicated pneumoconiosis is “against the rest of the medical community,” although claimant also concedes that Dr. Robinette is the only physician to diagnose complicated pneumoconiosis since the prior denial. Claimant’s Brief at 6.

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, including evidence of simple pneumoconiosis and of no pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304, the administrative law judge on remand properly considered the evidence developed since the prior denial and rationally found that it did not establish complicated pneumoconiosis. One x-ray, dated February 3, 2003 and read by Dr. Robinette, a B reader,¹ showed complicated pneumoconiosis. The administrative law judge rationally found that this x-ray was outweighed by numerous x-ray readings in the record, taken after the prior denial of benefits, and read by doctors with outstanding

¹ The term “B reader” refers to a physician who has demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. See 42 C.F.R. §37.51.

qualifications, as well as subsequently developed CT scan interpretations and biopsy evidence, all of which were negative for complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33; Decision and Order on Remand at 1-2. Consequently, we affirm the administrative law judge's finding that claimant did not establish complicated pneumoconiosis pursuant to Section 718.304.

Claimant also argues that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in not crediting the opinions of Drs. Forehand and Robinette, that claimant is totally disabled, since they are reasoned and documented opinions based on qualifying blood gas studies. Because the administrative law judge's weighing of the medical opinion evidence is intertwined with his Section 718.204(b)(2)(ii) findings, we first must address those findings.

Section 718.204(b)(2) provides that, "In the absence of contrary probative evidence, evidence which meets the standards of . . . (b)(2)(ii) . . . of this section shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2). The phrase "contrary probative evidence" refers to all evidence, medical and otherwise, that is contrary to and probative of the fact to be established by the method used to establish total disability. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). The administrative law judge must assign the contrary probative evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge clarified his finding, on remand, by stating that he did not find claimant's blood gas studies to be nonqualifying based on claimant's age, but rather, found that they were mostly qualifying but did not establish total disability, based upon his consideration of the contrary probative evidence of record; namely, Dr. Hippensteel's opinion that claimant is not totally disabled from a pulmonary standpoint. We affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(ii), as clarified on remand, because, as we discuss below, we affirm the administrative law judge's weighing of the opinions of Drs. Forehand, Robinette, and Hippensteel pursuant to Section 718.204(b)(2)(iv). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); Decision and Order on Remand at 2-3.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge, on remand, rationally found that the opinions of Drs. Forehand and Robinette were outweighed by Dr. Hippensteel's opinion because Dr. Hippensteel had a more complete record upon which to base his opinion. *See Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n. 1 (1984)(holding that an administrative law judge may give less weight to a doctor's

opinion that he finds supported by limited medical data, and more weight to an opinion that he finds supported by extensive documentation); Decision and Order on Remand at 3-4. As the administrative law judge found, not only did Dr. Hippensteel examine claimant, he also reviewed an extensive amount of claimant's medical records. See Employer's Exhibits 3, 6, 11, 14. In contrast, as the administrative law judge found, Dr. Forehand examined claimant once, and did not review any of claimant's medical records. Director's Exhibit 10. Although Dr. Robinette examined claimant and reviewed a limited amount of his medical records, the administrative law judge accurately stated that Dr. Hippensteel reviewed a more complete record. Claimant's Exhibit 1. Additionally, the administrative law judge permissibly found that Dr. Hippensteel fully explained his diagnosis that claimant does not have complicated pneumoconiosis and his conclusion that claimant is not totally disabled, and that Dr. Hippensteel's explanations were well reasoned. See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950-951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 4. Because the administrative law judge rationally found that the opinions of Drs. Forehand and Robinette were outweighed by Dr. Hippensteel's opinion, we affirm the administrative law judge's weighing of this medical opinion evidence. We, therefore, affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b). Since the newly submitted evidence did not establish total disability pursuant to Sections 718.204(b) and 718.304, claimant's subsequent claim was properly denied.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge