BRB No. 05-0889 BLA

EUGENE E. RIGGLEMAN Claimant-Petitioner	)	
v.	)	DATE ISSUED: 07/28/2006
ISLAND CREEK 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-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Eugene E. Riggleman, Elkins, West Virginia, *pro se*.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order-Denying Benefits (03-BLA-6424) of Administrative Law Judge Gerald M. Tierney rendered 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] The

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 6.

administrative law judge found that employer is the responsible operator and credited claimant with at least thirty years of coal mine employment. Decision and Order at 2. After determining that the instant claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). Decision and Order at 5-7. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement that was previously adjudicated against him, and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 7.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[3]

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. *McFall v. Jewell Ridge Coal Corp.*, 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, 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).

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."

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[2] Claimant's initial claim for benefits, filed on March 6, 1985, was finally denied on July 19, 1989 because claimant failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.202(b)(2). Director's Exhibit 1. Claimant filed his current claim on February 7, 2001. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment finding, as well as his finding that employer is the responsible operator are affirmed as unchallenged and not detrimental to claimant. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis arising out of coal mine employment or that he is totally disabled due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Pursuant to Section 718.202(a)(1), the administrative law judge considered five readings of three new x-rays in light of the readers' radiological qualifications. Decision and Order at 8. The administrative law judge correctly noted that the one positive reading of the October 10, 2001 x-ray by Dr. Patel, a B reader and Board-certified radiologist, was countered by a negative reading for pneumoconiosis by Dr. Binns, also a B reader and Board-certified radiologist. Decision and Order at 3-4, Director's Exhibit 17; Employer's Exhibit 1. Because Dr. Binns read the other two newly submitted films as negative for pneumoconiosis and there were no other readings of these x-rays, the administrative law judge rationally found that claimant did not establish the existence of pneumoconiosis by a preponderance of the newly submitted x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; Decision and Order at 2. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

The administrative law judge did not evaluate the evidence pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), as there are no biopsy results to be considered, and none of the presumptions listed at 20 C.F.R. §718.202(a)(3) are applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. Claimant therefore as a matter of law may not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical reports in which Dr. Rasmussen diagnosed pneumoconiosis, the contrary opinions of Drs. Renn and Bellotte, and the medical records that reflect a history of chronic obstructive pulmonary disease. Director's Exhibits 14, 13, 19; Employer's Exhibit 5, 9. Dr. Rasmussen diagnosed claimant with coal workers' pneumoconiosis due to coal dust exposure based upon Dr. Patel's positive reading of the film dated October 10, 2001 and chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibits 13-18. The administrative law judge permissibly accorded less weight to Dr. Rasmussen's opinion because his medical specialty credentials are not part of the record and he did not identify the bases for his diagnosis of coal workers' pneumoconiosis beyond an x-ray reading, which was outweighed by the other interpretations of record, and a reference to claimant's coal mine employment history.

Island Creek Coal Co. v. Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 4-5. Further, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Rasmussen provided no support for his opinion that both coal dust exposure and cigarette smoking caused claimant's bronchitis and lung function impairment. *Id.*

The administrative law judge also permissibly found Dr. Rasmussen's opinion outweighed by the contrary opinions of Drs. Renn and Bellotte, based upon their qualifications as Board-certified internists and pulmonologists, and because their opinions were premised upon a more complete picture of claimant's health. *Compton*, 211 F.3d 203, 22 BLR 2-162; Decision and Order at 5. The administrative law judge noted that Dr. Renn evaluated claimant in 1985 and 2001 and explained that Dr. Rasmussen's pulmonary function studies "revealed a disproportionate pattern of volumes and flows which is not consistent with coal workers' pneumoconiosis." Decision and Order at 4; Director's Exhibit 19. Dr. Bellotte conducted the most recent examination and testing and reviewed the earlier medical evidence. Employer's Exhibit 5. Additionally, the administrative law judge reasonably found that although the record related to claimant's heart problems contains references to chronic obstructive pulmonary disease, no physician linked this disease to coal mine dust exposure. 20 C.F.R. §718.201; *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); Decision and Order at 3; Director's Exhibit 19. We therefore affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether claimant established that he is totally disabled by a respiratory or pulmonary impairment under Section 718.204(b)(2)(i), (ii) the administrative law judge properly found that the newly submitted pulmonary function and blood gas studies did not produce qualifying values. Decision and Order at 6; Director's Exhibits 16, 19; Employer's Exhibit 5. The administrative law judge also properly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure to permit claimant to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge acted within his discretion in finding that Dr. Rasmussen's diagnosis of a totally disabling respiratory impairment was entitled to little weight because Dr. Renn, a physician with superior qualifications, found that the diffusing capacity test upon which Dr. Rasmussen relied, was invalid. Decision and Order at 6; Director's Exhibit 14; Employer's Exhibit 9; *Compton*, 211 F.3d 203, 22 BLR 2-162; *Trumbo*, 17 BLR 1-85, 1-88-89 and n.4. The administrative law judge determined correctly that Dr. Renn's opinion did not support a finding of total disability under Section 718.204(b)(2)(iv), as Dr. Renn was aware of the

exertional requirements of claimant's usual coal mine work and stated explicitly that claimant's mild obstructive impairment would not prevent him from performing his job as a maintenance foreman. Decision and Order at 6; Employer's Exhibit 9; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

With respect to Dr. Bellotte's opinion on the issue of total disability, the administrative law judge found that that Dr. Bellotte did not make a specific determination regarding claimant's ability to perform his usual coal mine work. Decision and Order at 7; Employer's Exhibit 5. The administrative law judge further stated that he would not compare Dr. Bellotte's finding of "some mild to moderate pulmonary respiratory impairment" to the exertional requirements of claimant's usual coal mine employment because Dr. Bellotte's disability diagnosis was vague and Dr. Bellotte failed to identify the basis for his diagnosis of a mild to moderate impairment. *Id*. We affirm the administrative law judge's findings with respect to Dr. Bellotte's opinion as being within his discretion as fact-finder. The administrative law judge rationally determined that Dr. Bellotte's diagnosis of an impairment was rendered equivocal by his use of the word "some" to preface his designation of the level of claimant's impairment as mild to moderate. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also rationally found that Dr. Bellotte did not adequately explain his diagnosis of a mild to moderate impairment when the doctor indicated that the objective testing that he performed showed only mild levels of pulmonary impairment. *Compton*, 211 F.3d 203, 22 BLR 2-162; *Lane*, 105 F.3d 166, 21 BLR 2-34.

We affirm, therefore, the administrative law judge's finding that Dr. Bellotte's opinion is insufficient to establish total respiratory or pulmonary disability under Section 718.204(b)(2)(iv). *Lane*, 105 F.3d 166, 21 BLR 2-34.

Because we have affirmed the administrative law judge's determination that claimant has not established a change in an applicable condition of entitlement that defeated the award of benefits in his prior claim, we must also affirm the denial of benefits. 20 C.F.R. §725.309(d); *White*, 23 BLR 1-1, 1-3.

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

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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JUDITH S. BOGGS
Administrative Appeals Judge