BRB No. 07-0627 BLA

D.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/26/2008
	)	
RANGER FUEL CORPORATION	)	
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 – Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (06-BLA-5418) of Administrative Law Judge Paul H. Teitler 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 subsequent claim on December 23, 2004.[1] Director's Exhibit 6. The administrative law judge noted that

[1] Claimant filed his first claim for benefits on September 1, 1978, and the record does not indicate the disposition of this claim. Director's Exhibit 1. Claimant filed his

claimant's benefits application indicated that he had twenty-eight to thirty years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge therefore determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4). Further, claimant generally asserts that the administrative law judge did not accord proper weight to Dr. Rasmussen's medical opinion.[3] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file 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).

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second claim on September 25, 1985, but withdrew it on April 30, 1990. Director's Exhibit 2. On September 25, 1995, claimant filed his third claim for benefits, which was denied on September 30, 1996, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 3. Claimant filed his fourth claim on September 4, 2002, which was denied on September 18, 2003, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 13.

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 the existence of pneumoconiosis or that he was totally disabled. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or total disability 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 the existence of pneumoconiosis was not established at Section 718.202(a)(1). Claimant contends that the administrative law judge improperly relied on a numerical head count of the x-rays in determining that claimant did not establish the existence of pneumoconiosis by x-ray. Claimant's contention lacks merit.

The administrative law judge considered six readings of four new x-rays dated May 25 and September 14, 2005, and July 28 and 29, 2006. Dr. Rasmussen, a B reader, interpreted the May 25, 2005 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis.[4] Director's Exhibits 15, 16; Employer's Exhibit 2. Dr. Zaldivar, a B reader, interpreted the September 14, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Rasmussen interpreted the July 28, 2006 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Claimant's Exhibits 1, 3; Employer's Exhibit 8. Dr. Patel, a Board-certified radiologist, read the July 29, 2006 x-

[4] Dr. Gaziano, a B reader, interpreted the May 25, 2005 x-ray for its film quality only. Director's Exhibit 15.

ray as "classifiable pneumoconiosis," but provided no ILO classification for his x-ray.[5] Claimant's Exhibits 1-3.

The administrative law judge found that the negative readings by Drs. Wheeler and Wiot were more persuasive than the positive readings by Dr. Rasmussen, based on the superior radiological qualifications of Drs. Wheeler and Wiot. Decision and Order at 10. The administrative law judge further found that the negative reading by Dr. Zaldivar, a B reader, supported the negative readings by Drs. Wheeler and Wiot. *Id.* Thus, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the new chest x-rays pursuant to Section 718.202(a)(1). The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Consequently, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant next argues that the administrative law judge erred in finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge erred in finding that Dr. Rasmussen relied solely on his positive x-ray reading to support his opinion. Claimant's Brief at 10. We disagree.

As the administrative law judge noted, both Drs. Hippensteel and Zaldivar opined that claimant has neither clinical nor legal pneumoconiosis in their reports and depositions. Employer's Exhibits 1, 3-5, 7. Dr. Hippensteel reviewed claimant's medical records, while Dr. Zaldivar reviewed claimant's records and examined him. Dr. Rasmussen examined and tested claimant and, in a report dated May 25, 2005, opined that claimant has both clinical and legal pneumoconiosis. Director's Exhibit 15. The administrative law judge gave greater weight to the opinions of Drs. Hippensteel and Zaldivar because they were better qualified than Dr. Rasmussen, because their opinions were better reasoned and better documented, and because their opinions were supported by the treatment records of Dr. Mullins.[6] Decision and Order at 11-12.

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[5] The administrative law judge properly found that Dr. Patel's x-ray reading was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), because it was not properly classified. *See* 20 C.F.R. §§718.102(b), 718.202(a)(1); Decision and Order at 9.

[6] None of Dr. Mullins's treatment records diagnosed claimant with coal workers' pneumoconiosis, as the administrative law judge noted. Decision and Order at 11; Claimant's Exhibit 3.

Contrary to claimant's contentions, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's diagnosis of clinical pneumoconiosis was poorly documented as it was merely a restatement of his positive chest x-ray reading, which was outweighed by negative readings from more highly qualified physicians.[7] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badget, Inc.*, 8 BLR 1-405, 1-407 (1985); Decision and Order at 11; Director's Exhibit 15. In evaluating Dr. Rasmussen's diagnosis of legal pneumoconiosis, the administrative law judge rationally found that Dr. Rasmussen failed to adequately explain his diagnosis of chronic bronchitis from cigarette smoking and coal dust exposure, after acknowledging that both etiologies can cause similar types of lung destruction.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 11; Director's Exhibit 15. Moreover, the administrative law judge permissibly found that Dr. Rasmussen's conclusion that claimant's coal dust exposure caused his impairment was questionable in light of the opinions of the pulmonary specialists, Drs. Hippensteel and Zaldivar, who attributed claimant's impairment to his coronary artery disease. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994); Decision and Order at 11; Director's Exhibit 15. Thus, we reject claimant's contention that the administrative law judge erred in his analysis of Dr. Rasmussen's opinion. Consequently, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Rasmussen's opinion that claimant is totally disabled was "not as persuasive" as the better reasoned and supported opinions of Drs. Hippensteel and Zaldivar. Decision and Order at 13. Claimant generally asserts that the administrative law judge did not give proper weight to Dr. Rasmussen's opinion. However, claimant alleges no specific error in regard to the administrative law judge's consideration of the medical opinions as to total disability. *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48

[7] Dr. Rasmussen, in both his narrative and Department of Labor (DOL) form, stated that claimant has clinical pneumoconiosis based on his significant coal dust exposure and x-ray changes. Director's Exhibit 15.

[8] In his narrative and DOL form, Dr. Rasmussen attributed claimant's disabling lung disease to cigarette smoking and coal dust exposure because both etiologies cause similar types of lung tissue destruction, noting that coal dust exposure also causes impairment in oxygen transfer without airway obstruction. Director's Exhibit 15. Dr. Rasmussen cited three medical studies to support his conclusion. *Id.*

(6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. 20 C.F.R. §§802.211, 802.301. Consequently, the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv) is affirmed.

Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement. Consequently, we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

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