BRB No. 08-0591 BLA

D.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILVERADO MINING COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 03/30/2009
	)	
Employer/Carrier-Respondents	)	
	)	
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 Stephen L. Purcell, Associate Chief Administrative Law Judge, United States Department of Labor.

D.J., Panther, West Virginia, *pro se*.

Douglas A. Smoot and Seth P. Hayes (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2005-BLA-6275) of Associate Chief Administrative Law Judge

Stephen L. Purcell 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). The administrative law judge found the instant case to be a subsequent claim filed on October 19, 2004.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with nineteen years of coal mine employment based on the parties' stipulation, and considered whether the evidence submitted since the prior denial was sufficient to establish one of the applicable conditions of entitlement previously adjudicated against claimant pursuant to 20 C.F.R. §725.309(d). The administrative law judge found that the newly submitted medical evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that the evidence submitted since the prior denial was insufficient to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's denial of benefits.[2] In response, employer urges affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis and, therefore, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response unless requested to do so by the Board.

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[1] Claimant filed his initial claim for benefits on November 23, 1994. That claim was denied by the district director on May 15, 1995, because claimant failed to establish any of the applicable elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second claim for benefits on July 24, 1998. That claim was denied by the district director on October 5, 1998, because claimant did not establish any of the applicable elements of entitlement. Director's Exhibit 2. No further action was taken by claimant until he filed his current claim on October 19, 2004. Director's Exhibit 4.

[2] Claimant, in his April 25, 2008 letter to the Board appealing the administrative law judge's denial of benefits, states that he also wishes "to be able to present additional evidence from new doctors yet to be seen." Claimant's Appeal Letter dated April 25, 2008. Because the Board lacks jurisdiction to reopen the record and review evidence not presented to the administrative law judge, claimant cannot submit new evidence directly to the Board. 20 C.F.R. §§801.102, 802.301. However, if claimant wishes to obtain new evidence, he may, at any time within one year after the denial of this claim, file a request for modification with the district director and submit any relevant new evidence he has obtained in support of that request to the district director. 20 C.F.R. §§802.301(c), 725.310 (2000); *see Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

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, 1-177 (1989). 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.[3] 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If a miner files an application 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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing either of these conditions of entitlement to proceed with his claim. 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence of record, consisting of six readings of three x-ray films dated November 11, 2004, March 17, 2005 and February 19, 2007. Director's Exhibits 12, 13; Claimant's Exhibit 1; Employer's Exhibits 9, 10, 15. Dr. Forehand, a B reader, read the November

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

11, 2004 x-ray as positive for the existence pneumoconiosis, whereas Dr. Meyer, a B reader and Board-certified radiologist, read this film as negative for pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 9. Dr. Rasmussen, a B reader, read the February 19, 2007 x-ray as positive for pneumoconiosis, but Dr. Wiot, a B reader and Board-certified radiologist, read the same film as negative. Claimant's Exhibit 1; Employer's Exhibit 15. The remaining film, dated March 17, 2005, was read as negative for pneumoconiosis by both Dr. Hippensteel, a B reader, and Dr. Meyer. Director's Exhibit 13; Employer's Exhibit 10.

Weighing the conflicting x-ray evidence, the administrative law judge permissibly accorded greater weight to the negative interpretations of the November 17, 2004 x-ray and the February 19, 2007 x-ray by Drs. Meyer and Wiot, respectively, than to the positive readings of these x-rays, based on the superior radiological credentials of Drs. Meyer and Wiot. 20 C.F.R. §718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 13. Consequently, as the administrative law judge conducted an appropriate qualitative and quantitative analysis of the x-ray evidence, we affirm his finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *White*, 23 BLR at 1-4-5.

In addition, the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3), as the record contained no biopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 were not available to claimant.[4] *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 12. This finding, therefore, is affirmed.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Forehand, Rasmussen, Hippensteel and Zaldivar. Decision and Order at 8-11. Dr. Rasmussen, Board-certified in Internal Medicine and Pulmonary Disease, diagnosed both clinical pneumoconiosis, based on claimant's x-ray and coal mine employment history, and legal pneumoconiosis, opining that claimant's "cigarette smoking and his coal mine dust exposure are responsible for his

[4] The presumption at 20 C.F.R. §718.304 was inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant was not entitled to the presumption at 20 C.F.R. §718.305 because his claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 4. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 was also inapplicable.

minimal impaired function."[5] Claimant's Exhibit 1; Employer's Exhibit 12. Dr. Forehand, a Board-certified Pediatrician, diagnosed clinical pneumoconiosis, as well as chronic bronchitis due to claimant's cigarette smoking and coal dust exposure. Director's Exhibit 12. Drs. Hippensteel and Zaldivar, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant did not suffer from clinical or legal pneumoconiosis. Director's Exhibit 13; Employer's Exhibits 1, 5, 8, 13-14.

In weighing the conflicting medical opinion evidence, the administrative law judge initially determined that the medical opinions were insufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4), because the opinions of Drs. Forehand and Rasmussen, diagnosing the presence of clinical pneumoconiosis, were merely restatements of x-ray readings. *See Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Further, the administrative law judge rationally found that, after considering the weight of the negative x-ray evidence and the negative opinions for clinical pneumoconiosis of Drs. Hippensteel and Zaldivar, the opinions of Drs. Forehand and Rasmussen did not establish clinical pneumoconiosis at Section 718.202(a)(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, we affirm the administrative law judge's finding that the existence of clinical pneumoconiosis was not established at Section 718.202(a)(4).

The administrative law judge reasonably found that the preponderance of the newly submitted medical opinion evidence did not support a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). In particular, the administrative law judge found that the opinions of Drs. Hippensteel and Zaldivar, that pneumoconiosis was not present, were well-reasoned and documented. The administrative law judge found that Dr. Hippensteel's opinion was entitled to great weight as the doctor based his opinion on objective evidence, and explained how the newer evidence of record and the evidence he reviewed corroborated his opinion. Decision and Order at 14; Director's Exhibit 13; Employer's Exhibits 5, 13. Likewise, the administrative law judge found Dr. Zaldivar's opinion entitled to great weight because the physician based his opinion on the objective evidence and explained how the evidence supported his conclusions. Decision and Order at 14; Employer's Exhibits 1, 8, 14. These findings were within the administrative law judge's discretion and were supported by substantial evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998);

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). For the purposes of the regulations, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

Akers, 131 F.3d at 441, 21 BLR at 2-275-276; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

In contrast, the administrative law judge found that Dr. Rasmussen did not adequately explain his opinion or point to specific findings to support his conclusions that claimant's pulmonary impairment was due, in part, to his coal dust exposure, without adequately discussing the other possible causative factors. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Clark*, 12 BLR at 1-155; Decision and Order at 13-14. Similarly, the administrative law judge permissibly accorded little weight to Dr. Forehand's opinion, because he found that Dr. Forehand did not adequately discuss the bases for his diagnoses; particularly, his finding that claimant's bronchitis was related to his coal mine employment. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; Decision and Order at 14. The administrative law judge therefore properly accorded greater weight to the opinions of Drs. Hippensteel and Zaldivar, that claimant did not have legal pneumoconiosis, over the opinions of Drs. Forehand and Rasmussen, as they were better reasoned, *i.e.*, they were supported by their underlying documentation and provide a better explanation of their conclusions. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 14. Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Moreover, substantial evidence supports the administrative law judge's finding that all of the relevant newly submitted evidence weighed together did not establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a). 20 C.F.R. §718.202(a); *Compton*, 211 F.3d at 207, 22 BLR at 2-167-168. Therefore, we affirm the administrative law judge's finding that the evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a).

In addition, we affirm the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish that claimant is totally disabled pursuant to Section 718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three newly submitted pulmonary function studies dated November 17, 2004, March 17, 2005 and February 19, 2007. Of these three studies, the administrative law judge correctly noted that only the pre-bronchodilator results of the March 17, 2005 study yielded qualifying values, but that the post-

bronchodilator results of the same study yielded non-qualifying values.[6] Decision and Order at 15; Director's Exhibits 13. The administrative law judge further correctly found that the remaining two pulmonary function studies, including the most recent study, yielded non-qualifying results. Decision and Order at 15; Director's Exhibit 12; Claimant's Exhibit 1. Based upon the preponderance of non-qualifying pulmonary function studies, including the most recent study, the administrative law judge found that the newly submitted pulmonary function study evidence did not establish total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 15. Because it is based upon substantial evidence, we affirm this finding. 20 C.F.R. §718.204(b)(2)(i); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

In addition, we affirm the administrative law judge's finding that the newly submitted blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge accurately noted that the record contained three newly submitted blood gas studies conducted on November 17, 2004, March 17, 2005 and February 19, 2007. Decision and Order at 7-8, 16; Director's Exhibits 12, 13; Claimant's Exhibit 1. Of these three blood gas studies, the administrative law judge correctly noted that only claimant's March 17, 2005 study produced qualifying values. Decision and Order at 16. The administrative law judge accurately noted that the other two blood gas studies, including the most recent study conducted on February 19, 2007, produced non-qualifying values. *Id.* Based upon the preponderance of non-qualifying blood gas studies, as well as the most recent non-qualifying blood gas study evidence, the administrative law judge found that the newly submitted blood gas study evidence did not establish total disability pursuant to Section 718.204(b)(2)(ii). Decision and Order at 16. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted blood gas study evidence did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); *see e.g., Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411, 1-412 (1984) (holding that later blood gas studies may properly be credited as more probative of a miner's present condition than earlier studies).

Moreover, because there was no newly submitted evidence of record indicating that the claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16.

[6] A "qualifying" objective study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

In considering whether the medical opinions established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Forehand, Rasmussen, Hippensteel and Zaldivar, submitted since the prior denial. Dr. Forehand opined that claimant was totally disabled, diagnosing a significant respiratory impairment and that claimant was not capable, from a respiratory standpoint, of returning to his usual coal mine employment. Director's Exhibit 12. Dr. Rasmussen opined that claimant was not capable, from a respiratory standpoint, of performing his usual coal mine employment, diagnosing a minimal loss of lung function. Claimant's Exhibit 1. In his deposition testimony, however, Dr. Rasmussen stated that, with his minimal obstructive defect, claimant would probably be able to do some heavy manual labor, but not very heavy manual labor. Employer's Exhibit 12 at 20, 27. Dr. Zaldivar opined that claimant has a pulmonary impairment that would prevent him from performing his usual coal mine employment due to his asthma, obesity and cigarette smoking. Employer's Exhibit 1. However, in his May 14, 2007 deposition, Dr. Zaldivar further stated that, following review of Dr. Rasmussen's examination and testing, claimant is "totally disabled intermittently, depending on the status of his asthma at any given time" and that " when his asthma is at its optimum, yes, he can do very heavy labor." Employer's Exhibit 15 at 19. Dr. Hippensteel noted that claimant had numerous non-coal mine employment respiratory conditions, including asthma, sleep apnea, morbid obesity and a history of cigarette smoking that would have caused "his impairment as a whole man." Director's Exhibit 13. However, following a review of the medical evidence of record, specifically Dr. Rasmussen's examination and studies, Dr. Hippensteel stated that "from an intrinsic pulmonary standpoint, he actually has the function to perform at his previous job." Employer's Exhibit 13 at 17.

Weighing the newly submitted medical opinion evidence, the administrative law judge reasonably accorded little weight to Dr. Forehand's opinion, based on his determination that Dr. Forehand failed to adequately explain the basis for his finding of total disability, in light of his underlying documentation, and also because Dr. Forehand is a Board-certified Pediatrician, whereas Drs. Rasmussen, Hippensteel and Zaldivar are all Board-certified Pulmonologists. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 16. Likewise, the administrative law judge reasonably accorded little weight to Dr. Rasmussen's opinion, finding that Dr. Rasmussen failed to adequately explain his finding that claimant was not able to perform the job of a scoop operator, in light of the underlying documentation and his diagnosis of a minimal impairment. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; Decision and Order at 16. In addition, the administrative law judge rationally found that Dr. Zaldivar's diagnosis, that claimant was "intermittently" disabled, was equivocal and, therefore, entitled to diminished weight. *See Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64

(1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 16. In contrast, the administrative law judge found that Dr. Hippensteel's opinion, that claimant was capable, from a respiratory standpoint, of performing his usual coal mine employment, was the best reasoned and documented opinion, as it was supported by the underlying objective evidence. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; Decision and Order at 16-17.

Because the administrative law judge rationally addressed the comparative credentials of the physicians, the documentation underlying their medical opinions, and the explanations for their conclusions, we affirm the administrative law judge's finding that the weight of the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as supported by substantial evidence. *See Hicks*, 138 F.3d at 533, 536, 21 BLR at 2-335, 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Moreover, we affirm the administrative law judge's finding that the newly submitted evidence, when weighed together, was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). 20 C.F.R. §718.204(b); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 17.

Because we have affirmed the administrative law judge's determination that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), we also affirm his finding that claimant failed to demonstrate a change in one of the applicable conditions of entitlement pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order Denying 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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BETTY JEAN HALL
Administrative Appeals Judge