

BRB No. 05-0741 BLA

ROBERT L. MESSER)
)
 Claimant-Petitioner) DATE ISSUED: 05/11/2006
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 v.)
)
 CEDAR 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-Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-5815) of Administrative Law Judge Richard A. Morgan 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).¹ Initially, the administrative law judge found²

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The

that the evidence was insufficient to establish at least 10 years of coal mine employment. The administrative law judge also found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that the evidence was insufficient to establish a change in an

provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

² The procedural history of this case is as follows. Claimant filed his first claim for benefits on July 10, 1985, which was denied by the district director on January 6, 1986, because the evidence was insufficient to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 47 of Director's Exhibit 1. Because claimant did not pursue this claim any further, the denial became final. Director's Exhibit 1. Claimant subsequently filed his second claim on August 2, 1993, which was denied by Administrative Law Judge Levin because the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000). Decision and Order at 2; Director's Exhibit 1 of Director's Exhibit 1. The Board affirmed Judge Levin's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000) on the merits, and at Sections 718.202(a)(2), (a)(3)(2000) and 718.204(c)(4)(2000) as unchallenged on appeal. The Board further rejected claimant's contentions at 20 C.F.R. §718.204(c)(3)(2000), and remanded the case to Judge Levin for further consideration at Sections 718.202(a)(4)(2000) and 718.204(c)(1), (c)(2)(2000). *Messer v. Cedar Coal Co.*, BRB No. 95-1520 BLA (January 30, 1996)(unpub.); Director's Exhibit 2. On remand, Judge Levin found that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4)(2000) and that pneumoconiosis could not be at least a contributing cause of claimant's disability at 20 C.F.R. §718.204(b)(2000). Decision and Order at 2; Director's Exhibit 2. Judge Levin did not reconsider Section 718.204(c)(1) or (c)(2)(2000) on remand. *Id.* Subsequently, the Board affirmed Judge Levin's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000) on the merits, and declined to address the administrative law judge's findings regarding total disability and whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) under the standard articulated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). *Messer v. Cedar Coal Co.*, BRB No. 96-1754 BLA (July 15, 1997)(unpub.); Director's Exhibit 2. Consequently, the Board affirmed the denial of claimant's second claim. *Id.* Claimant did not appeal or take any further action within one year of the denial; thus, the second claim was finally denied and administratively closed. Director's Exhibit 2.

applicable condition of entitlement since the date upon which claimant's prior claim became final 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 newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director did not file a response brief.³

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in discrediting Dr. Rasmussen's opinion that claimant has pneumoconiosis. Claimant also contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Altmeyer because they relied primarily on employer's negative x-ray interpretations to support their conclusions that claimant does not have pneumoconiosis. Claimant further argues that the administrative law judge improperly applied the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) by first finding that pneumoconiosis was not established by x-ray and then crediting the medical opinions which support that finding.

Drs. Rasmussen and Zaldivar examined claimant, and Dr. Altmeyer reviewed claimant's medical records. Dr. Rasmussen diagnosed coal worker's pneumoconiosis due to coal mine dust exposure based on claimant's 12 years of coal mine employment and x-ray evidence of pneumoconiosis. Director's Exhibit 14 at 4. Dr. Rasmussen also diagnosed chronic obstructive pulmonary disease and asthma due to occupational dust and fumes, cigarette smoking, and hyperactive airways based on claimant's partially reversible airflow obstruction. *Id.* Dr. Rasmussen stated in a supplemental opinion that even if claimant worked 5.6 years in the coal mines and not 12 years as claimant reported, that 5.6 years of coal mine employment is sufficient exposure to acquire coal workers' pneumoconiosis. Director's Exhibit 14 (Dr. Rasmussen's May 15, 2003, report). Subsequently, Dr. Rasmussen testified by deposition. Employer's Exhibit 2. Dr. Rasmussen stated that claimant's coal mine dust exposure contributed minimally to his pulmonary impairment.

³ The administrative law judge's finding that the evidence is insufficient to establish at least 10 years of coal mine employment, as well as the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 6, 10-11.

Employer's Exhibit 2 at 9-10.⁴ Although Dr. Rasmussen found that claimant has pneumoconiosis based on Dr. Patel's positive x-ray interpretation, he testified that he viewed the same film and did not find any radiological evidence of pneumoconiosis.⁵ Employer's Exhibit 2 at 20-22. Dr. Zaldivar opined that claimant has no evidence of pneumoconiosis nor any dust disease of the lungs, but has asthma unrelated to coal mine employment or pneumoconiosis, and further opined that if claimant has emphysema, it is entirely due to his lifelong smoking history. Director's Exhibit 15 (Dr. Zaldivar's report at 5). Dr. Altmeyer concluded that claimant does not have pneumoconiosis or any condition caused by coal dust exposure based on negative x-ray reports, including multiple negative readings by B readers. Employer's Exhibit 1 at 9. Dr. Altmeyer opined that claimant's totally disabling pulmonary impairment is due to his obesity and chronic asthma and not pneumoconiosis or coal dust exposure, and stated that claimant's cough with sputum production are due to naturally occurring asthma, aggravated by long-term tobacco smoking. *Id.*

The administrative law judge considered whether the newly submitted medical opinion evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis. Decision and Order at 11. The administrative law judge found that Dr. Rasmussen's opinion, which arguably supports claimant's position that he has clinical and legal pneumoconiosis, was entitled to no weight because the doctor's deposition testimony was ambiguous, equivocal, and conflicting. On the other hand, the administrative law judge found that the opinions of Drs. Zaldivar and Altmeyer, that claimant does not have pneumoconiosis, are better reasoned and documented, and more consistent with the credible, objective evidence, including the negative x-ray evidence, claimant's minimal coal mine employment history, his longstanding history of asthma, and his extensive cigarette smoking history.⁶ The administrative law judge thus found that the clear preponderance of the

⁴ At deposition, employer's counsel asked: "Well, but other than the asthma, which everybody seems to acknowledge is present, you couldn't even say for sure that he has pneumoconiosis or that he has [an] impairment due to cigarette smoking. They are just two possible causes?" Dr. Rasmussen answered, "That's correct." Employer's Exhibit 2 at 20.

⁵ Dr. Rasmussen is a B reader. Employer's Exhibit 2 at 21.

⁶ As discussed, *supra*, the administrative law judge found that the preponderance of the newly submitted x-ray evidence was negative for pneumoconiosis, and that claimant had failed to meet his burden of establishing at least 10 years of coal mine employment. Decision and Order at 4, 6, 10-11. Drs. Rasmussen, Zaldivar, and Altmeyer all reported that claimant had a history of asthma since childhood, and a smoking history of two to three packs per day from 1966-2001. Director's Exhibit 14 at 2; Director's Exhibit 15 (Dr. Zaldivar's report at 1); Employer's Exhibit 1 at 1. The administrative law judge found the evidence conflicting regarding the extent of claimant's smoking history, since claimant testified to smoking one and one-half to two packs per day for 15 to 18 years at the first hearing in this case, when

credible medical opinion evidence is negative for pneumoconiosis, and thus that claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4). Weighing all relevant evidence together under Section 718.202(a), the administrative law judge found that claimant did not establish the existence of clinical or legal pneumoconiosis, based on the clear preponderance of the negative x-ray interpretations and medical opinion evidence, citing *Compton*, 211 F.3d 203, 22 BLR 2-162.

We affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4).⁷ The administrative law judge rationally accorded no weight to Dr. Rasmussen's opinion, and therefore found it insufficient to meet claimant's burden at Section 718.202(a)(4), because his deposition testimony was ambiguous, equivocal, and conflicting. Decision and Order at 11; Employer's Exhibit 2. Specifically, the administrative law judge properly found that Dr. Rasmussen's deposition testimony was ambiguous and equivocal regarding the existence of legal pneumoconiosis because Dr. Rasmussen initially stated that claimant's coal mine dust exposure contributed minimally to his pulmonary impairment but subsequently testified that he could not say for sure whether claimant has pneumoconiosis or that he has an impairment due to cigarette smoking. Employer's Exhibit 2 at 9-10, 20. Moreover, the administrative law judge properly found that Dr. Rasmussen's deposition testimony was conflicting as to the existence of clinical pneumoconiosis since Dr. Rasmussen diagnosed pneumoconiosis based on a positive x-ray interpreted by Dr. Patel although Dr. Rasmussen, a B reader himself, interpreted this film as negative for pneumoconiosis. Employer's Exhibit 2 at 20-22. An administrative law judge may decline to credit a medical opinion that is ambiguous and equivocal. See *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, an administrative law judge need not credit a medical opinion that is conflicting. See *White v. New White Coal Co.*, 23 BLR 1-1 (2004). As the administrative law judge properly discredited the medical opinion of Dr. Rasmussen, the only opinion that arguably supports claimant's burden to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we need not address the administrative law judge's weighing of the remaining opinions of Drs. Zalidvar and Altmeyer, as any error

hospital records earlier had reported a history of three to four packs per day for 33 years. Decision and Order at 5-6. The administrative law judge characterized claimant's smoking history as "very significant." *Id.*

⁷ A finding of either clinical pneumoconiosis, see 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, see 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). "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).

therein would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983); Decision and Order at 11; Director's Exhibit 15; Employer's Exhibits 1, 2. Further, since the administrative law judge rationally accorded no weight to the only medical opinion evidence that could support claimant's burden at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁸

Because the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the element of entitlement previously adjudicated against claimant, we hold that claimant has failed to establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final at 20 C.F.R. §725.309(d).⁹

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁸ Contrary to claimant's contention, the administrative law judge properly weighed the evidence at 20 C.F.R. §718.202(a) in accordance with *Compton*, 211 F.3d 203, 22 BLR 2-162, to find that the existence of pneumoconiosis had not been established at Section 718.202(a), because he weighed all of the relevant x-ray and medical opinion evidence together, citing *Compton*. Decision and Order at 10-11.

⁹ We decline to address claimant's argument that the newly submitted evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) since the denial of claimant's prior claim was based on a finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Messer v. Cedar Coal Co.*, BRB No. 96-1754 BLA (July 15, 1997)(unpub.); *Messer v. Cedar Coal Co.*, BRB No. 95-1520 BLA (January 30, 1996)(unpub.); 20 C.F.R. §725.309(d); Director's Exhibit 2; *see n. 1, supra*.

BETTY JEAN HALL
Administrative Appeals Judge