BRB No. 06-0373 BLA

WARREN D. HOLLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/29/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Warren D. Hollis, Hartshorne, Oklahoma, *pro se*.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Living Miner's Benefits (05-BLA-5482) of Administrative Law Judge Thomas M. Burke rendered on a subsequent[1] 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). Pursuant to 20 C.F.R. Part 718, based on claimant's February 24, 2004 filing date, the administrative law judge credited claimant with eleven years of coal mine

[1] The procedural history is summarized in the administrative law judge's Decision and Order at 2.

employment[2] and 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). 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).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director, Office of Workers' Compensation Programs, has filed a letter urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

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." 20 C.F.R. §725.309(d)(2). The administrative law judge found that claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a pulmonary impairment. Decision and Order at 2; 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).

Because there are no x-rays properly classified according to 20 C.F.R. §718.102, and the readings did not diagnose pneumoconiosis, the administrative law judge rationally found that claimant did not establish the existence of pneumoconiosis by x-ray. *See* 20 C.F.R. §718.202(a)(1). *White*, 23 BLR at 1-4-5; Decision and Order at 5; Director

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as claimant was last employed in the coal mine industry in Oklahoma. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 8.

Exhibit 20; Claimant's Exhibit 1. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1). Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that 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 contains no evidence of complicated pneumoconiosis. The administrative law judge therefore rationally found that claimant may not establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the four newly submitted medical reports. Director's Exhibit 17; Claimant's Exhibits 1, 2. The administrative law judge reasonably found that Dr. Raunikar's opinion, that claimant is suffering from pneumoconiosis, was not well reasoned because he based his opinion on an x-ray that "showed fibrotic changes which could be consistent with pneumoconiosis but, was not diagnostic of pneumoconiosis," and on normal pulmonary function tests that he admittedly found "neither confirmed nor ruled out pneumoconiosis." *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc); Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 7; Claimant's Exhibit 1. The administrative law judge also acted rationally in discrediting as unpersuasive Dr. Raunikar's conclusion, that because the tests for claimant's cardiac condition were negative, and the pulmonary testing was normal and, therefore, ruled out the presence of chronic obstructive pulmonary disease, claimant's pulmonary condition must be caused by pneumoconiosis. *Id*.

Similarly, the administrative law judge reasonably found that Dr. Trent's opinion, that claimant has objective findings consistent with pneumoconiosis, is not supported by the record because it was based on an x-ray that is not diagnostic of pneumoconiosis. 20 C.F.R. §718.202(a). The administrative law judge found that Dr. Benson, a cardiologist, on a consultation report requested by Dr. Raunikar, did not diagnose pneumoconiosis, but concluded that claimant had exertional dyspnea of undetermined etiology. *Id.* Because Dr. Odgers's opinion specifically concluded that claimant has "no apparent cardiopulmonary disease" and the administrative law judge permissibly found that the x-ray evidence and opinions of Drs. Raunikar, Trent and Benson failed to support a finding of pneumoconiosis, we must 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). 20 C.F.R. §718.201; *Island Creek Coal Co. v. Compton* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark*, 12 BLR 1-149*; Fields*, 10 BLR 1-19 (1987); Decision and Order at 12.

In considering whether claimant established that he is totally disabled by a respiratory or pulmonary impairment under 20 C.F.R. §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 8, 9; Director's Exhibits 18, 30; Claimant's Exhibit 1. 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). Decision and Order at 8, n.3.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical reports by Drs. Odgers, Raunikar, Benson, and Trent in finding that claimant has not shown that he is suffering from a totally disabling pulmonary impairment. The administrative law judge found that Dr. Odgers, who examined claimant for the Department of Labor, concluded that claimant had no cardiopulmonary disease after considering claimant's coal mine employment history, coal mine job as operating a cutting machine, smoking history, symptoms, physical limitations, x-ray, normal pulmonary function test and blood gas study showing hypoxia. Decision and Order at 10; Director's Exhibit 17.

The administrative law judge further found that Dr. Raunikar's June 28, 30, August 4, October 1, 2004 treatment notes and September 24, 2004 letter failed to provide an opinion on whether claimant has a total pulmonary disability and the severity of claimant's condition. Decision and Order at 10; Claimant's Exhibit 1. The administrative law judge found that on June 28, 2004, Dr. Raunikar concluded that claimant's dyspnea had gradually worsened, but offered no opinion on severity. *Id.* The administrative law judge found that Dr. Raunikar's treatment note on June 30, 2004, concluding that "if" claimant "is determined to have pneumoconiosis, he would be totally disabled from doing his job as a coal miner" does not constitute an opinion on whether claimant has a total pulmonary disability. *Id.* The administrative law judge found that on August 4, 2004, Dr. Raunikar examined claimant and ordered an echocardiogram to determine the cause of claimant's shortness of breath, but did not provide an opinion on whether claimant's pulmonary condition was compromised. *Id.* The administrative law judge found that Dr. Raunikar's September 24, 2004 letter stated that claimant's echocardiogram did not show evidence of coronary artery disease or congestive heart failure, and that the cause of claimant's shortness of breath was therefore pulmonary due to pneumoconiosis, but did not provide an opinion on the severity of claimant's condition. *Id.* The administrative law judge further found that on October 1, 2004, Dr. Raunikar reviewed the tests performed since June 2004 and concluded that claimant had pneumoconiosis without discussing the severity or whether the pneumoconiosis was totally disabling. *Id.*

Likewise, the administrative law judge found that Dr. Benson diagnosed exertional dyspena and Dr. Trent asserted that claimant's exercise tolerance and activity level are diminished by history, but neither provided an opinion on the severity of claimant's condition or whether claimant was totally disabled. *Carson v. Westmoreland Coal Co.,*

19 BLR 1-16 (1994); Decision and Order at 10; Claimant's Exhibits 1, 2. We affirm, therefore, the administrative law judge finding that because there are no newly submitted medical reports diagnosing total pulmonary or respiratory disability, claimant has failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Carson*, 19 BLR 1-16.

Consequently, we affirm the administrative law judge's finding that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled and thus claimant did not establish a change in any condition of entitlement that had previously been adjudicated against him. 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 Living Miner's 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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BETTY JEAN HALL
Administrative Appeals Judge