BRB No. 06-0430 BLA

WAYNE PERRY DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 11/30/2006
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Wayne Perry Deel, Lick Creek, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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 (03-BLA-0016) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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 credited claimant with at least nineteen years of coal mine employment, pursuant to the parties' stipulation, and found that employer was the responsible operator.[1] Decision and

[1] The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibits 2, 4, 38. Accordingly, this case arises within the

Order at 2, 4; Hearing Transcript at 15. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 15. After determining that this claim was a subsequent claim,[2] the administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 3, 15-28. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him, and he denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 28.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

In order to establish entitlement to benefits in a living 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. Failure to establish any

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jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Claimant filed his initial claim for benefits on September 11, 1986, which was finally denied on August 13, 1990. Director's Exhibit 38. Claimant filed a second claim on July 3, 1997, which was finally denied by the district director on October 7, 1998, because claimant failed to establish any element of entitlement. Director's Exhibit 39. Claimant took no further action until he filed this claim on June 20, 2000, in which the district director denied benefits on March 23, 2001. Director's Exhibits 1, 36. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 37, 40. Following a remand to the district director for further evidentiary development, a hearing was held on February 17, 2004.

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the twenty-three newly submitted readings of the nine x-rays of record in light of the readers' radiological qualifications. Decision and Order at 17-18. Two readings were positive for pneumoconiosis. The February 19, 2002 x-ray was read as positive by Drs. Patton and Sundaram. Director's Exhibits 43, 52. The administrative law judge accurately noted that those physicians had no radiological credentials of record. The administrative law judge accorded more weight to the negative reading of the February 19, 2002 x-ray by Dr. Repsher, who is a B-reader, based on his radiological qualifications. Director's Exhibits 43, 52; Employer's Exhibit 2; Decision and Order at 17. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Director's Exhibits 7, 8, 26, 29, 42, 43, 52, 59; Employer's Exhibits 1, 2, 4, 6, 8, 10; Decision and Order at 17-18. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Considering the newly submitted biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge noted that the pathology report by Dr. Segen was positive for the existence of pneumoconiosis while the pathology report by Dr. Caffrey was negative for the existence of pneumoconiosis. Decision and Order at 18. The administrative law judge found that both opinions were reasoned and documented and that both physicians possessed superior credentials in the field of pathology. Decision and Order at 18; Director's Exhibit 27; Employer's Exhibit 13. The administrative law judge concluded that the reports were equally persuasive and therefore insufficient to meet claimant's burden of proof. Decision and Order at 18.

The administrative law judge rationally determined that the biopsy evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), since the conflicting opinions by physicians with similar qualifications were in equipoise. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Consequently, the administrative law judge permissibly concluded that the claimant failed to carry his burden to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) by a preponderance of the biopsy evidence. *Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

The administrative law judge also correctly found that the claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.[3] *See* 20 C.F.R. §§718.202(a)(3); Decision and Order at 18.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge acted within his discretion in concluding that the opinions of Drs. Younes, Hussain, Ammisetty, Sundaram and Briggs, diagnosing pneumoconiosis, were insufficient to meet claimant's burden of proof because the physicians' opinions were not well documented and reasoned. *See Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); Decision and Order at 20-23; Director's Exhibits 27, 34, 35, 43, 52, 59; Claimant's Exhibits 1, 2.

Specifically, the administrative law judge permissibly found the opinions of Drs. Younes, Hussain, and Ammisetty were entitled to little weight as they failed to offer any explanation or basis for their conclusions. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-155. Further, the administrative law judge permissibly accorded little weight to the opinions of Drs. Sundaram and Biggs because Dr. Sundaram failed to consider claimant's smoking history, and because Dr. Biggs did not have a complete picture of claimant's health. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Additionally, the administrative law judge permissibly found the opinions of Drs. Dahhan, Repsher, and Rosenberg, stating that claimant does not have legal pneumoconiosis, to be well documented and reasoned and bolstered by the physicians'

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

qualifications in Internal Medicine and Pulmonary Disease. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as they are supported by substantial evidence and in accordance with law.[4] *McFall*, 12 BLR at 1-177.

In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge properly determined that all of the newly submitted pulmonary function studies were non-qualifying and that as the preponderance of the most recent blood gas studies were non-qualifying, they were insufficient to meet claimant's burden of proof.[5] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 7, 29, 30, 43, 52, 59; Claimant's Exhibit 1; Employer's Exhibit 10; Decision and Order at 24. The administrative law judge further properly found that there is no evidence of cor pulmonale with right-sided congestive heart failure in the record pursuant to Section 718.204(b)(2)(iii). *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 24.

Pursuant to the administrative law judge permissibly concluded that the opinions of Drs. Dahhan, Repsher, and Rosenberg, that claimant is not totally disabled, were more persuasive as the opinions were supported by the medical evidence of record and bolstered by the physicians' qualifications. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Clark*, 12 BLR at 1-155.

Furthermore, in determining if total disability was established, the administrative law judge noted the existence of contrary probative evidence in the record and permissibly concluded that this evidence was sufficient to outweigh the evidence supportive of a total disability finding. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 27-28. Consequently, we affirm the administrative law judge's finding that the weight of the

[4] When weighing the medical opinions, the administrative law judge also noted accurately that Drs. Wheeler, Scott, and Sargent interpreted a February 13, 2001 CT scan as negative for the existence of coal workers' pneumoconiosis. Decision and Order at 20; Director's Exhibit 42.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

evidence of record is insufficient to support a finding of total disability. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999); *Shedlock*, 9 BLR 1-195.

Because the administrative law judge's finding that the newly submitted evidence of record did not establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b) is supported by substantial evidence and in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(d)(2000); *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235. Consequently, we affirm the denial of benefits.

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