BRB No. 05-0193 BLA

DANNY M. REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BISHOP COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/14/2005
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Danny M. Reynolds, Bishop, Virginia, *pro se*.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (03-BLA-5399) of Administrative Law Judge Richard T. Stansell-Gamm 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] The administrative law judge accepted the parties' stipulation of at least ten

[1] Claimant has filed two claims previously. The first claim, filed on July 23, 1979, was ultimately denied on October 31, 1990. Director's Exhibit 1. Claimant filed his

and one-half years of coal mine employment and 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). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs has indicated that he will not participate in this appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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., Inc.*, 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. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed

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second claim on September 4, 1992, which was denied on January 21, 1999 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 2. Claimant filed this claim on September 17, 2001. Director's Exhibit 3.

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*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge considered ten readings of nine new x-rays. There was one positive reading, a "1/0" reading of the February 12, 2002 x-ray by Dr. Forehand, a B-reader. Director's Exhibit 8. However, the administrative law judge permissibly accorded greater weight to Dr. Spitz's negative interpretation of the February 12, 2002 x-ray, based on Dr. Spitz's "superior credentials" as a Board-certified radiologist and B-reader. Decision and Order at 9; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). Substantial evidence supports the administrative law judge's finding that the new x-rays did not establish the existence of pneumoconiosis. We therefore affirm his finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. Decision and Order at 8. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge noted that "[e]leven physicians have evaluated [claimant's] pulmonary condition since the record closed in the prior proceeding." Decision and Order at 16. As summarized by the administrative law judge, Dr. Iosif, claimant's treating physician, diagnosed pneumoconiosis in an initial evaluation in 1993, but rarely mentioned pneumoconiosis in his treatment notes spanning from 1993 to 1997, and made no reference to pneumoconiosis in his treatment notes from September of 1997 to February of 2002. Decision and Order at 11, 16; Employer's Exhibit 2. Reviewing the records of several emergency room evaluations of claimant by physicians at the Tazewell Community Hospital, the administrative law judge noted that Drs. Castillo, Tepoel, and Rhinehart diagnosed pneumoconiosis, while Drs. Small, Velena, Mulagha, and Maggard, did not. Director's Exhibit 17; Claimant's Exhibits 1, 4; Employer's Exhibit 2. The administrative law judge considered that Dr. Forehand diagnosed pneumoconiosis after a 2002 pulmonary examination. Director's Exhibit 8. The administrative law judge also reviewed the reports and depositions of Drs. Castle and McSharry, who examined and tested claimant and reviewed his medical treatment records, and concluded that he does not have pneumoconiosis but suffers from disabling asthma unrelated to dust exposure in coal mine employment. Claimant's Exhibits 1, 4; Employer's Exhibits 1, 5, 9-12.

The administrative law judge found that the emergency room physicians who diagnosed pneumoconiosis were "terse" in how they reached their conclusions, in that they either referred to pneumoconiosis as a historical diagnosis, listed the disease as a present diagnosis, or stated, without elaboration, that claimant's shortness of breath supported a finding of pneumoconiosis. Decision and Order at 17. The administrative law judge acted within his discretion in finding that these opinions were not well-reasoned because the physicians did not indicate how they determined that claimant suffers from pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Next, the administrative law judge noted that Dr. Iosif is Board-certified in pulmonary disease and observed that because of his frequent contact with claimant, Dr. Iosif was in an "excellent position to develop the best documented opinion in the record." Decision and Order at 17. However, the administrative law judge rationally found that this "potential probative value [was] diminished because the physician did not reasonably or persistently diagnose pneumoconiosis." *Id*.; *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-88, 22 BLR 2-564, 2-571 (4th Cir. 2002). Specifically, the administrative law judge permissibly found that Dr. Iosif "neither identified the underlying documentation supporting his black lung disease diagnosis nor explained how he reached his conclusion that [claimant] had pneumoconiosis." *Id.*; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Additionally, the administrative law judge reasonably took into account that despite diagnosing pneumoconiosis in 1993, Dr. Iosif never referred to pneumoconiosis as a historical, current, or possible diagnosis in his office notes from September 1997 through February 2002. *See Clark*, 12 BLR 1-155. Substantial evidence supports the administrative law judge's permissible determination that "Dr. Iosif's black lung diagnosis has little relative probative weight," because of "the absence of rationale for his initial diagnosis and the apparent variability of his opinion about the presence of pneumoconiosis." Decision and Order at 17; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993).

Additionally, the administrative law judge permissibly found that Dr. Forehand's opinion was entitled to diminished weight because of "both documentation and reasoning deficiencies." Decision and Order at 17; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Trumbo*, 17 BLR at 1-88-89 and n.4. Specifically, the administrative law judge properly considered that Dr. Forehand relied upon his own positive reading of the February 12, 2002 x-ray, a reading that the administrative law judge had found outweighed by that of a better qualified physician and contrary to the remaining x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge also found that Dr. Forehand's opinion was not well reasoned because the only basis for the diagnosis of pneumoconiosis that Dr. Forehand listed was

"HX, PFS," with no further explanation. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2- 31-32 (4th Cir. 1997); Director's Exhibit 8 at 4. Further, the administrative law judge rationally considered that Dr. Forehand did not review other evidence in the record that was contrary to his diagnosis, was not aware of claimant's smoking history, and lacks qualifications in pulmonary disease. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Substantial evidence supports the administrative law judge's discretionary determination to accord "diminished relative probative value" to Dr. Forehand's opinion. Decision and Order at 17. Because the administrative law judge permissibly discounted the medical opinions diagnosing pneumoconiosis, and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.204(a)(4).

In sum, substantial evidence supports the administrative law judge's finding that the new medical evidence did not establish the existence of pneumoconiosis, and his finding is in accordance with law. *McFall*, 12 BLR at 1-177. Because claimant failed to establish the existence of pneumoconiosis, the element of entitlement that was previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge