BRB No. 06-0686 BLA

CLETIS GOODMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/27/2007
	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Francesca Tan (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5284) of Administrative Law Judge William S. Colwell 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 law judge found 22.32 years of coal mine employment and that employer was the responsible operator. Decision and Order at 16. 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 3. After determining that the instant claim

was a subsequent claim,[1] the administrative law judge found that, as employer stipulated that claimant was now totally disabled pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 was established. Decision and Order at 2-4; Director's Exhibits 1, 4.[2] Considering all the relevant evidence of record, the administrative law judge found that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 4, 19-24. The administrative law judge also concluded that, as claimant failed to establish the existence of pneumoconiosis, the issues of whether the pneumoconiosis arose out of coal mine employment and whether pneumoconiosis was totally disabling (disability causation), pursuant to 20 C.F.R. §§718.203(b) and 717.204(c), were moot. Decision and Order at 24-25. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis by x-ray and medical opinion evidence and in failing to find disability causation established. Employer responds, asserting that

[1] Claimant filed his first claim for benefits with the Department of Labor on May 26, 1995. That claim was denied by Administrative Law Judge Lee Romero on July 31, 1997, as claimant failed to establish any element of entitlement. The Board affirmed that denial on August 26, 1998. Director's Exhibit 1. Claimant requested modification on September 4, 1999, which was denied by the district director on April 21, 2000. Director's Exhibit 1. Claimant took no further action, until he filed his second claim on June 22, 2001. Director's Exhibit 2. Claimant requested withdrawal of that claim, which was granted on July 12, 2002. Director's Exhibit 2. Claimant filed his third and current claim on August 11, 2003, the denial of which is now before us on appeal.

[2] 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 (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 claimant failed to establish any element of entitlement. Director's Exhibit 1. Consequently, as employer stipulated that the miner was now totally disabled pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 was established. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR 1-1; Decision and Order at 2-4; Director's Exhibits 1, 4; *see also 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)(applying prior regulations, claimant must establish at least one element of entitlement previously adjudicated against him).

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 participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any 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*).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and must be affirmed. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984).[4] Contrary to claimant's contention, the administrative law judge was not required to consider whether the newly submitted x-ray evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, before considering all the x-ray evidence, as the administrative law judge found an applicable condition of entitlement established based on employer's stipulation that the miner was totally disabled. Thus, as the administrative law judge found that one of the elements of entitlement previously adjudicated against claimant was

[3] The administrative law judge's length of coal mine employment, responsible operator, and smoking history determinations (42 pack years), as well as his findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(2)-(3) and 718.204(b)(2) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that the miner was last employed in the coal mine industry in Virginia. Director's Exhibits 1, 2, 8; Decision and Order at 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

established, the administrative law judge was obligated to consider all of the evidence of record, both old and new, to determine if the elements of entitlement were established. 20 C.F.R. §725.309; *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *see 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). Claimant's contention in this regard is, therefore, rejected.

Turning to 20 C.F.R. §718.202(a)(1), therefore, the administrative law judge considered all of the x-ray evidence of record in light of the readers' radiological qualifications. Decision and Order at 19. Considering the x-ray evidence submitted with the first claim, the administrative law judge found that the overwhelming majority of the readings by dually-qualified readers was negative for pneumoconiosis. Decision and Order at 19. Likewise, considering the x-ray evidence submitted subsequent to the denial of claimant's first claim, the administrative law judge also found that the majority of the readings by dually-qualified readers was negative for pneumoconiosis. In considering all of the x-ray evidence, the administrative law judge concluded that, because the overwhelming majority of the dually-qualified physicians interpreted the x-rays of record as negative, claimant did not establish the existence of pneumoconiosis. This was proper. Director's Exhibits 1, 2, 12, 14, 27-29; Claimant's Exhibits 1-3; Employer's Exhibits 1, 4, 7; Decision and Order at 19; *see* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Further, pursuant to 20 C.F.R. §718.202(a)(4), contrary to claimant's contention, the administrative law judge did not err in weighing the medical opinions along with the x-ray evidence and according less weight to the opinions that were contrary to the weight of the negative x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As claimant does not otherwise challenge the administrative law judge's findings concerning the medical opinion evidence, they are affirmed, *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis. Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the denial of benefits, and we need not consider claimant's argument on disability causation. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.[5]

[5] The administrative law judge properly noted that because claimant failed to establish the existence of pneumoconiosis, claimant could not establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

BETTY JEAN HALL
Administrative Appeals Judge

See Trent v. Director, OWCP, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order at 24-25.