BRB No. 06-0775 BLA

DOUGLAS WALLACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/18/2007
	)	
BUFFALO MINING 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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Douglas Wallace, Bluff City, Tennessee, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (05-BLA-5470) of Administrative Law Judge Thomas M. Burke 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). Claimant's prior application

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

for benefits, filed on March 25, 1980, was finally denied on December 29, 1980 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. On February 24, 2003, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order – Denying Benefits issued on June 22, 2006, the administrative law judge credited claimant with nine years and eight months of coal mine employment,[2] based on Social Security Administration earnings records, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). 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 of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 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).

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 a finding of

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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.*, 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 determined that claimant's prior claim was denied because he failed to establish any of the conditions of entitlement. Consequently, claimant had to submit new evidence establishing one of the required elements. 20 C.F.R. §725.309(d)(2), (d)(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).

The administrative law judge initially found that the newly developed evidence contained x-rays identifying the existence of Category A and B large opacities. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.[3]

[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Evaluating the x-ray evidence pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that Drs. Alexander and Cappiello, who are Board-certified radiologist and B readers, diagnosed large opacities, classified as Category A or B, by chest x-rays dated June 12, 2003, January 7, 2005, April 7, 2005 and August 17, 2005. Decision and Order at 7, 16; Claimant's Exhibits 1-3, 5, 6. The administrative law judge further found, however, that Drs. Scott, Scatarige, and Wheeler, who are equally qualified Board-certified radiologists and B readers, and Drs. Fino and Girish, who are B readers, read the same x-rays as negative for the existence of large opacities. Considering both the quantity and the quality of the x-ray readings of record, the administrative law judge permissibly concluded that the preponderance of the x-ray evidence did not establish the existence of complicated pneumoconiosis. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6.

> described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *see Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must, however, weigh together the evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

The administrative law judge further found, correctly, that the record contains no biopsy or autopsy evidence, and that thus, the existence of complicated pneumoconiosis could not be established pursuant to 20 C.F.R. §718.304(b).

In addition, the administrative law judge found that the computerized tomography (CT) scans of record, relevant to 20 C.F.R. §718.304(c), were uniformly read as negative for the existence of complicated pneumoconiosis. As the administrative law judge found, Drs. Fino and Hippensteel, who explained the probative value of CT scans for diagnosing the existence of pneumoconiosis, acknowledged that the CT scans revealed large abnormalities, but further explained why those abnormalities did not constitute evidence of complicated pneumoconiosis. 20 C.F.R. §§718.107, 718.304(c); Decision and Order at 16; Employer's Exhibits 2, 6, 10, 11.

Finally, the administrative law judge found that the medical opinion evidence also did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). The administrative law judge specifically found that Drs. Fino and Hippensteel opined that claimant does not suffer from complicated pneumoconiosis, and explained how the objective medical evidence supported their conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 16-17; Employer's Exhibits 2, 6, 10, 11. By contrast, Dr. Girish did not diagnose the presence of the disease, and, as found by the administrative law judge, Dr. McSharry offered an equivocal opinion that claimant's chest x-ray and CT scan were consistent with "probable" progressive massive fibrosis, and did not explain whether the abnormalities he observed could be equated to either large opacities, or massive lesions, as set forth at 20 C.F.R. §718.304(a), (b). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 17; Director's Exhibit 9; Claimant's Exhibit 4.

Weighing the x-ray, CT scan, and medical opinion evidence together, the administrative law judge permissibly concluded that the credible evidence of record, as a whole, did not establish the existence of complicated pneumoconiosis, and, therefore was insufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Substantial evidence supports the administrative law judge's finding. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304.

Having determined that the evidence was insufficient to invoke to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge then examined the evidence relevant to the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Evaluating the x-ray evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge found that Drs.

Alexander and Cappiello, who are Board-certified radiologists and B readers, diagnosed the existence of pneumoconiosis by chest x-rays dated June 12, 2003, January 7, 2005, April 7, 2005, and August 17, 2005. Decision and Order at 7, 16; Claimant's Exhibits 1-3, 5, 6. The administrative law judge further found, however, that Drs. Scott, Scatarige, and Wheeler, who are equally qualified Board-certified radiologists and B readers, and Drs. Fino and Girish, who are B readers, read the same x-rays as negative for the existence of pneumoconiosis. Considering both the quantity and the quality of the x-ray readings of record, the administrative law judge permissibly concluded that the preponderance of the x-ray evidence does not establish the existence of pneumoconiosis. *See Ondecko*, 512 U.S. at 267; *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 6. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge then found, correctly, that the record contains no autopsy or biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§ 718.304, 718.305 and 718.306 are unavailable in this living miner's claim filed after January 1, 1982, in which the existence of complicated pneumoconiosis has not been established. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.305, 718.306. Consequently we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(3), as supported by substantial evidence.

Finally, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions and treatment records relevant to the existence of pneumoconiosis. Initially, the administrative law judge noted that: Drs. Fino and Hippensteel opined that claimant does not suffer from either clinical or legal pneumoconiosis; Dr. Girish diagnosed a moderate ventilatory obstruction due to a combination of coal dust exposure and smoking; Dr. McSharry opined that pneumoconiosis was a "possibility"; and claimant's treating internists at Blue Ridge Medical Specialists and Bristol Medical Specialists listed pneumoconiosis among their diagnoses. Decision and Order at 17-18; Director's Exhibit 9; Claimant's Exhibit 4; Employer's Exhibits 2, 6, 10, 11.

The administrative law judge found, within his discretion, that while the treatment records from Blue Ridge Medical Specialists and Bristol Medical Specialists listed pneumoconiosis among their diagnoses, they did not include an independent, documented diagnosis of the disease. *See Clark*, 12 BLR at 1-155; Decision and Order at 18. The administrative law judge further permissibly found that Dr. Girish did not explain the basis for his conclusion that claimant's ventilatory obstruction was due in part to coal dust exposure, and that Dr. McSharry's opinion that pneumoconiosis was a "possibility" did not constitute a definitive diagnosis of the disease. *See Clark*, 12 BLR at 1-155; *Justice*, 11 BLR at 1-94; Decision and Order at 17-18; Director's Exhibit 9; Claimant's Exhibit 4. By contrast, the administrative law judge acted within his discretion in finding

the definitive opinions of Drs. Fino and Hippensteel, that claimant does not suffer from pneumoconiosis or any chronic dust disease of the lungs, to be better supported by the objective evidence of record, and thus entitled to determinative weight.[4] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark*, 12 BLR at 1-155; Decision and Order at 7-8; Employer's Exhibits 2, 6, 10, 11. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Weighing the chest x-rays, autopsy evidence, and medical opinions together, as required in the Fourth Circuit to determine if pneumoconiosis is established, s*ee Compton*, 211 F.3d at 203, 22 BLR at 2-162, the administrative law judge found that the preponderance of the evidence failed to establish the existence of either clinical or legal pneumoconiosis. Decision and Order at 18. Substantial evidence supports this finding. We, therefore, affirm the administrative law judge's finding that the newly submitted evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

Turning to the issue of total disability, the administrative law judge properly found that, as all of the newly developed pulmonary function and blood gas studies are non-qualifying,[5] claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 19; Director's Exhibit 9; Employer's Exhibits 2, 3. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that the record contains no medical evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 19.

Finally, in evaluating the medical opinion evidence relevant to total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that neither Dr. Girish nor Dr. McSharry offered a sufficient basis to support a conclusion that claimant has a totally disabling respiratory impairment. Substantial evidence supports this finding. As the administrative law judge found, Dr. Girish, when asked to assess the severity of claimant's impairment, merely responded that claimant experiences dyspnea.

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[4] Consequently, the administrative law judge permissibly found that Dr. Girish's diagnosis of moderate obstruction was "not borne out by the other physician opinions or the subsequent testing." *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 17.

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

Similarly, Dr. McSharry opined that claimant suffers from dyspnea, but did not elaborate on claimant's ability to perform his usual coal mine job. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). The administrative law judge permissibly credited, as more consistent with the objective data of record, the opinions of Drs. Fino and Hippensteel that claimant has no impairment, and is not totally disabled. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Trumbo*, 17 BLR at 1-88-89 and n.4; Decision and Order at 19-20; Director's Exhibit 22; Employer's Exhibits 4, 5. Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-111. As they are supported by substantial evidence, we affirm the administrative law judge's findings that claimant did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is totally disabled pursuant to 20 C.F.R. §718.204(b). Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and the denial of benefits. *See White*, 23 BLR at 1-7.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge