BRB No. 97-0970 BLA

TONY VORONO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for the employer.

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

PER CURIAM:

Claimant appeals the Decision and Order -- Denial of Benefits (96-BLA-0589) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant becomes entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-181, 2-190 (4th Cir. 1995).

Claimant filed the instant claim on March 2, 1995.[1] DX-1. Because this date comes more than one year after the denial of claimant's previous application for benefits, the instant filing constitutes a duplicate claim, *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(en banc), *cert. denied* 117 S.Ct. 763 (1997), which must be denied on the basis of a prior denial unless the claimant demonstrates that there has been a material change in conditions. 20 C.F.R. §725.309(d). In order to evaluate whether a claimant has demonstrated a material change in conditions, the administrative law judge must consider whether all of the new medical evidence gathered after the prior denial proves one (or more) of the elements previously adjudicated against the claimant. *See Rutter*, 86 F.3d at 1362-63, 20 BLR at 2-236; *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-73 (1997). If this threshold is met, the claimant is entitled to a full adjudication of his claim based on the record as a whole. *Cline.*

In this instance, claimant's first claim was denied because of his failure to

[1] Claimant filed for benefits on June 17, 1982. DX-28. This claim was before the Board on two occasions. *Vorono v. Consolidation Coal Co.*, BRB No. 86-3011 BLA (April 19, 1988)(unpub.) and *Vorono v. Consolidation Coal Co.*, BRB No. 88-2567 BLA (Mar. 29, 1990)(unpub.). The record also contains a notice from the Department of Health, Education, and Welfare informing claimant that an apparent claim under Part B of the Act was denied after review under the Act as amended in 1972, and an election card, which was forwarded to claimant on September 29, 1978 and then returned by claimant who requested that the Department of Labor review his claim under Section 435 of the Act. 30 U.S.C. §945. DX-28.

prove that he suffered from a totally disabling pulmonary or respiratory impairment and that this disability was due to pneumoconiosis. 20 C.F.R. §§718.204(b), (c). The administrative law judge found that claimant again failed to demonstrate that he suffered from a totally disabling pulmonary or respiratory impairment due to pneumoconiosis or the existence of complicated pneumoconiosis, determined that claimant failed to establish a material change in conditions, and denied benefits. Decision and Order at 14-15. Claimant then brought this appeal.[2]

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant bears the burden of establishing, *inter alia*, that he suffers from a totally disabling pulmonary or respiratory impairment. *See Milburn Colliery Co. v. Hicks*, No. 96-2438, 1998 WL 95275 * 2 (4th Cir. Mar. 6, 1998); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-21 (1994), *modified on recon.* 20 BLR 1-64 (1996). In the absence of contrary probative evidence, evidence which meets the disability criteria set forth at 20 C.F.R. §718.204(c) will establish total respiratory disability. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997).

On appeal, claimant asserts that the administrative law judge erred by failing to consider the exertional requirements of his usual coal mine employment, and avers that Drs. Marijeh and Rasmussen were the only physicians of record "to actually consider the claimant's pulmonary condition and its effect on his ability to do his usual coal mine employment[,]" and that the administrative law judge erred in discrediting their opinions. Claimant's Brief at 5-6. Claimant also contends that the

[2] No party challenges findings that claimant established the existence of simple pneumoconiosis and 31 years of coal mine employment. These findings are therefore affirmed. *See C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 1116, 28 BRBS 84, 87 (11th Cir. 1994); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

administrative law judge failed to determine whether claimant's pulmonary impairment was derived from his coal mine employment.

Because the administrative law judge failed to address the medical opinion report of Dr. Marijeh, who concluded that claimant suffered from a moderate disability, we are unable to conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish total respiratory disability. DX-10; *see generally Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).[3] In his February 21, 1995 medical report, Dr. Marijeh, a cardiologist who has treated claimant in Florida, reported "lung findings typical for coal mine exposure," and diagnosed "severe bronchitis with restrictive lung disease." He noted claimant's complaints, and wrote that "[e]ach time I try to wean the patient off his lung medication, his lung condition becomes worse. For that reason the patient most likely has moderate disability due to his exposure to the coal dust." DX-10.

This report is relevant to the issue of whether claimant is afflicted with a totally disabling pulmonary or respiratory impairment, and could lend support to Dr. Rasmussen's opinion that claimant is totally disabled from a pulmonary or respiratory impairment. We recognize the considerable evidence that exists to support the Decision and Order in this case. *See generally Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950-51, 21 BLR 2-23, 2-31-33 (4th Cir. 1997)(citing importance of

[3] Contrary to claimant's argument that only Drs. Marijeh and Rasmussen were aware of the job requirements of claimant's last coal mine employment, the record demonstrates that at least two of employer's experts, Dr. Hippensteel, who both examined claimant and reviewed his medical file, and Dr. Reed, understood the exertional requirements of claimant's coal mine duties. DX-9, EXs-1, 12; *compare Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991)(discounting rebuttal opinions of physicians unacquainted with miner's coal mine employment duties). Dr. Hippensteel examined claimant on October 8, 1995, and reviewed in detail claimant's medical records. Exs-1, 12. He was well acquainted with the job requirements of claimant's usual coal mine employment, EX-12 at 8, and opined that claimant has the respiratory capacity to return to his last coal mine employment, even if it involved occasional heavy labor. EX-12 at 17. Dr. Reed, who assessed claimant as "mildly impaired," reported on April 6, 1995 that claimant's last coal mine employment involved "no exertion." DX-11. Dr. Reed's comments were noted by Dr. Zaldivar, who opined after a review of claimant's medical records that they showed no pulmonary impairment. EX-8. The findings of no totally disabling pulmonary impairment are supported by the conclusions of Drs. Dahhan and Repsher. EXs-10, 11.

medical opinion documentation and experts' qualifications). None of the post-denial clinical studies produced qualifying results,[4] and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(1)-(3). A numerical majority of the medical opinions support the conclusion that claimant does not suffer from a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(c), and Dr. Marijeh's conclusions are questioned by Dr. Hippensteel, a pulmonary specialist. EX-1. Nevertheless, the probative value of Dr. Marijeh's opinion, and the weight to which it is entitled, are questions of fact which must be determined in the first instance by the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982).

Because the administrative law judge failed to discuss Dr. Marijeh's report DX-6, we are unable to conclude whether he "simply disregarded significant probative evidence or reasonably failed to credit it." *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356, 21 BLR 2-83, 2-90-91 (3d Cir. 1997). We must therefore vacate the administrative law judge's Decision and Order and remand this case for a reconsideration of the evidence consistent with this opinion.

The Decision and Order denying benefits is affirmed in part, vacated in part, and this claim is remanded to the administrative law judge for consideration of all relevant evidence.

SO ORDERED.

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[4] A clinical test "qualifies" by meeting the disability standards set forth in 20 C.F.R. Part 718, Appendices B & C. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 BLR 2-259, 2- 262 n. 5 (3d Cir. 1990). Claimant does not contest on appeal the administrative law judge's finding that the x-ray and CT scan evidence does not establish complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. This finding is also affirmed as unchallenged. *See C. G. Willis, Inc.*, 31 F.3d at 1116, 28 BRBS at 87; *Skrack*, 6 BLR at 1-711.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge