BRB No. 05-0744 BLA

OSCAR R. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
B & W COAL, INCORPORATED	)	DATE ISSUED: 05/30/2006
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

James M. Moore (Law Office of James M. Moore), Knoxville, Tennessee, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-1210) of Administrative Law Judge Edward Terhune Miller 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).[1] This case involves a duplicate claim filed on

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

February 3, 1999.[2] After crediting claimant with thirty-five years of coal mine employment, 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 total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).[3] The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinion evidence.

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[2]Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on October 12, 1970. Director's Exhibit 28. The SSA denied the claim on March 16, 1971, June 13, 1973, July 6, 1974 and June 7, 1979. *Id.* The Department of Labor denied the claim on October 14, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1970 claim.

Claimant filed a second claim on August 3, 1995. Director's Exhibit 29. The district director denied benefits on January 30, 1996. *Id.* The district director found that the evidence (1) did not show that claimant had pneumoconiosis; (2) did not show that the disease was caused at least in part by coal mine work; and (3) did not show that claimant was totally disabled by the disease. *Id.* The district director also found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* There is no indication that claimant took any further action in regard to his 1995 claim.

Claimant filed a third claim on February 3, 1999. Director's Exhibit 1.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c). In this case, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *See* 20 C.F.R. §718.2. However, because the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) are equivalent to findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 996, 19 BLR 2-10, 2-17 (6th Cir. 1994). Claimant's 1995 claim was denied because claimant failed to establish any of the elements of entitlement. *See* Director's Exhibit 29. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(b).

Claimant argues that the administrative law judge erred in his consideration of the medical opinion evidence. A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The record contain two newly submitted medical opinions. In a report dated May 10, 1999, Dr. Parrish diagnosed coal workers' pneumoconiosis and industrial bronchitis. Director's Exhibit 9. In a report dated February 6, 2002, Dr. Hippensteel opined that claimant did not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 1. Dr. Hippensteel reiterated his opinions during an April 23, 2003 deposition. Employer's Exhibit 24.

[5]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that the May 10, 1999 x-ray that Dr. Parrish interpreted as positive for pneumoconiosis was interpreted by three better qualified physicians as negative for pneumoconiosis,[7] thus calling into question the reliability of Dr. Parrish's diagnosis of coal workers' pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 13; Director's Exhibits 11, 12, 27.

The administrative law judge noted that Dr. Parrish also diagnosed industrial bronchitis. Decision and Order at 13; Director's Exhibit 9. The administrative law judge, however, discredited Dr. Parrish's diagnosis of industrial bronchitis because he found that it was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13. Moreover, because Dr. Parrish did not indicate that claimant's industrial bronchitis was "chronic," the administrative law judge found that Dr. Parrish's diagnosis did not constitute a finding of legal pneumoconiosis.[8] Decision and Order at 13. The administrative law judge, therefore, found that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant initially contends that the administrative law judge erred in not considering Dr. Baker's July 13, 1995 report. The record contains Dr. Baker's July 13, 1995 report, wherein Dr. Baker diagnosed coal workers' pneumoconiosis. *See* Director's Exhibit 7. However, because Dr. Baker's report was available prior to the denial of claimant's 1995 claim, the administrative law judge properly found that it does not constitute newly submitted evidence and, therefore, cannot support a finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Ross*, *supra*; Decision and Order at 4 n.3.

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[7]While Drs. Parrish and Scott, two physicians without any special radiological qualifications, interpreted claimant's May 10, 1999 x-ray as positive for pneumoconiosis, Director's Exhibit 11, Drs. Sargent, Wheeler and Scott, each dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Director's Exhibits 12, 27.

[8]The administrative law judge noted that Dr. Hippensteel disagreed with Dr. Parrish's diagnosis of industrial bronchitis. Decision and Order at 13. Dr. Hippensteel explained that industrial bronchitis usually dissipates within a period of several months after leaving coal mine employment. Employer's Exhibit 24 at 26-27.

Claimant also argues that the administrative law judge erred in not according greater weight to Dr. Parrish's opinion based upon his status as claimant's treating physician. We disagree. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed, *supra*, the administrative law judge properly found that Dr. Parrish's opinion was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we find no error in the administrative law judge's refusal to accord greater weight to Dr. Parrish's opinion based on his status as claimant's treating physician.

Claimant also argues that Dr. Hippensteel's opinion should have been accorded less weight because the doctor did not examine claimant. The Board has held that an administrative law judge cannot reject the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may, however, properly take into consideration the fact that the physician had not personally examined the miner. *See Tackett v. Cargo Mining* Co., 12 BLR 1-11 (1988) (*en banc*); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). The Sixth Circuit has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In this case, the administrative law judge acted within his discretion in relying upon Dr. Hippensteel's opinion. Although the administrative law judge acknowledged that Dr. Hippensteel did not examine claimant, he noted that Dr. Hippensteel conducted a "detailed review of the medical records," including the objective testing conducted by Dr. Parrish. Decision and Order at 13-14. Thus, we find no error in the administrative law judge's refusal to accord less weight to Dr. Hippensteel's opinion based upon his status as a non-examining physician.

Claimant also contends that Dr. Hippensteel is a "biased witness" whose opinions were prepared for the purpose of litigation. Claimant's Brief at 2. There is no logical basis for assuming that evidence prepared in anticipation of litigation is less reliable or unfairly slanted in favor of the party presenting it. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Unless the physicians retained by the parties are properly held to be biased, based on the evidence in the record, the administrative law judge may not accord less weight to their opinions based upon their party affiliation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Claimant has not pointed to any evidence of bias in this case.

Because claimant does not allege any additional error, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that the newly submitted medical opinion evidence was insufficient to establish total disability. The administrative law judge found that Dr. Parrish's opinion, that claimant's reversible airways disease requires chronic medication, was insufficient to establish that claimant was precluded, from a pulmonary standpoint, from performing his previous coal mine employment. Decision and Order at 14; Director's Exhibit 9. Dr. Hippensteel, the only other physician to submit a report since the denial of claimant's 1995 claim, opined that claimant retained the pulmonary capacity to perform his former coal mine employment. Employer's Exhibits 1, 24. Because no party challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability, this finding is affirmed. *See* 20 C.F.R. §718.204(b)(2)(iv); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis and total disability, *see* 20 C.F.R. §§718.202(a), 718.204(b), we affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. 725.309 (2000). *Ross, supra*.

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