BRB No. 03-0263 BLA

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| CYRIL E. SOLOMON | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 11/18/2003 |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Rocco V. Valvano, Jr., Scranton, Pennsylvania, for claimant.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5002) of Administrative Law Judge Robert D. Kaplan on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

[1] The instant claim was filed on January 30, 2001. Director's Exhibit 1. Claimant's prior application for benefits, filed on October 30, 1997, was denied by the district director on March 13, 1998 based on claimant's failure to establish any element of entitlement. Director's Exhibit 13. Claimant took no further action on this prior claim.

30 U.S.C. §901 et seq. (the Act).[2] The administrative law judge credited claimant with 3.96 years of coal mine employment.[3] Considering the evidence submitted since the 1998 denial of the prior claim, the administrative law judge found that this new evidence failed to establish any applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) (2000). Specifically, the administrative law judge found that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 and fails to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the new evidence establishes the existence of pneumoconiosis. Claimant relies on the positive interpretations of the April 1, 2002 x-ray film rendered by Drs. Gaia and Navani, Claimant's Exhibits 1, 2, as well as on Dr. Talati's May 28, 2002 medical opinion, Director's Exhibit 15. Dr. Talati opined that claimant has simple coal workers' pneumoconiosis which results in a "[v]ery minimal impairment which doesn't prevent performing his last coal mine job." *Id.* Claimant argues that the weight of the conflicting interpretations of the April 1, 2002 x-ray should be resolved in his favor. Claimant similarly contends that the administrative law judge should have resolved in his favor the conflict presented by the two new medical opinions, namely Dr. Talati's May 28, 2002 opinion that claimant has simple coal worker's pneumoconiosis arising out of exposure to coal dust, Director's Exhibit 15, and Dr. Levinson's March 6, 2001 opinion which includes diagnoses of artherosclerotic heart disease, coronary artery disease, prior inferior wall infarction, non-insulin dependent diabetes mellitus and hypertension, but includes no diagnosis related to claimant's coal mine employment, Director's Exhibit 3. The Director, Office of Workers' Compensation Programs (the Director), responds, and acknowledges that the administrative law judge mischaracterized the readings of the April 1, 2002 x-ray at 20 C.F.R. §718.202(a)(1) and failed, at 20 C.F.R. §718.202(a)(4), to discharge his duty to resolve the conflict presented by the new medical opinion evidence. The Director argues, however, that the administrative law judge's errors in determining that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 are harmless, because the evidence of record is legally insufficient to meet claimant's burden to establish total disability at 20 C.F.R. §718.204(b). The Director thus asserts that even if claimant could establish the existence of pneumoconiosis, he cannot establish his entitlement to benefits in the instant case. Consequently, the Director urges the Board to affirm the administrative law

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[2] 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.

[3] We affirm the administrative law judge's finding of 3.96 years of coal mine employment as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge's denial of benefits because the evidence of record is legally insufficient to establish total disability at 20 C.F.R. §718.204(b).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised by the parties on appeal and the evidence of record, we affirm the administrative law judge's denial of benefits based on claimant's failure to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). In the instant case, the administrative law judge properly noted that each of the two new pulmonary function studies and each of the two new blood gas studies resulted in non-qualifying values. 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 2, 5, 16, 17. The administrative law judge further properly found that the record contains no medical evidence that shows 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 12. The administrative law judge also properly determined that both Dr. Talati, in his May 28, 2002 medical opinion, Director's Exhibit 15, and Dr. Levinson, in his March 6, 2001 medical opinion, Director's Exhibit 3, opined that claimant was capable of performing his usual coal mine work. Specifically, Dr. Talati opined that claimant's very minimal pulmonary impairment does not prevent him from performing his last coal mine job, Director's Exhibit 15, while Dr. Levinson opined that "[t]here does not appear to be substantial isolated pulmonary impairment." Director's Exhibit 3. Because substantial evidence supports the administrative law judge's finding that the new evidence fails to establish total disability at 20 C.F.R. §718.204(b) and thus, fails to establish an applicable condition of entitlement under 20 C.F.R. §718.204(b) in this subsequent claim, we affirm the administrative law judge's finding.

Further, we note that the evidence previously considered in connection with the prior claim is legally insufficient to establish total disability at 20 C.F.R. §718.204(b). Specifically, the pulmonary function study and blood gas study dated February 6, 1998, resulted in non-qualifying values. 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibit 13. We also note that Dr. Levinson, in his medical report dated February 6, 1998, indicated that "[t]here does not appear to be significant pulmonary impairment on the basis of the present examination." 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibit 13. Because claimant cannot establish total disability at 20 C.F.R. §718.204(b) on the merits of the claim, given the content of the record before us, we affirm the administrative law judge's denial of benefits.

Because we affirm herein the administrative law judge's denial of benefits based on the insufficiency of the record evidence to establish total disability at 20 C.F.R. §718.204(b), a finding of entitlement to benefits is precluded in the instant case. Hence, we need not

address claimant's challenge to the administrative law judge's findings in determining that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202.

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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PETER A. GABAUER, Jr.
Administrative Appeals Judge