

BRB No. 11-0564 BLA

ELVIN JOSEPH )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 LEECO, INCORPORATED ) DATE ISSUED: 05/17/2012  
 )  
 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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5067) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves claimant's request for modification of the denial of a subsequent claim filed on October 9, 2003.<sup>1</sup>

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<sup>1</sup> Claimant initially filed a claim for benefits on November 3, 1999. Director's Exhibit 1. In a Decision and Order dated September 27, 2002, Administrative Law Judge Daniel J. Roketenetz found that the evidence did not establish the existence of

Initially, Administrative Law Judge Ralph A. Romano found that the medical evidence developed since the denial of the prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). Judge Romano, therefore, determined that claimant failed to establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309, and he denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Romano's findings pursuant to 20 C.F.R. §§718.202(a), 718.204(b), and 725.309. *E. J. [Joseph] v. Leeco, Inc.*, BRB No. 07-0365 BLA (Dec. 27, 2007) (unpub.). The Board, therefore, affirmed Judge Romano's denial of benefits. *Id.*

Claimant timely requested modification. Director's Exhibit 66; *see* 20 C.F.R. §725.310. In a Decision and Order issued on April 21, 2011, Administrative Law Judge Theresa C. Timlin (the administrative law judge) credited claimant with forty years of coal mine employment,<sup>2</sup> and reconsidered the subsequent claim record. The administrative law judge found that the medical evidence developed since the denial of the prior claim did not establish the existence of pneumoconiosis or total disability and, thus, did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). The administrative law judge, therefore, found that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence submitted since the denial of the prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 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.

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).

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pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Judge Roketenetz also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id.* Accordingly, Judge Roketenetz denied benefits. *Id.*

<sup>2</sup> The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.<sup>3</sup> 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). Consequently, to obtain review of the merits of his subsequent claim, claimant had to establish that he suffered from pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Claimant requested modification of Judge Romano's denial of his subsequent claim based on a failure to establish a change in an applicable condition of entitlement. Therefore, the administrative law judge, in considering claimant's request for modification, addressed whether the evidence developed since the denial of claimant's prior claim, including the evidence submitted since Judge Romano's denial of benefits, established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

Claimant's sole contention of error is that the administrative law judge erred in finding that the medical opinion evidence submitted since the denial of the prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>4</sup> Claimant specifically argues that the administrative law judge erred in finding that the opinions of Drs. Chaney and Pierce did not establish the existence of pneumoconiosis.

In reports dated January 14, 2003, and July 1, 2008, Dr. Chaney diagnosed coal workers' pneumoconiosis. Director's Exhibit 32; Claimant's Exhibit 1. In numerous treatment records from 2003 and 2004, Dr. Pierce diagnosed "possible chronic obstructive airways disease or coal workers' pneumoconiosis." Director's Exhibit 32.

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<sup>3</sup> Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case because it was filed before January 1, 2005.

<sup>4</sup> Because claimant does not challenge the administrative law judges findings that the evidence developed since the denial of the prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), or total disability pursuant to 20 C.F.R. §718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge, however, found that neither Dr. Chaney nor Dr. Pierce identified the tests upon which their diagnoses were based, or provided an adequate explanation for their opinions. Decision and Order at 16. The administrative law judge, therefore, permissibly found that the opinions of Drs. Chaney and Pierce were insufficiently reasoned to support a finding of pneumoconiosis.<sup>5</sup> See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge also permissibly found that Dr. Pierce's opinions were too equivocal to constitute a diagnosis of pneumoconiosis. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 16.

Claimant argues that the administrative law judge should have accorded greater weight to the opinions of Drs. Chaney and Pierce, based upon their status as claimant's treating physicians. An administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. See 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). Because Drs. Chaney and Pierce did not provide an adequate explanation for their diagnoses of coal workers' pneumoconiosis, the administrative law judge permissibly found that their diagnoses were not sufficiently reasoned. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 16. Consequently, we reject claimant's contention that the administrative law judge was required to accord their opinions greater weight based upon their status as claimant's treating physicians.

Because claimant does not assert any other error in regard to the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed.

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish 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(b)(2), we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Consequently, we affirm

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<sup>5</sup> Because Dr. Pierce did not attribute claimant's chronic obstructive airways disease to his coal mine dust exposure, his opinion does not support a diagnosis of legal pneumoconiosis, *i.e.*, a chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

the administrative law judge's denial of claimant's request for modification. 20 C.F.R. §725.310.

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