U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 07 June 2006

Case No.: 2004-BLA-05882

In the Matter of

LIBERO MANCINI
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Maureen Hogan Krueger, Esquire
For Claimant

Neil A. Morholt, Esquire
For Director

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On March 5, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. The case was assigned to me on October 17, 2005. The hearing was held before me in Ft. Lauderdale, Florida, on February 23, 2006, where the parties had full opportunity to present evidence and argument. Director and Claimant filed briefs on April 21

[1] The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725.

and 24, respectively. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The parties stipulated that Claimant has a coal mine employment history totaling five years. (T 14-16)[2] The following issues are presented for adjudication:

(1) whether Claimant has pneumoconiosis;

(2) whether Claimant's pneumoconiosis arose out of his coal mine employment;

(3) whether Claimant is totally disabled;

(4) whether Claimant's total disability is due to pneumoconiosis;

(5) whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed his first claim for benefits October 21, 1980. On August 14, 1981 the District Director denied the claim. The District Director found that Claimant had established the presence of pneumoconiosis, but not that he had pneumoconiosis arising out of his coal mine employment. The District Director also found that Claimant had not established that he was totally disabled. Claimant did not seek review of that determination. (DX 1)

Claimant filed the instant claim on April 17, 2002. (DX 3) On November 25, 2003 the District Director denied the claim. (DX 26) On December 16, 2003 Claimant requested a formal hearing. (DX 27)

B. Factual Background

Claimant was born on November 17, 1915. He married Carmela Masterman on September 8, 2000, and she is his only dependent for purposes of augmentation of benefits. (DX 3, 10) Claimant testified that in the last four years of his coal mine employment his work consisted of sitting and watching coal moving on a line. When the line stopped moving, Claimant signaled the engineer by making hand movements that informed the engineer what the problem was. Claimant testified that in performing this work he just sat in one location all day.[3] (T 14-18) Claimant stated that he never smoked nicotine products and was not exposed to coal

[2] The following abbreviations are used herein: "CX" refers to Claimant's Exhibits; "DX" refers to Director's Exhibits; "T" refers to the transcript of the February 23, 2006 hearing.

[3] This case comes within the jurisdiction of the Third Circuit Court of Appeals because Claimant's coal mine employment took place in Pennsylvania.

dust or other dust in his non-coal mining employment. (T 18-19) He was treated by Dr. Kankam from about 1991 to about 2005. For the last two years he has been treated by Dr. Roofeh. Claimant takes medication for hypertension and his heart. (T 22-24)

C. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. In addition, if Claimant establishes the presence of complicated pneumoconiosis by a preponderance of the evidence, pursuant to § 718.304, he is entitled to an irrebutable presumption that he is totally disabled due to pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

The record contains a prior claim filed in 1980. The prior claim was denied because Claimant failed to establish that he had pneumoconiosis arising out of his coal mine employment or that he was totally disabled. Section 725.309(d) provides that the following rules shall apply in adjudicating subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.
>
> (4) If claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim.

§ 725.309(d).

Therefore, the instant "subsequent claim," or current claim, must be denied unless Claimant demonstrates that one of the applicable conditions of entitlement has changed since the denial of the prior claim. Id..

D. The Current Medical Evidence

Claimant's burden is to establish by the new evidence either that he has pneumoconiosis arising out of his coal mine employment, is totally disabled due to a respiratory or pulmonary impairment, or that he has complicated pneumoconiosis under § 718.304.

Complicated pneumoconiosis

Section 718.304 provides that the irrebuttable presumption of total disability due to pneumoconiosis is established where Claimant proves that he

> 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 in (1) the ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or (2) The . . . "ILO Classification (1968); or (3) . . . the "UICC/Cincinnati (1968) Classification": 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) . . . would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) . . . had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

All the evidence relevant to the presence or absence of complicated pneumoconiosis must be weighed prior to the invocation of the presumption, pursuant to § 718.304(a)-(c). Melnick v. Consolidated Coal Co., 16 BLR 1-31 (1991).

All the new evidence relevant to whether Claimant has complicated pneumoconiosis pursuant to § 718.304(c), or can otherwise establish that he is totally disabled under § 718.204(b)(1) is set forth below.

X-ray evidence, § 718.304(a)

The current record contains the following chest X-ray evidence.[4]

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS	LARGE OPACITIES
8/20/02	8/20/02	DX 11	Dr. Sweet	--	1/0	A
8/20/02	9/24/02	DX 11	Dr. Goldstein	B	Unreadable	Unreadable
10/15/02	5/29/03	DX 19	Dr. Cappiello	BCR, B	1/1	A
10/15/02	12/11/02	DX 11	Dr.Goldstein	B	Negative	None

The August 20, 2002, X-ray was interpreted by Dr. Sweet as indicating the presence of pneumoconiosis 1/1, as well as large opacities size "A" which constitutes complicated pneumoconiosis. On the other hand, Dr. Goldstein found the film unreadable because it was overexposed. As Dr. Goldstein is a B-reader, while Dr. Sweet has no special qualifications for interpreting chest X-rays, I find that his opinion that the August 2002 film is unreadable outweighs Dr. Sweet's contrary opinion. Consequently, Dr. Sweet's interpretation of the film is entitled to no weight. In sum, the August 2002 film is not probative evidence in this case.

The October 15, 2002 film was interpreted by Dr. Cappiello as positive for pneumoconiosis 1/1 as well as indicating large opacities size "A." However, Dr. Cappiello read the X-ray as negative for pneumoconiosis and without large opacities size "A," "B" or "C." Dr. Goldstein is a B-reader but not a radiologist, while Dr. Cappiello is both a B-reader and a Board certified radiologist. Despite Dr. Cappiello's superior qualifications, I find there is no compelling reason to give greater weight to the opinion of Dr. Cappiello than to that of Dr. Goldstein. Claimant argues that Dr. Goldstein

> should have classified an opacity he observed according to the DOL Form-933 as a "large opacity" under Section 2C of that form instead of simply classifying it under "Other Symbols" as cancer when there was no indication whatsoever of lung cancer aside from the this (sic) opacity.

Claimant's Brief at 5-6. Claimant's latter reference is to Dr. Goldstein's notation on the Form CM-933 that he saw a questionable "mid lung nodule – R/O [rule out] Ca [cancer]." However, I find unpersuasive Claimant's contention that Dr. Goldstein "should have classified this opacity

[4]A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

as a large opacity under Section 2C of that form." The record contains no medical opinion supporting this naked assertion by Claimant.[4]

Based on the foregoing, I find that the conflicting opinions regarding the October 2002 X-ray are in equilibrium both as to whether the film is positive or negative for the presence of simple pneumoconiosis and whether it indicates that Claimant has complicated pneumoconiosis.

In light of the above, the new X-ray evidence does not support a finding of complicated pneumoconiosis.

Biopsy or autopsy evidence, § 718.304(b)

A determination that complicated pneumoconiosis is present may be based on biopsy or autopsy evidence. § 718.304(b). That method is unavailable here because the current record contains no such evidence.

Diagnosis of complicated pneumoconiosis by other means under § 718.304(c)

In addition, complicated pneumoconiosis can be established when diagnosed by means that are directly relevant to diagnosing complicated pneumoconiosis, other than those specified in subparagraphs (a) and (b) of § 718.304. Physicians' opinions must be considered, as well as other relevant evidence such as CT scans of the chest. Melnick, supra.

The new evidence contains the following pulmonary function studies.

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
8/20/02	DX 11	Dr. Sweet	86	1.75 2.16*	2.25 2.75*	33 78*	77% 78%*	Fair Fair*	Yes No*

*post-bronchodilator

I used Claimant listed height of 69 inches, in evaluating this study.

The current record contains the following arterial blood gas study.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
8/20/02	DX 11	Dr. Sweet	35 38*	80 98*	No No*

*post-exercise

I next turn to the new physicians' opinions. An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data

[4] It is of interest that Director questions Dr. Cappiello's finding of complicated pneumoconiosis because that physician recommended a CT scan of Claimant's chest and consultation with Claimant's personal physician due to a left lung nodule of 1.5 cm. which "may represent carcinoma." Director's Brief at 6.

that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

Dr. Sweet examined Claimant at the behest of the Department of Labor on August 20, 2002, and issued a report on that date. (DX 11) The physician noted Claimant's hospitalization for pneumonia and pulmonary emboli in September 2001. Dr. Sweet also noted Claimant's symptoms and his normal clinical examination at that time. The physician stated that the pulmonary function study performed in connection with the examination was within normal limits (presumably, for someone 86 years of age, like Claimant), with a good response to bronchodilator. Dr. Sweet also referred to his arterial blood gas study and stated that a pulse oximetry indicated oxygen saturation of 96% at rest and 97% with exercise. The physician stated diagnoses of hypertension, angina, and asthma with pleuroparenchymal scarring. He attributed these diagnosed conditions to coronary artery disease and exposure to dust in coal mine employment. The physician concluded that Claimant is totally disabled due to his cardiac and pulmonary diseases. Although Dr. Sweet was of the opinion that Claimant has pneumoconiosis arising out of his coal mine employment and is totally disabled due to that condition, Dr. Sweet did not opine that Claimant had complicated pneumoconiosis. Dr. Sweet, like Drs. Cappiello and Goldstein, recommended a chest CT scan "to evaluate the scar left mid lat[eral] chest."

The only other new physician's opinion of record is that of Dr. Kankam dated August 21, 2003. (DX 25) Dr. Kankam wrote that she had been Claimant's primary physician from November 1997 to February 2003. The physician noted that Claimant had several bouts with pneumonia and bronchitis. Dr. Kankam stated that Claimant's chest X-rays show evidence of "coal miners lung." The physician opined that considering Claimant's five years of coal mine employment and his symptoms "he qualifies for disability due to pneumoconiosis caused by his coal miners employment." Dr. Kankam made no reference to complicated pneumoconiosis.

Based on the foregoing, I find that the presence of complicated pneumoconiosis is not supported by the new evidence § 718.304(c).

As neither the new X-ray evidence or the other medical evidence supports a finding of complicated pneumoconiosis, the presence of complicated pneumoconiosis has not been established pursuant to § 718.304(a)-(c).

Pneumoconiosis arising out of coal mine employment pursuant to § 718.202(a) and § 718.203(b), and total disability pursuant to § 718.204(b)

Claimant can establish an element of entitlement previously found against him if the new evidence establishes that he has both pneumoconiosis and pneumoconiosis arising out of his coal

mine employment. As Claimant has a coal mine employment history of less than 10 years, he is not entitled to the presumption that any pneumoconiosis arose out of coal mine employment. § 718.203(b).

As discussed above, the X-ray evidence does not establish the presence of complicated, or simple, pneumoconiosis. § 718.202(a)(1). Further, it appears that Dr. Sweet based his finding of the presence of pneumoconiosis primarily on his own interpretation of the August 20, 2002 X-ray, while I have found that the film is unreadable. Further, Dr. Sweet provided no explanation for his finding of pneumoconiosis, nor that the pneumoconiosis arose out of Claimant's five years of coal mine employment. Consequently, I find that Dr. Sweet's opinion is entitled to no weight. § 718.202(a)(4); § 718.203(b). Dr. Kankam opined that Claimant has pneumoconiosis arising out of his coal mine employment. However, the physician provided no explanation for this opinion. Consequently, I find that Dr. Kankam's opinion is entitled to no weight. § 718.202(a)(4); § 718.203(b). Based on the above, Claimant has not established that he has pneumoconiosis arising out of his coal mine employment.

The next question is whether the new evidence establishes that Claimant is totally disabled, without reference to the presumption of total disability raised by proof of complicated pneumoconiosis. Claimant must establish that he is totally disabled due to a respiratory or pulmonary impairment. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. ee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. afferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. 718.204(b)(2)(i)(A-C). Such studies are designated as "qualifying" under the regulations. As noted above, the ventilatory study of August 20, 2002, resulted in a qualifying pre-bronchodilator test. However, it was noted that Claimant's effort on the testing was not maximal (it was reported as "Fair") and, more pertinently, Dr. Sweet opined that the study was within normal limits for Claimant, who was 86 years of age at the time. Further, the post-bronchodilator testing was nonqualifying. Based on the foregoing, I find that the new pulmonary function study evidence does not support a finding of total disability pursuant to § 718.204(b)(2)(i).

The new blood gas studies did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques.
§ 718.204(b)(2)(iv).

Although Dr. Sweet stated the opinion that Claimant is totally disabled, in part due to pneumoconiosis, the physician did not explain how he arrived at that opinion in light of the nonqualifying blood gas studies of August 2002 and the physician's own statement that the ventilatory study was within normal limits for Claimant. Based on the above, I find that the opinion of Dr. Sweet is not reasoned and documented. Consequently, I find that the opinion of Dr. Sweet is entitled to no weight.

I infer from Dr. Kankam's statements set for the above that she is of the opinion that Claimant is totally disabled due to pneumoconiosis arising out of his coal mine employment. However, Dr. Kankam did not refer to any laboratory studies or objective signs that support her opinion, other than "few crackles [at] base of lungs." I therefore find that Dr. Kankam's opinion is not reasoned and documented. Therefore, despite the fact that she treated Claimant, her opinion is entitled to no weight.

As previously noted, the pulmonary function tests and arterial blood gas studies do not establish total disability. The medical opinion evidence also fails to establish total disability. Based on the forgoing, Claimant has not established this element of entitlement by the new evidence. § 718.204(b).

E. Conclusion

As Claimant has not established by the new evidence that he has pneumoconiosis pursuant to § 718.202(a) or complicated pneumoconiosis pursuant to § 718.304, or is totally disabled pursuant to § 718.204(b), this subsequent claim must be denied. § 725.309(d).

ATTORNEY FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of Libero Mancini for benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).