BRB No. 09-0498 BLA

ROY J. McKINNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/23/2010
	)	
WESTMORELAND COAL COMPANY, INCORPORATED	)	
	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Roy J. McKinney, Coal City, West Virginia, *pro se*.

Douglas A. Smoot and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (07-BLA-5929) of Administrative Law Judge Linda S. Chapman

[1] Brenda Yates, a lay representative with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

rendered on a subsequent claim[2] 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).[3] The administrative law judge credited claimant with twenty-one years of coal mine employment[4] and found that the evidence submitted since the previous denial did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge determined that claimant did not establish a change in the applicable condition of entitlement pursuant 20 C.F.R. §725.309(d), and she denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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

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[2] Claimant's first claim for benefits, filed on October 12, 2004, was denied by the district director on June 8, 2005, because claimant failed to establish total disability. Director's Exhibit 1. Claimant did not further pursue his 2005 claim. Claimant filed the instant claim on August 1, 2006. Director's Exhibit 3.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant miner's claim, as the evidence does not demonstrate the existence of a totally disabling respiratory or pulmonary impairment.

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

The administrative law judge reviewed the evidence submitted since the prior denial to determine whether it established total disability pursuant to Section 718.204(b)(2). She correctly found that neither of the two new pulmonary function studies, administered on October 30, 2006, and February 7, 2007, yielded qualifying[5] values pursuant to 20 C.F.R. §718.204(b)(2)(i). Director's Exhibit 11; Employer's Exhibits 1, 2. Additionally, the administrative law judge correctly noted that the record contains no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). We therefore affirm the administrative law judge's findings that the new evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii).

Turning to the three new blood gas studies, pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge accurately noted that they "produced mixed results."[6] Decision and Order at 9. However, since the preponderance of the exercise blood gas study values was qualifying, the administrative law judge found that the new blood gas study evidence supported a finding of total disability under 20 C.F.R. §718.204(b)(2)(ii), "in the absence of probative evidence to the contrary. . . ." Decision and Order at 10. Because that finding is supported by substantial evidence, it is affirmed.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i),(ii).

[6] The February 7, 2007 blood gas study yielded non-qualifying values on both the resting and exercise portions of the test. Employer's Exhibit 1. Both the October 30, 2006 and October 20, 2008 blood gas studies yielded non-qualifying values on the resting portion of the test, but qualifying values on the exercise portion of the test. Director's Exhibit 11; Claimant's Exhibit 5.

Turning to the four new medical reports,[7] the administrative law judge found that the better reasoned and documented reports provided by Drs. Hippensteel and Zaldivar constituted "contrary probative evidence" demonstrating that claimant does not suffer from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), but rather, suffers from heart disease that is detected on a blood gas study when he exercises. The administrative law judge found that, by contrast, Dr. Rasmussen's opinion, diagnosing claimant with a totally disabling respiratory impairment, was not well-reasoned or supported, and that Dr. Golden did not address the issue of whether claimant has a totally disabling respiratory impairment.

Upon review, we conclude that substantial evidence supports the administrative law judge's credibility determinations. Specifically, the administrative law judge permissibly found the explanations of Drs. Zaldivar and Hippensteel, that claimant does

[7] Dr. Rasmussen, who is Board-certified in Internal Medicine, examined and tested claimant and noted that claimant's coal mine employment involved "considerable heavy" and "some very heavy" manual labor. Based on claimant's "impaired oxygen transfer during exercise," Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last coal mine job. Director's Exhibit 11. Dr. Golden, claimant's treating physician, submitted a brief letter in which he discussed two CT-scans and an x-ray, and stated that claimant has "pneumoconiosis and the respiratory symptoms associated with this." Claimant's Exhibit 4. Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant, administered objective tests, reviewed other medical records, and detailed claimant's job duties. He noted the existence of a "very minimal airway obstruction," diagnosed coronary artery disease, and opined that claimant's shortness of breath stems from cardiac deconditioning and left ventricular systolic dysfunction. He opined that claimant's "minimal pulmonary impairment will not prevent him from performing his usual coal mining work or work requiring similar exertion." Employer's Exhibit 1; Employer's Exhibits 5, 7. Dr. Zaldivar further explained that overall, although claimant has only "minimal to mild" pulmonary impairment that is not disabling, he does have disabling cardiac disease that is reflected in the exercise blood gas study values. Employer's Exhibit 5 at 19-20. Dr. Hippensteel, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed medical records and noted that claimant's coal mine employment involved heavy manual labor. He opined that although claimant appears "to have enough dysfunction at times from a whole body standpoint to be unable to go back to his previous job in the mines," he "has the pulmonary capacity to return to his previous job in the mines." Employer's Exhibit 3; Employer's Exhibits 6 at 23, 8. Dr. Hippensteel explained that claimant does not have an intrinsic respiratory or pulmonary problem, but does have cardiac dysfunction that affects his blood gas study values when he exercises. Employer's Exhibit 6 at 20, 23.

not have an intrinsic pulmonary problem or respiratory disability, but has disabling heart disease that is detected in his blood gas study results with exercise, to be well-reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Employer's Exhibits 1, 3, 5-8. The administrative law judge rationally found that Dr. Rasmussen's contrary opinion was not as well-reasoned or supported, since "although [Dr. Rasmussen] was aware of [claimant's] cardiac condition, he did not discuss its effect on [claimant's] physiologic testing, specifically his marked impairment in oxygen transfer, or his symptoms."[8] Decision and Order at 10; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Casella v. Kaiser Steel Corp*., 9 BLR 1-131, 1-134 (1986). In addition, the administrative law judge permissibly found that Dr. Rasmussen's explanation, that a reduction in oxygen transfer can be caused by respiratory impairment resulting from emphysema due in part to coal mine dust exposure, was not persuasive, because Dr. Rasmussen did not diagnose claimant with emphysema. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Director's Exhibit 11. Further, the administrative law judge properly took into account the relative qualifications of the physicians in according greater weight to the opinions of Drs. Hippensteel and Zaldivar. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because the administrative law judge's evaluation of the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed.[9]

In weighing together the contrary probative evidence, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that the well-reasoned and supported opinions of Drs. Hippensteel and Zaldivar outweighed the qualifying blood gas study evidence. Decision and Order at 10. Because we have affirmed the administrative law judge's decision to rely on the well-reasoned and documented opinions of Drs. Zaldivar and Hippensteel explaining that claimant does not have a totally disabling respiratory impairment, we also affirm the administrative law judge's finding that those opinions outweigh the blood gas study evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-323; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); *Shedlock v.*

[8] Drs. Hippensteel, Rasmussen, and Zaldivar each noted that claimant has had two heart attacks, has coronary artery disease, and has had stents placed in his coronary arteries. Director's Exhibit 11; Employer's Exhibit 1, 3, 5, 7.

[9] As the administrative law judge found, Dr. Golden did not address whether claimant has a respiratory or pulmonary impairment. Claimant's Exhibit 4; Decision and Order at 11. Therefore, this opinion does not support claimant's burden of establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

Consequently, we affirm the administrative law judge's finding that the new evidence developed since the prior denial did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).[10] Therefore, we affirm the administrative law judge's finding that the new evidence did not establish a change in the applicable condition of entitlement, and we affirm her denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

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

[10] The record contains no new evidence of complicated pneumoconiosis. Therefore, claimant cannot establish total disability by means of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1).