BRB No. 11-0601 BLA

M.C. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW WHITE COAL COMPANY	)	DATE ISSUED: 04/27/2012
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Office), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Subsequent Claim (08-BLA-6003) of Administrative Law Judge Christine L. Kirby rendered on a claim filed pursuant to 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).[1] Claimant's most recent prior claim was denied because claimant failed to establish the presence of pneumoconiosis and total respiratory disability. That denial was affirmed by the Board in *Smith v. New White Coal Co.*, BRB No. 06-0293 BLA (Aug. 30, 2006)(unpub.), which also set out the lengthy procedural history of the case. On November 29, 2007, claimant filed the present claim. In considering this subsequent claim, the administrative law judge credited claimant with 2.26 years of coal mine employment and found that the new evidence, submitted after the denial of the prior claim, failed to establish total respiratory disability pursuant to 20 C.F.R §718.204(b). Further, the administrative law judge found that, since the evidence submitted in the prior claims failed to establish total respiratory disability, claimant would not be entitled to benefits under the Act, and it would be unnecessary for her to consider whether the new evidence established the existence of pneumoconiosis.[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the evidence establishes 4.24 years of coal mine employment, contrary to the administrative law judge's finding of only 2.26 years of coal mine employment. Additionally, claimant contends that the administrative law judge erred in failing to consider whether the new evidence establishes the existence of pneumoconiosis, thereby establishing a change in an applicable condition of entitlement by that means. Further, claimant contends that the administrative law judge erred in finding that the new medical opinion evidence fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Finally, claimant contends that the new evidence establishes disability causation pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers'

[1] Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act with respect to the entitlement criteria for certain claims, is inapplicable to this miner's claim because the administrative law judge credited claimant with 2.26 years of coal mine employment, and claimant does not allege fifteen years of coal mine employment. *See* Director's Exhibit 3 at 816-17, 826-29; Claimant's Brief at 2; Decision and Order at 8.

[2] Normally, prior to considering *all* of the evidence on an element of entitlement, the administrative law judge is required to consider whether the *new* evidence establishes any of the elements of entitlement previously adjudicated against claimant. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that the newly submitted evidence fails to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iii). Decision and Order at 10 and n.3, 11-12; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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.[4] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We first address the issue of total respiratory disability. Claimant argues that the administrative law judge erred in rejecting the opinions of Drs. Vaezy[5] and Maboob[6] pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant argues that his coal

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3 at 826-29; Decision and Order at 8.

[5] Dr. Vaezy, who is Board-certified in internal medicine with a sub-specialty in pulmonary disease, performed claimant's Department of Labor pulmonary evaluation on December 18, 2007. Based on occupational, social, and family history, examination, pulmonary function, arterial blood gas and EKG testing, Dr. Vaezy's diagnoses included: pneumoconiosis based on history and x-ray, "[chronic obstructive pulmonary disease], mild, with normal [pulmonary function and arterial blood gas tests]," and coronary artery disease. To the query regarding degree of severity of impairment, particularly with regard to performance of usual coal mine employment, Dr. Vaezy answered: "no pulmonary impairment." Director's Exhibit 11 at 3, 12; Decision and Order at 12-15.

[6] Dr. Maboob's report, contained in claimant's medical records, consists of the findings on a physical examination from March 3, 2005, and pulmonary function testing. He diagnosed mild chronic obstructive pulmonary disease, coronary artery disease, hypercholesterolemia, cardiovascular accident, and tobacco abuse. Dr. Maboob, however, did not discuss either the exertional requirements of claimant's usual coal mine employment, or whether claimant had a disabling respiratory impairment. Claimant's Exhibit 1.

truck driver job involved heavy concentrations of dust exposure and that, "[t]aking into consideration the claimant's condition [sic] against such duties…in conjunction with the opinions of Drs. Vaezy and Maboob, it is rational to conclude that claimant's condition prevents him from engaging in his usual employment, in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis."[7] Claimant's Brief at 5. Claimant's argument is without merit.

The administrative law judge found that, "all the physicians in the current claim concluded that claimant did not suffer from a totally disabling respiratory impairment."[8] Decision and Order at 13, 14; Director's Exhibits 11, 13. The administrative law judge determined that Dr. Vaezy provided a well-reasoned and well-documented opinion, based on normal pulmonary function and blood gas testing, and physical examination, that claimant did not have a respiratory impairment. Decision and Order at 13; Director's Exhibit 11 at 3, 12. We, therefore, reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Vaezy's assessment of claimant's respiratory impairment. Because Dr. Vaezy found that claimant did not have a respiratory impairment, it was unnecessary for the administrative law judge to compare the exertional requirements of claimant's usual coal mine employment with Dr. Vaezy's opinion. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

[7] Claimant argues that the administrative law judge failed to identify claimant's usual coal mine work or the physical requirements of that work. Employer's Brief at 4-5. The administrative law judge, however, noted that claimant's last job as a coal truck driver required him to drive a truck, and required moderate manual labor. Decision and Order at 12.

[8] The administrative law judge determined that the remaining newly submitted medical opinions, by Drs. Fino and Dahhan, failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Fino, based on examination and testing in October, 2008, opined that claimant's pulmonary system and heart are normal, and that he retains the respiratory capacity to perform all the requirements of his last coal mine job, even assuming that his last job required sustained heavy labor. Decision and Order at 13-14; Employer's Exhibit 1. Dr. Dahhan, based on a physical examination and testing in January, 2008, opined that claimant has a mild restrictive ventilatory impairment, but retains the capacity to return to his previous coal mining job or one requiring comparable physical demands. Decision and Order at 13; Director's Exhibit 13. Similarly, the administrative law judge considered that, in the earlier evidence of record, Dr. Becknell failed to address claimant's respiratory or pulmonary condition, and Dr. Baker's opinion did not support a finding of a totally disabling respiratory disease. Decision and Order at 13-14; Employer's Exhibit 1; Director's Exhibit 3. The foregoing findings are unchallenged on appeal and are, therefore, affirmed. *Skrack*, 6 BLR at 1-711.

Additionally, claimant's argument is essentially an assertion that, because of his respiratory condition, further exposure to coal mine dust is inadvisable. Claimant's Brief at 2. A doctor's recommendation that further coal dust exposure is contraindicated is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). We affirm, therefore, the administrative law judge's finding that Dr. Vaezy's opinion is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). 20 C.F.R. §718.202(b)(2)(iv).

Likewise, we reject claimant's general assertion that the opinion of Dr. Maboob establishes total respiratory disability. Claimant fails to argue, with any specificity, that the administrative law judge erred in finding that Dr. Maboob's opinion did not discuss claimant's respiratory or pulmonary capacity. Decision and Order at 14, Director's Exhibit 3 at 2, 3 and n.3, 88-92; Claimant's Exhibit 1; Claimant's Brief at 3, 6.

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge, as the trier-of-fact, and the Board, as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR at 1-120; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

Consequently, because claimant has failed to point to any specific errors made by the administrative law judge in her analysis of Dr. Maboob's opinion on the issue of total respiratory disability, we have no basis on which to review the administrative law judge's disposition of Dr. Maboob's opinion. The administrative law judge's finding regarding Dr. Maboob's opinion is, therefore, affirmed. Accordingly, we affirm the administrative law judge's finding that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iv), based on the new medical opinion evidence.

Finally, claimant contends that the administrative law judge erred in failing to consider whether the new evidence established the existence of pneumoconiosis pursuant to Section 718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to Section 725.309(d). However, because the administrative law

judge reviewed the prior decisions, and the evidence discussed in those decisions, and found that the evidence, as a whole, failed to establish total respiratory disability, an essential element of entitlement, she found that entitlement to benefits would be precluded. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc). The administrative law judge appropriately did not make a finding on whether the new evidence established the existence of pneumoconiosis and, thereby, a change in an applicable condition of entitlement, as the finding of no totally disabling respiratory impairment precluded a finding of entitlement. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's denial of benefits in the instant claim.[9] *See* 20 C.F.R. §718.204(b)(2); *Gee*, 9 BLR at 1-5.

Accordingly, the administrative law judge's Decision and Order Denying Subsequent Claim is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9] In view of this holding, we need not address claimant's assertion that the administrative law judge erred in finding only 2.26 years of coal mine employment, instead of 4.24, as a finding of 4.24 years, even if correct, would not aid claimant in establishing entitlement to benefits. *See* 20 C.F.R. §718.203(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).