BRB No. 05-0145 BLA

HARRISON NEACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AZTEC MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY CENTRAL INSURANCE	)	
COMPANY, C/O AMERICAN	)	DATE ISSUED: 08/17/2005
RESOURCES INSURANCE	)	
	)	
Employer/Carrier- Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6131) of Administrative Law Judge Daniel J. Roketenetz on a subsequent[1] claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). After accepting the parties' stipulation that claimant engaged in nine years of coal mine employment, the administrative law judge found that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), and thus failed to establish a "material change in conditions" pursuant to 20 C.F.R. §725.309(d). Decision and Order - Denial of Benefits at 11. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), (a)(4) and total disability under 718.204(b)(2)(iv). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not file a response brief on the merits of this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant's prior claim was filed on January 15, 1991 and was finally denied by the district director on September 16, 1991 because claimant failed to establish any element of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1. On November 24, 2000, claimant filed a subsequent claim, but upon claimant's request the district director, by order issued on November 7, 2001, granted withdrawal of the claim. Director's Exhibit 2. Claimant filed his current, subsequent claim on October 26, 2001. Director's Exhibit 4. The administrative law judge conducted a formal hearing on April 6, 2004.

[2] We affirm as unchallenged the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), and his finding crediting claimant with nine years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons,* 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge noted accurately that the only new x-ray reading was negative for the existence of pneumoconiosis. Director's Exhibit 10. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.204(a)(4), the administrative law judge correctly found that Dr. Hussain, in the only new medical opinion of record, diagnosed claimant with emphysema caused by "tobacco abuse," and did not indicate that claimant has pneumoconiosis or any other condition or pulmonary disease that resulted from claimant's coal mine employment. Decision and Order – Denial of Benefits at 8; Director's Exhibit 10. Thus, claimant's arguments that the administrative law judge may not discredit a physician's diagnosis as based on a positive x-ray interpretation contrary to the administrative law judge's findings, and that it "appears" that the administrative law judge substituted his own conclusion for that of a physician, are groundless. Claimant's Brief at 3-4. Consequently, we affirm the administrative law judge's finding

that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Hussain's opinion that claimant has a mild, non-disabling impairment. Director's Exhibit 10 at 4, 5. The administrative law judge found Dr. Hussain's opinion "well-reasoned, well-documented, and supported by the objective evidence of record," and concluded that it did not establish that claimant is totally disabled pursuant to Section 718.204(b)(2)(iv).

We reject claimant's allegations of error in the administrative law judge's finding that claimant did not establish total disability. Claimant alleges that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with his discussion of the claimant's disability." Claimant's Brief at 6. But claimant's specific argument is 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 . . . ." Claimant's Brief at 6. We reject claimant's allegation of error, because mere advisement against further dust exposure does not establish total respiratory disability.[3] *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White*, 23 BLR at 1-7. We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

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[3] Moreover, although a mild impairment may be totally disabling, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), the administrative law judge acknowledged claimant's job as a rock truck driver, loader, washer, crusher and tipple worker, and reasonably found that the non-qualifying objective studies and Dr. Hussain's opinion that claimant has the respiratory capacity to perform the work of a miner did not carry claimant's burden to establish total disability under Section 718.204(b)(2). Decision and Order – Denial of Benefits at 3, 9; Director's Exhibits 6, 8, 10; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon en banc*, 9 BLR 1-236 (1987). Unlike the situation in *Cornett,* in the case at bar there is no conflicting medical evidence that would allow the administrative law judge to reach a different conclusion.

Because claimant failed to establish either the existence of pneumoconiosis or total disability, the elements of entitlement that were previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge