

BRB No. 06-0172 BLA

GRADY E. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/31/2006
	)	
CANDICE COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC.), Lexington , Kentucky, for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5727) of Administrative Law Judge Thomas M. Burke rendered on a subsequent 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). This subsequent claim was filed on August 6, 2002.<sup>1</sup> Decision and Order at 2; Director’s Exhibit 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and credited claimant with twenty-one years of coal mine employment.<sup>2</sup> Decision and Order at 3. The administrative law judge found that the evidence developed since the prior denial of benefits did not establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore concluded that claimant failed to establish a change in any condition of entitlement that had previously been adjudicated against him pursuant to 20 C.F.R. §725.309(d). Decision and Order at 15. The administrative law judge also found that based on all the evidence of record including the evidence of the prior claim, claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but failed to establish a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(b)(2). *Id.* Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.<sup>3</sup>

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 by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> The procedural history is summarized in the administrative law judge’s Decision and Order at 2.

<sup>2</sup> The administrative law judge properly found that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3; Director’s Exhibit 1.

<sup>3</sup> The administrative law judge’s length of coal mine employment determination, and his findings pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2)(ii)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, BLR 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). 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); *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 that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four new pulmonary function studies dated September 30, 2002, June 24, 2003, May 28, 2003, and May 25, 2004. Decision and Order at 4-5; Director's Exhibits 12, 15, 28; Claimant's Exhibit 1. The administrative law judge correctly found that the September 30, 2002 pulmonary function study was non-qualifying.<sup>4</sup> The administrative law judge also found that Dr. Hippensteel, the physician who administered the June 24, 2003 pulmonary function study, reported that the qualifying study was invalid because claimant's effort was "inconsistent." Decision and Order at 4, 12; Director's Exhibits 12, 15. The administrative law judge further found that the qualifying pulmonary function studies dated May 28, 2003 and May 25, 2004 were also invalidated by Dr. Hippensteel. Decision and Order at 12; Director's Exhibit 28. The administrative law judge noted that the May 28, 2003 test was also considered invalid by an independent reviewer, Dr. Ranavaya. Decision and Order at 12; Director's Exhibit 12. The administrative law judge concluded that none of the qualifying studies was probative evidence of the extent of claimant's pulmonary or respiratory impairment. Decision and Order at 12.

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<sup>4</sup> A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Claimant argues that Dr. Hippensteel's evaluation of the May 25, 2004 pulmonary function study is inconsistent with the computer generated report and with Dr. Gaziano's opinion that the study showed severe restrictive resting impairment with hyperinflation and moderate diffusion impairment. Claimant's Brief at 13. Claimant further argues that the administrative law judge did not explain why he gave greater weight to Dr. Hippensteel's evaluation of the pulmonary function study than to the review of Dr. Gaziano, who is equally qualified. Claimant's Brief at 13-14.

The administrative law judge permissibly credited Dr. Hippensteel's invalidation of the pulmonary function studies of Dr. Gaziano and Mr. Prichard, a physician's assistant. The administrative law judge, acting within his discretion, was persuaded by the "precise rationale" of the analysis provided by Dr. Hippensteel, who he noted was board-certified in internal medicine and pulmonary medicine and was a professor of medicine. Decision and Order at 8.<sup>5</sup> The administrative law judge rationally found the pulmonary function study evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).<sup>6</sup>

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<sup>5</sup> The administrative law judge noted that Dr. Gaziano is board-certified in internal medicine, chest diseases, and critical care medicine. Decision and Order at 10. However, review of the record reveals no statement of claimant's effort in the computer generated May 25, 2004 pulmonary function study report, nor in Dr. Gaziano's pulmonary function study report. The administrative law judge therefore acted within his discretion in determining the reliability of the study based on Dr. Hippensteel's review of the tracings, finding the study invalid due to "variable" effort. 20 C.F.R. §718.103; *Director, OWCP v. Greenwich Colliers [Ondecko]* 114 S. Ct. 2251, 18 BLR 2A-1 (1984); *Robinette v. Director, OWCP*, 9 BLR 1-154 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Employer's Exhibit 1.

<sup>6</sup> Claimant argues that the September 17, 2003 pulmonary function study was qualifying, and that because the technician reported good effort and cooperation, Dr. Hippensteel's opinion as to variability of effort should be given no weight. The September 17, 2003 pulmonary function study was admitted into the record as part of claimant's treatment records but it was not considered by the administrative law judge under 20 C.F.R. §718.204(b)(2)(i) and it was not proffered by any party under Section 718.204(b)(2)(i), nor was it included in claimant's evidence summary or pre-hearing report. The report is not signed or interpreted by a physician other than Dr. Hippensteel, who found it invalid due to poor effort. Employer's Exhibit 1. Error, if any, by the administrative law judge in not considering this pulmonary function study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Pursuant to Section 718.204(b)(2)(iv), claimant alleges that the administrative law judge erred in rejecting the opinions of Dr. Gaziano and claimant's treating physician assistant, Mr. Prichard, that claimant was totally disabled, and erred in giving greater weight to the contrary opinion of Dr. Hippensteel, despite his misdiagnosis that claimant did not have pneumoconiosis. Claimant concedes that Dr. Mullins's report including pulmonary function and blood gas studies, provided by the Department of Labor, indicated that claimant was not totally disabled on September 30, 2002, but claimant argues that the administrative law judge failed to discuss the "deterioration" of claimant's pulmonary condition shown in the subsequent evidence. Claimant's Brief at 11.

The administrative law judge acted within his discretion in according more weight to the opinions of Drs. Hippensteel and Mullins because he found that their opinions were better reasoned and documented on the issue of total disability. The administrative law judge rationally found that Dr. Mullins corroborated Dr. Hippensteel's more detailed and better explained opinion and that Dr. Hippensteel reviewed and discussed the medical evidence, as a whole. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Although the administrative law judge did not credit Dr. Hippensteel's opinion that claimant did not have pneumoconiosis, he reasonably credited the doctor's opinion that claimant is not totally disabled, because this diagnosis is well-supported and it is not based on the premise that claimant does not suffer from pneumoconiosis. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Accordingly, the administrative law judge properly found that the opinions of Drs. Hippensteel and Mullins outweighed the opinions of Dr. Gaziano and Mr. Prichard; hence, he determined that claimant failed to establish total disability under Section 718.204(b)(2)(iv). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Because claimant did not establish a change in one of the applicable conditions of entitlement, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge