BRB No. 06-0962 BLA

M.O.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/21/2007
MATHIES COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest/Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

M.O., Canonsburg, Pennsylvania, *pro se*.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (05-BLA-5404) of Administrative Law Judge Michael P. Lesniak 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).[1]

[1] Claimant's first claim for benefits, filed on March 3, 1980, was finally denied on September 27, 1991, because claimant did not establish that he was totally disabled by a

Claimant filed this claim for benefits on December 2, 2003. Director's Exhibit 4. The administrative law judge credited claimant with at least thirty-three years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b). Consequently, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.[3]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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 administrative law judge finds that "one of the applicable conditions of entitlement . . .

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respiratory impairment. Director's Exhibit 1, internal exhibit 1. Claimant's second claim, filed on July 19, 2001, was denied on May 1, 2002, because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 2. Since claimant did not pursue this claim any further, the denial became final.

[2] The record indicates that claimant's last coal mine employment occurred in Pennsylvania. Nov. 3, 2005 Tr. at 13. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The Director notes that employer, Mathies Coal Company, was self-insured and filed for bankruptcy in 1990. Although the district director notified employer of this claim, employer did not respond and has not participated. Director's Brief at 2; Director's Exhibit 21.

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 the existence of pneumoconiosis or that he was totally disabled by a respiratory impairment. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3). The administrative law judge found that claimant did not establish either of these elements.

The Director asserts that, because the district director found that claimant established the existence of pneumoconiosis and the Director did not contest that issue at the hearing, the administrative law judge erred in finding that claimant did not establish the existence of pneumoconiosis or a change in an applicable condition of entitlement.[4] Director's Brief at 4; Director's Exhibits 23, 29; *see* 20 C.F.R. §725.463(a). However, the Director contends that the administrative law judge's error was harmless, because claimant has not established that he is totally disabled.

We agree with the Director that any error by the administrative law judge was harmless, for even if he should have found a change in an applicable condition of entitlement established, the administrative law judge properly denied benefits because the relevant evidence of record is insufficient to establish total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Specifically, pursuant to 20 C.F.R. §718.202(b)(2)(i), the administrative law judge considered the new pulmonary function study dated January 9, 2004, and correctly found that it did not establish total disability as

[4] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the new x-ray dated January 9, 2004, did not establish the existence of pneumoconiosis because it was read by a Board-certified radiologist and B reader as negative for pneumoconiosis. Decision and Order at 3, 6; Director's Exhibit 16. The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), because there was no new biopsy evidence of record and none of the presumptions are applicable to this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 6. The administrative law judge further found that the new medical opinion of Dr. Cho, that claimant has chronic obstructive lung disease probably caused by coal dust, merited no weight because it was weak and conclusory. Decision and Order at 6-7; Director's Exhibits 11, 12.

it was non-qualifying.[5] Decision and Order at 7; Director's Exhibit 14. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the new blood gas study dated January 15, 2004, and correctly found that this non-qualifying study was insufficient to establish total disability. Decision and Order at 8; Director's Exhibit 13. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately found that there was no new evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 7. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that Dr. Cho's new medical opinion stated that claimant is not totally disabled.[6] Decision and Order at 8; Director's Exhibit 11.

Based on the foregoing, we agree with the Director that the administrative law judge properly denied benefits because the evidence of record is insufficient to establish total disability. Because the evidence is insufficient to establish total disability, a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[5] 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, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[6] The medical evidence in the miner's previously denied second claim is insufficient to establish total disability, as it contains one non-qualifying pulmonary function study and one non-qualifying blood gas study, and Dr. Basheda's opinion that claimant has no significant impairment from a respiratory standpoint. Director's Exhibit 2. Further, we agree with the Director that the medical evidence associated with the miner's first claim, denied fifteen years ago, is insufficient to establish total disability, since the relevant inquiry is claimant's disability as of the date of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405 (1982); Director's Brief at 5 n.5.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge