BRB No. 06-0974 BLA

A.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERSTATE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	DATE ISSUED: 08/16/2007
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Bard and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5563) of Administrative Law Judge Adele Higgins Odegard 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). Claimant filed his subsequent claim on October 3, 2001.[1] The district director issued a Proposed Decision and Order denying benefits on July 19, 2003. Director's Exhibit 37. Claimant requested a hearing, and the case was transferred to the Office of Administrative Law Judges (OALJ). On June 8, 2004, Administrative Law Judge Daniel J. Rokentenetz remanded the claim in order for the district director to satisfy his obligation to provide claimant with a complete pulmonary evaluation as required by 20 C.F.R. §725.406(a). The district director obtained a supplemental report from Dr. Hussain, who had performed the Department of Labor examination, and then returned the case to the OALJ on February 9, 2005, where it was reassigned to Judge Odegard (the administrative law judge). A hearing was held on July 22, 2003. Director's Exhibit 38. The administrative law judge noted that in the prior claim, claimant had established the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge determined that the newly submitted evidence was insufficient to establish that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, she found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the administrative law judge's finding that Dr. Baker's opinion was insufficient to establish total disability.[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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[1] Claimant filed a claim for benefits on November 13, 1996. Director's Exhibit 1. In a Decision and Order dated April 23, 1998, Administrative Law Judge Thomas F. Phalen credited claimant with twenty-seven years of coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment. *Id.* Judge Phalen also found, however, that the evidence was insufficient to establish that claimant was totally disabled. Director's Exhibit 1. The Board affirmed Judge Phalen's findings on appeal, *[A.L.] v. Interstate Coal Co.*, BRB No. 98-1070 BLA (Apr. 27, 1999) (unpub.). *Id.* Claimant took no further action until filing his subsequent claim on October 3, 2001. Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked twenty-four years in coal mine employment, and her finding that evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish his entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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); *see Tennessee Consolidated Coal Co., v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *White v. New White Coal Co.*, 23 BLR 1-1 (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 was totally disabled in order 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).

Claimant contends that the administrative law judge erred in finding that he failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant asserts that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine work with the diagnoses of mild respiratory impairment by Drs. Baker and Hussain. Claimant's Brief at 4-5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Claimant contends that Dr. Baker's diagnosis of a mild respiratory impairment, and his statement that claimant should avoid further exposure to coal dust, must be deemed sufficient to establish his total disability. Claimant's Brief at 5.

In this case, Dr. Baker stated:

> Patient has a Class 2 impairment with the FEV1 between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. With the presence of pneumoconiosis, he has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 24. Because Dr. Baker did not explain whether his diagnosis of a mild respiratory impairment (Class 2 respiratory impairment) would prevent claimant from performing his usual coal mine employment, the administrative law judge properly determined that Dr. Baker's opinion was insufficient to establish that claimant was totally disabled under Section 718.204(b)(2)(iv). *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Contrary to claimant's contention, the administrative law judge also properly found that, while Dr. Baker did not discuss claimant's respiratory impairment in conjunction with the exertional requirements of claimant's usual coal mine work, Drs. Hussain and Broudy specifically opined that claimant was not totally disabled for coal mine work based on his mild respiratory impairment.[3] Decision and Order at 11; Director's Exhibits 14, 45; Employer's Exhibit 1. In this regard, the administrative law judge specifically noted:

> Dr. Hussain and Dr. Broudy, stated unequivocally that the Claimant retained the respiratory capacity to work as a coal miner. They had conducted physical examinations of the claimant, and administered appropriate tests. According to their reports, they were aware of the claimant's work history and knowledgeable about his duties as a miner. Consequently, they had both the professional qualifications and the specific knowledge of the claimant's work history to assess the results of the medical tests regarding the Claimant's physical capacities.

[3] Dr. Broudy noted that claimant ran a bulldozer and worked as a mechanic. He specifically opined that claimant retained the respiratory capacity to perform arduous manual labor. Employer's Exhibit 1. Dr. Hussain indicated on the Department of Labor examination form that he had been provided a copy of Form 911, "Description of Coal Mine Work," which had been completed by claimant and listed the physical requirements of his work as a mechanic/repairman. Director's Exhibits 5, 14. Dr. Hussain opined that claimant was not totally disabled for his usual coal mine employment as the result of his mild respiratory impairment. Director's Exhibit 14.

Decision and Order at 11. Thus, because Drs. Hussain and Broudy were aware of the exertional requirements of claimant's last coal mine job, *see Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Lane v. Union Carbide Corp*. 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), and they specifically opined that claimant was not totally disabled from performing that work, it was unnecessary for the administrative law judge to undertake an independent comparison of the exertional requirement requirements of claimant's last coal mine work in conjunction with Dr. Baker's opinion.

Moreover, as properly noted by the administrative law judge, Dr. Baker's recommendation that claimant should limit further exposure to coal dust is not the equivalent of a reasoned opinion of total disability. Decision and Order at 12. Medical opinions that advise against further coal dust exposure, and fail to address the miner's physical capacity to do his usual coal mine employment, are not sufficient to satisfy claimant's burden of proof under 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., Inc.*, 12 BLR 1-83 (1988).

Lastly, claimant argues that because pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further. Because claimant makes no other assertions of error regarding the administrative law judge's weighing of the medical opinion evidence,[4] we affirm her determination pursuant to Section 718.204(b)(2)(iv), and her finding that claimant was unable to establish total disability, the applicable condition of element that was adjudicated against him in his prior claim. Consequently, we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). *White*, 23 BLR at 1-3; *Trent*, 11 BLR at 1-27.

[4] The administrative law judge rejected Dr. Rosenberg's diagnosis of a moderate respiratory impairment because he found that it was not sufficiently reasoned. He also rejected Dr. Rosenberg's opinion that claimant was totally disabled for his usual coal mine work because the administrative law judge found that Dr. Rosenberg did not have an accurate understanding of the exertional requirements of claimant's job. Decision and Order at 12-13; Employer's Exhibits 2, 3. Claimant does not challenge the weight accorded Dr. Rosenberg's opinion; therefore, the administrative law judge's credibility determination as to Dr. Rosenberg's opinion is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge