

BRB No. 07-0129 BLA

C.R.)
)
 Claimant-Petitioner)
)
 v.)
)
 BLACK GOLD TRUCKING COMPANY)
)
 and)
)
 KENTUCKY COAL PRODUCERS' SELF-) DATE ISSUED: 08/27/2007
 INSURANCE 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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: McGRANERY, HALL AND BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5042) of Administrative Law Judge Janice K. Bullard 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 a subsequent claim on October 7, 1993.¹ Director's Exhibit 3. 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) and, therefore, that claimant was unable to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in finding that he was not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Claimant further asserts that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that he has satisfied his obligation to provide claimant with a

¹ Claimant initially filed a claim for benefits on August 24, 1988. Director's Exhibit 1. Administrative Law Judge Donald W. Mosser denied benefits on December 28, 1992. *Id.* He specifically found that while claimant had established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202(a), 718.203(c), the evidence was insufficient to establish that claimant was totally disabled. *Id.* Claimant appealed, and the Board affirmed the denial of benefits. [*C.R.*] *v. Black Gold Trucking Co.*, BRB No. 93-0855 BLA (Sep. 26, 1994) (unpub.). Director's Exhibit 1. On September 26, 1995, claimant filed a request for modification. *Id.* Judge Mosser determined that the newly submitted evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and accordingly, denied benefits. Director's Exhibit 1. Claimant appealed, and the Board affirmed Judge Mosser's findings. [*C.R.*] *v. Black Gold Trucking Co.*, BRB No. 97-1717 BLA (Aug. 7, 1998) (unpub.). *Id.* On September 21, 1998, claimant filed another request for modification, which was initially denied by the district director on January 27, 1999. *Id.* The case was reassigned to Administrative Law Judge Joseph E. Kane, who issued a Decision and Order denying benefits on January 24, 2000. Director's Exhibit 1. Claimant appealed, and the Board affirmed the denial of benefits. [*C.R.*] *v. Black Gold Trucking Co.*, BRB No. 00-0497 BLA (Jan. 31, 2001) (unpub.). *Id.* Claimant took no further action with respect to the denial of his modification request until he filed the instant subsequent claim on October 7, 2003. Director's Exhibit 3.

complete and credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

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.² 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).

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 Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

We first address claimant's contention that he was not provided a complete and credible pulmonary evaluation, sufficient to substantiate that he is totally disabled. In this case, claimant was examined on October 28, 2003 by Dr. Simpao, at the request of the Department of Labor (DOL). Director's Exhibit 10. Dr. Simpao noted claimant's work, medical, and smoking histories, his symptoms and complaints, and physical findings. He stated that the pulmonary function study revealed a mild degree of both restrictive and obstructive airway disease, and that the arterial blood gas study showed "ventilatory perfusion mismatch with hypoxemia." *Id.* When asked on the (DOL) Form CM-988 to assess the degree of impairment, Dr. Simpao wrote that claimant had "moderate impairment." Director's Exhibit 10. He further attributed claimant's moderate impairment to multiple years of coal dust exposure. *Id.*

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

At employer's request, claimant was also examined by Dr. Dahhan. Employer's Exhibit 1. Dr. Dahhan reported that a pulmonary function study showed mild respiratory impairment secondary to claimant's obesity. *Id.* Dr. Dahhan opined that claimant retained the respiratory capacity to continue his usual coal mine work. *Id.*

In weighing the medical opinion evidence at Section 718.204(b)(2), the administrative law judge stated with respect to Dr. Simpao's opinion:

Contrary to the assertion made in [c]laimant's brief...my review of the record does not sustain a finding that Dr. Simpao's report discloses an opinion "that claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment." Rather, I find that Dr. Simpao's report does not include an opinion as to whether [c]laimant can or could return to his usual coal mine employment.

Decision and Order at 8. The administrative law judge further found that while Dr. Simpao opined that claimant had a moderate pulmonary impairment, he did not offer an opinion regarding whether claimant was able to return to coal mine employment, "[n]or [did] he offer medical restrictions that would allow me to make my own conclusion as to whether [c]laimant could perform his usual coal mine work." Decision and Order at 9. The administrative law judge concluded, therefore, that Dr. Simpao's opinion was insufficient to satisfy claimant's burden of proving total disability. *Id.* Because Dr. Dahhan specifically found that claimant was not totally disabled, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that insofar as the administrative law judge found that Dr. Simpao did not make "findings" regarding the issue of total disability, a requisite element of entitlement, the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required under the Act. Claimant's Brief at 4. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges*, 18 BLR at 1-88 n.3; *see also Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992).

The Director concedes that Dr. Simpao's report is "incomplete" because it lacks an opinion regarding whether claimant is totally disabled, but also asserts that he has satisfied his statutory obligation. The Director states:

The [administrative law judge] fully credited Dr. Dahhan's opinion that [claimant] is not totally disabled. Consequently, even had Dr. Simpao found [claimant's] *mild respiratory impairment* totally disabling, his opinion, even if fully credited, would not establish that [claimant] is totally disabled (emphasis added). Because [claimant] carries the burden of proving each element of entitlement...the weight of the evidence would remain insufficient to establish total disability.

Director's Brief at 2, citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The Director's argument has no merit. In order for the evidence to be held in equipoise, the opinions of Drs. Simpao and Dahhan must be equally probative. The Director's argument ignores that there is conflict between these physicians as to whether claimant has a mild or a moderate impairment. We cannot presume that the administrative law judge would find a medical opinion assessing no total disability based on a mild impairment to be equally probative as an opinion stating that claimant is totally disabled based on a moderate impairment.

A determination as to whether the evidence is in equipoise is the equivalent of a credibility finding within the purview of the administrative law judge. See *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, see *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and to assess the evidence of record and draw his own conclusions and inferences there from, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Consequently, because the Director concedes that Dr. Simpao's report is incomplete, and fails to address whether claimant is totally disabled, a requisite element of entitlement,³ we vacate the administrative law judge's findings at 20 C.F.R.

³ 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.

§§718.204(b)(2), 725.309. We, therefore, vacate the administrative law judge's denial of benefits, and remand the case to the district director for further medical development necessary to provide claimant with a complete pulmonary evaluation. *Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

I concur in result only.

JUDITH S. BOGGS
Administrative Appeals Judge

§§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).