BRB No. 07-0141 BLA

E.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/17/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5036) of Administrative Law Judge Thomas F. Phalen, Jr. 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] Claimant filed his first claim for

[1] In his Petition for Review and Brief, claimant asserts that he is appealing the Decision and Order of September 7, 2006 by Administrative Law Judge Alice M. Craft. Claimant's Petition for Review at 1; Claimant's Brief at 1. In fact, Administrative Law Judge Thomas F. Phalen, Jr. issued the denial of benefits for this claim on September 20, 2006.

benefits on July 24, 1978, which was denied on March 26, 1979, because the evidence did not establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibits 1-101, 1-130. Claimant filed his second claim for benefits on September 10, 1992, and it was denied on December 22, 1997, because claimant did not establish the existence of pneumoconiosis and total disability. Director's Exhibits 1-1, 1-299. Claimant filed his third and instant claim on January 22, 2001. Director's Exhibit 3.

The administrative law judge initially found the evidence sufficient to establish at least 8.23 years of coal mine employment.[2] The administrative law judge also found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[3] Consequently, the administrative law judge determined that the newly submitted evidence did not establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final, pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete pulmonary evaluation. The Director responds in support of the administrative law judge's denial of benefits, and argues that claimant is not entitled to a remand of this case for another pulmonary evaluation.[4]

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[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Decision and Order at 4; Director's Exhibits 4, 11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202, 1-203 (1989)(*en banc*).

[3] In his brief, claimant asserts that the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment. Claimant's Brief at 2. In fact, the administrative law judge found that claimant did not establish the existence of pneumoconiosis. Decision and Order at 9-10.

[4] The administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-11.

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).

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. 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).

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 the existence of pneumoconiosis and that he was totally disabled. Director's Exhibits 1-1, 1-299. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or total disability to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

We first address claimant's challenge to the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Pursuant to that section, the administrative law judge found that Dr. Baker's opinion that claimant has no pulmonary impairment and is able to perform his usual coal mine employment was well-reasoned and well-documented, because it was supported by the nonqualifying pulmonary function study and blood gas study, and normal physical examination.[5] Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's

[5] Claimant inaccurately describes Dr. Baker's May 18, 2001 report as indicating that claimant has a class I breathing impairment due to coal dust exposure and has coal workers' pneumoconiosis category 1/0. Claimant's Brief at 3. In fact, Dr. Baker indicated that claimant has no impairment, has the respiratory capacity to perform the work of a coal miner, and categorized claimant's chest x-ray as 0/1. Director's Exhibits 9-3, 9-5.

findings regarding the extent of any respiratory impairment. Claimant's Brief at 4-5. As just discussed, however, Dr. Baker stated that claimant has no impairment. The administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment to Dr. Baker's opinion that claimant does not have any impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); Decision and Order at 11; Director's Exhibit 9-5.

We also reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the newly submitted medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv) based on the new evidence. *See White*, 23 BLR at 1-6-7.

Claimant also contends that he is entitled to a remand of the case for the Director to provide him with a complete and credible pulmonary evaluation because the administrative law judge found that Dr. Hussain's report was entitled to no weight on the issue of total disability. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406; Claimant's Brief at 5. In fact, the record contains no opinion from Dr. Hussain. In this claim, claimant chose Dr. Baker, and not Dr. Hussain, to perform the Department of Labor pulmonary evaluation. Director's Exhibit 8. Moreover, the administrative law judge found that Dr. Baker's opinion, that claimant is not totally disabled from a pulmonary standpoint from performing his previous coal mine employment, was well-reasoned and well-documented because it was based on a nonqualifying pulmonary function study and blood gas study, and normal physical examination. Decision and Order at 11. The administrative law judge did find that Dr. Baker's diagnosis of legal pneumoconiosis was not well-reasoned because it was not supported by objective evidence or adequate rationale. Decision and Order at 10. The Director, however, responds that remand is not required since, even if the evidence were sufficient to establish the existence of pneumoconiosis, claimant could not establish total disability, based on the entire record. In his decision, the administrative law judge found that a remand for a complete pulmonary evaluation to cure any deficiencies in Dr. Baker's diagnosis of legal pneumoconiosis would be futile where the evidence is insufficient to establish total disability. Decision and Order at 12.

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. Dr. Baker examined claimant and performed the full range of testing required by the regulations. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Based on that evaluation, Dr. Baker categorized the extent of claimant's pulmonary impairment as "no impairment." Director's Exhibit 9-5. The administrative law judge fully credited this opinion. Decision and Order at 11. Since we have affirmed the administrative law judge's finding that claimant is not totally disabled based on the newly submitted evidence, a finding of total disability pursuant to 20 C.F.R. §718.204(b) on the merits is precluded. Therefore, the administrative law judge properly denied the claim pursuant to 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir. 1989); *Trent*, 11 BLR at 1-27. Consequently, we agree with the Director that there is no need to remand this case for a complete pulmonary evaluation.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge