BRB No. 08-0180 BLA

H.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/28/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-6064) of Administrative Law Judge Joseph E. Kane 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's first claim for benefits, filed on January 7, 1994, was denied on July 30, 1997, because claimant did not establish the presence of a totally disabling respiratory or pulmonary impairment. [*H.C.*] *v. Director, OWCP*, BRB No. 96-1688 BLA (July 30, 1997)(unpub.); Director's Exhibit 1. Claimant filed his current claim for benefits on December 6, 2002. Director's Exhibit 3.

In his decision, the administrative law judge credited claimant with eighteen years of coal mine employment, as stipulated.[1] The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge found that a change in an applicable condition of entitlement was not established pursuant to 20 C.F.R. §725.309(d), as the new evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement that was previously adjudicated against claimant. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv) based on the medical opinion of Dr. Simpao. The Director, Office of Workers' Compensation Programs, responds, asserting that the Board should affirm the administrative law judge's denial of benefits.[2]

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

[1] The record indicates that claimant's coal mine employment was in Kentucky and Tennessee. Decision and Order at 4; Director's Exhibits 1, 4. 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 (1989)(*en banc*).

[2] The administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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). The administrative law judge determined that claimant's prior claim was denied because he did not establish total disability. Decision and Order at 4. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(d)(3).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Simpao's opinion, that claimant's "mild pulmonary impairment would not leave him totally disabled," was well-reasoned because it was based on a non-qualifying[3] pulmonary function study and a normal blood gas study. Decision and Order at 9; Director's Exhibit 22 at 4. Claimant 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 findings regarding the extent of any respiratory impairment. Claimant's Brief at 2-3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The specific argument claimant sets forth, however, is that:

> It can be reasonably concluded that the claimant's regular coal mining duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Valentino Simpao (who did diagnose a minimal pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Kane made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability.

Claimant's Brief at 3. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *W.C. v. Whitaker Coal Corp.*, --- BLR ---, BRB Nos. 07-0649 BLA/A, slip op. at 11 (Apr. 30, 2008); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

[3] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i),(ii).

Moreover, the administrative law judge permissibly found that Dr. Simpao's May 3, 2006 opinion, that claimant's mild pulmonary impairment would not leave him totally disabled, was well-reasoned because it was based on a non-qualifying pulmonary function study and normal results of claimant's blood gas study.[4] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 9; Director's Exhibits 11, 22 at 4. We therefore reject claimant's allegation of error.

Further, we reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 3. 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, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence.

Because we have affirmed the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement that was previously adjudicated against claimant, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement. Consequently, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d).

[4] The record reflects that Dr. Simpao took into account the nature of claimant's usual coal mine employment in his March 31, 2003 report, by considering that claimant "bolted top, r[a]n loader, [and] drove shuttler." Director's Exhibit 11; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *W.C. v. Whitaker Coal Corp.*, --- BLR ---, BRB Nos. 07-0649 BLA/A, slip op. at 11 (Apr. 30, 2008). Claimant does not allege any inaccuracy by Dr. Simpao in describing claimant's job duties.

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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BETTY JEAN HALL
Administrative Appeals Judge