BRB No. 10-0694 BLA

CHARLES T. AKERS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 08/05/2011
	)	
Employer-Respondent	)	
	)	
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.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05544) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that the instant claim was a subsequent claim filed on August 8, 2008.[1] Adjudicating the claim pursuant

[1] Claimant filed his first claim for benefits on June 10, 2002. That claim was denied by the district director on August 28, 2003, because claimant failed to establish

to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-eight years of coal mine employment, based on the parties' stipulation. Weighing the evidence submitted since the prior denial, the administrative law judge found that the weight of the new evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that his usual coal mine employment was sedentary and that the new blood gas study and medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal, unless requested to do so by the Board.[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.[3] 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 entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless*

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any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second claim on October 28, 2005, which was denied by the district director on May 4, 2006, because claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit 2. Claimant took no action with regard to the denial of this claim.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-eight years of coal mine employment, and her finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

Coal Co. v. Akers, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

When 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). In this case, claimant is required to prove, based on the newly submitted evidence, that the miner is totally disabled by a respiratory or pulmonary impairment in order to have the claim reviewed on the merits. 20 C.F.R. §§725.309(d), 725.409(c); *see* Director's Exhibit 2.

In addressing the issue of total respiratory disability at Section 718.204(b), the administrative law judge found, based on claimant's testimony, that claimant's usual coal mine employment as a dispatcher involved both sitting and standing, and that claimant was not required to walk long distances. Decision and Order at 3, 12; Hearing Transcript at 10-12, 17-18. The administrative law judge found that there was "no evidence that this job required the [c]laimant to shovel the beltline, or perform similar manual labor, even on occasion." Decision and Order at 12. The administrative law judge noted that claimant described his job as "directing traffic in the mine, from a work station at the mine portal." Decision and Order at 3; Hearing Transcript at 11. Specifically, claimant testified that he did not have to do any lifting or carrying as a dispatcher, Hearing Transcript at 11, and that the most demanding part of his job was the stress, and that he worked in a standing position because of a sore back. Hearing Transcript at 17. The administrative law judge, therefore, properly concluded based on claimant's testimony, that there was "no evidence that the [c]laimant was expected to perform any degree of manual labor." Decision and Order at 11. Accordingly, we reject claimant's contention that the administrative law judge erred in finding that claimant's usual coal mine employment was sedentary. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

Next, we reject claimant's contention that the administrative law judge erred in her consideration of the blood gas study evidence. Contrary to claimant's contention, the administrative law judge properly considered all of the new blood gas studies together, those conducted pre-exercise and post-exercise, in determining that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(ii). The administrative law judge found that the new blood gas studies consisted of a single, post-exercise study, which was qualifying, and two pre-exercise studies, which were non-qualifying.[4]

[4] The administrative law judge noted that Dr. Forehand was the only physician to administer a post-exercise blood gas study; whereas, Drs. Hippensteel and Zaldivar

Weighing the studies together, the administrative law judge permissibly concluded that the qualifying post-exercise study was not as credible as the other blood gas studies, as it "required an exertional level higher than the exertional level of [c]laimant's usual coal mine work as a dispatcher."[5] Decision and Order at 12 n.15. The administrative law judge, therefore, properly concluded that the blood gas study evidence, as a whole, did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge was not required to find total disability established, based on the qualifying post-exercise blood gas study. 20 C.F.R. §718.204(b)(2)(ii); *see Beatty v. Danri Corp*., 16 BLR 1-11, 1-13 (1991); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987). Rather, the administrative law judge properly weighed all of the blood gas study evidence together, both pre-exercise and post-exercise, to determine whether, as a whole, it established total respiratory disability at Section 718.204(b)(2)(ii). *See Milburn Colliery Co. v. Director, OWCP* [*Hicks*], 138 F.3d 524, 534, 21 BLR 2-323, 2-336 (4th Cir.1998); *Lane v. Union Carbide*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields*, 10 BLR at 1-21. Accordingly, we affirm the administrative law judge's finding that the new blood gas study evidence did not establish total disability at Section 718.204(b)(2)(ii).

Regarding the administrative law judge's consideration of the medical opinion evidence, along with the exertional level of claimant's usual coal mine employment, at Section 718.204(b)(2)(iv), the administrative law judge correctly found that Dr. Forehand was the only physician who opined that claimant was unable to perform his usual coal mine employment, from a respiratory standpoint.[6] In evaluating Dr. Forehand's opinion,

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administered pre-exercise studies only, because they concluded that the exercise portion of the blood gas studies would be contraindicated because of claimant's medical history of stroke, heart attack and cardiac conditions. *See* 20 C.F.R. §718.105; Decision and Order at 7; Employer's Exhibits 1, 2.

[5] Specifically, the administrative law judge noted that, "[r]egarding the level of exercise that the [c]laimant's arterial blood gas tested, Dr. Forehand stated that he was most familiar with the job demands of coal mining, and the exercise protocol he chose was a 'hundred watts of work' and was equivalent to shoveling the belt. Dr. Forehand also stated that was a mid-range level of physical exertion." Decision and Order at 9.

[6] Dr. Forehand, conducted a physical examination and objective testing, and opined that claimant was totally disabled from performing his usual coal mine employment. Director's Exhibit 16; Employer's Exhibit 3. Based on the exercise portion of claimant's blood gas study, which yielded qualifying results, and his assumption that claimant's coal mine employment required heavy physical labor, Dr. Forehand stated that there was a significant respiratory impairment present and that claimant was totally and permanently disabled. *Id*.

the administrative law judge properly found that Dr. Forehand impermissibly based his opinion on his presumption that claimant's coal mine employment, as a dispatcher, required at least some degree of heavy manual labor. Dr. Forehand stated: "I've never heard coal mining is a light or sedentary type of work[.]" Employer's Exhibit 3 at 24. The administrative law judge, however, found that claimant's job as a "dispatcher" was sedentary. The administrative law judge, therefore, properly concluded that Dr. Forehand's opinion was not credible as it was not based on a correct assessment of the exertional level of claimant's usual coal mine employment. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.3d at 172, 21 BLR at 2-45-46; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); Decision and Order at 12. Because the administrative law judge properly found that the only opinion supportive of claimant's burden was not credible, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), and reject claimant's contention to the contrary. 20 C.F.R. §718.204(b)(2)(iv); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.3d at 172, 21 BLR at 2-45-46; *Gee v. W.G. Moore and Sons*, 9 BLR 104 (1986). Additionally, we affirm the administrative law judge's finding that the newly submitted evidence as a whole, both like and unlike, was insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.3d at 172,

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Dr. Hippensteel, conducted a physical examination, objective testing and review of additional medical evidence in the record, and opined that claimant had a mild restriction on pulmonary function study, but that it was not sufficient to prevent claimant from performing his usual coal mine employment, which the doctor stated was as a dispatcher and involved no physical labor, but a lot of mental stress. Employer's Exhibit 1. Dr. Hippensteel stated that the mild restrictive pulmonary impairment is related to claimant's hiatal hernia and obesity, which compress his lung volumes. Employer's Exhibit 1. Dr. Hippensteel further opined that, while claimant's respiratory condition did not prevent him from performing his usual coal mine employment, nonetheless, from a "whole man" standpoint, claimant was unable to return to his coal mine employment due to his prior stroke and cardiac condition. *Id*.

Dr. Zaldivar, conducted a physical examination, objective testing and a review of existing medical records, and stated that, from a pulmonary standpoint, claimant was not disabled from performing his usual coal mine employment as a dispatcher, which the doctor described as sedentary. Employer's Exhibit 2. However, Dr. Zaldivar further stated that, from a "whole man" standpoint, claimant is severely impaired and unable to perform his usual coal mine employment, due to his cardiovascular disease, diabetes and other medical problems not related to his respiratory condition. *Id*.

21 BLR at 2-45-46; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Fields*, 10 BLR at 1-21; Decision and Order at 12.

As the administrative law judge properly found that the new evidence failed to establish total disability, she properly found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309. Further, because we affirm the administrative law judge's finding that claimant failed to establish total disability, claimant is not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis in this case.[7] *See* 30 U.S.C. §921(c)(4).

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[7] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).