BRB No. 13-0159 BLA

JIMMY MCCOY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON, INCORORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/29/2013
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Lois Kitts and James M. Kennedy (Baird & Baird), Pikeville, Kentucky, for employer.[1]

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

PER CURIAM:

Claimant appeals the Decision and Order of Larry S. Merck (09-BLA-5703) denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits

[1] Employer is self-insured through Pittston Company.

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on May 17, 2006.[2] Director's Exhibit 3.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

After crediting claimant with at least fifteen years of qualifying coal mine employment,[3] the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore found that claimant failed to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 6, 8, 22-23. The administrative law judge further found that the new evidence did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinions in finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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[2] Claimant's prior claim, filed on June 6, 1995, was finally denied because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[3] Claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 16; Hearing Tr. at 35-36. 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).

[4] Additionally, the administrative law judge considered all the evidence on the merits, and found that claimant failed to establish either the existence of pneumoconiosis, or that he is totally disabled.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis, pursuant to 20

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 establish entitlement 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. 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 both the existence of pneumoconiosis, and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d).

Relevant to the issue of total disability, the administrative law judge considered the opinions of Drs. Jarboe, Rosenberg, Mettu and Sikder, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Jarboe, Rosenberg, and Mettu opined that claimant retains the respiratory capacity to perform his usual coal mine work. Director's Exhibits 16, 41; Employer's Exhibits 4, 5, 7, 15, 23, 24. In contrast, the administrative law judge found that Dr. Sikder, claimant's treating physician, opined that claimant has a totally disabling respiratory impairment. Claimant's Exhibit 1. The administrative law judge accorded the greatest weight to the opinions of Drs. Jarboe and Rosenberg, as supported by the opinion of Dr. Mettu, to conclude that claimant failed to establish that he is totally disabled. Decision and Order at 22.

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Jarboe, Rosenberg, and Mettu, over that of Dr. Sikder. Claimant asserts that as Dr. Mettu examined claimant in 2006, and Drs. Jarboe and Rosenberg examined claimant in 2007, their opinions should be accorded less weight than that of Dr. Sikder, who examined claimant in 2010 and 2011. Claimant's Brief at 18. Contrary to claimant's

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C.F.R. §718.202(a), or total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

contention, while Drs. Jarboe and Rosenberg initially examined claimant in 2007, both reviewed additional medical evidence, including Dr. Sikder's medical records, in preparation for their 2011 depositions. Employer's Exhibits 4, 5, 7, 15, 23, 24. Further, Drs. Jarboe and Rosenberg both concluded that the more recent evidence they reviewed did not alter their conclusions that claimant retains the pulmonary capacity to perform his usual coal mine work. Employer's Exhibits 23 at 6-8; 24 at 21, 22, 27-29. Thus there is no merit to claimant's contention that Dr. Sikder's opinion is based on a more accurate picture of claimant's health. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Claimant's Brief at 18-19.

Nor is there merit to claimant's contention that the administrative law judge was required to accord Dr. Sikder's opinion controlling weight based on her status as claimant's treating physician, pursuant to 20 C.F.R. §718.104(d). Claimant's Brief at 18, 19. An administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom,* 342 F.2d 486, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). The administrative law judge acknowledged that Dr. Sikder is claimant's treating physician, but permissibly accorded greater weight to the opinions of Drs. Jarboe and Rosenberg, finding them well-reasoned, well-documented, and better supported by the objective evidence of record, including the uniformly non-qualifying pulmonary function and blood gas study results.[6] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 13, 22.

Because the administrative law judge specifically found that Drs. Jarboe and Rosenberg set forth the rationale for their findings, based on their interpretations of the medical evidence of record, and explained the reasons for their conclusions that claimant retains the respiratory capacity to perform his usual coal mine work, we affirm the administrative law judge's determination to credit the opinions of Drs. Jarboe and Rosenberg, as supported by the opinion of Dr. Mettu, over the opinion of Dr. Sikder. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir.

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

2005); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; Decision and Order at 13, 20, 22. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant failed to establish that an applicable condition of entitlement has changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(d). We, therefore, affirm the denial of benefits.[7]

[7] In light of our affirmance of the administrative law judge's finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), we also affirm his finding that claimant is unable to invoke the Section 411(c)(4) rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 23.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge