BRB Nos. 08-0278 BLA
and 08-0278 BLA-A

L.D.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PANTHER BRANCH COAL COMPANY	)	DATE ISSUED: 12/08/2008
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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.

John Cline, Piney View, West Virginia, for claimant.

Christopher H. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denying Benefits (2006-BLA-5412) of Administrative Law Judge Adele Higgins Odegard,[1] rendered on a subsequent claim for benefits filed pursuant to the provisions of Title IV of

[1] The hearing was held before Administrative Law Judge Paul H. Teitler, who subsequently died. The case was then transferred to Administrative Law Judge Adele Higgins Odegard. Decision and Order at 2.

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with over twenty-eight years of coal mine employment, and adjudicated this subsequent claim, filed on January 21, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the miner's previous claim had been denied on the ground that the evidence was insufficient to establish total respiratory disability, and found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that the evidence as a whole was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and, after weighing all relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000),[2] found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge also found the evidence of record sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) or disability causation at Section 718.204(c). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing that the administrative law judge erred in finding the existence of clinical pneumoconiosis established pursuant to Section 718.202(a)(1), and in finding total respiratory disability established pursuant to Section 718.204(b)(2)(iv). Employer also challenges the administrative law judge's discrediting of the opinions of Drs. Hippensteel and Castle in finding that legal pneumoconiosis was not established at Section 718.202(a)(4). Claimant responds in support of his position. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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).

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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). 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.[3] 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 generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Allen v. Mead Corp.*, 22 BLR 1-61, 1-66 (2000); *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51, 1-53 (1997), *modifying on recon.*, 20 BLR 1-8 (1996).

Initially, we reject employer's contention that the administrative law judge erred in relying on the opinion of Dr. Rasmussen over the contrary opinions of Drs. Hippensteel and Castle to support her findings of total respiratory disability at Section 718.204(b)(2)(iv) and a change in an applicable condition of entitlement at Section 725.309(d). Contrary to employer's arguments, the administrative law judge permissibly credited Dr. Rasmussen's opinion as being well-reasoned and documented, as she determined that it was consistent with the objective diagnostic testing that showed exercise-induced hypoxemia, as well as with claimant's subjective complaints and the moderate to heavy exertional demands of claimant's last coal mine job as a continuous miner operator.[4] Decision and Order at 13; Director's Exhibits 12, 13; Claimant's

[3] Claimant's prior claim, filed on June 3, 2002, was finally denied by the district director on November 17, 2003. Director's Exhibit 1.

[4] Based on claimant's description of his coal mine employment on Form CM-913 and his hearing testimony, the administrative law judge determined that claimant's duties as a continuous miner operator at the face of the mine included carrying a remote, hanging ventilation curtains, moving cable and water lines, rock dusting, and setting timbers. Claimant indicated that he carried 12 pounds all day and lifted 150 pounds 12 times per day, Director's Exhibit 5, and testified that he spent 20 hours per week doing

Exhibit 2; *see Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge was persuaded by Dr. Rasmussen's explanation that, while the objective tests were non-qualifying, claimant's blood gas studies on light exercise showed an oxygen consumption well below the level required to perform the duties of claimant's coal mine employment. Decision and Order at 13; Director's Exhibit 13; Claimant's Exhibit 2. Although Dr. Hippensteel opined that claimant had no permanent disabling impairment because his more recent blood gas study showed normal results, and testified at deposition that claimant would have to lift sixty-five pounds on a regular basis in order to meet the work load requirements relied on by Dr. Rasmussen, the administrative law judge determined that Dr. Hippensteel's blood gas study was invalid[5] and that the physician's presumptions regarding the exertional requirements of claimant's usual coal mine employment were inconsistent with the record. Decision and Order at 14; Director's Exhibit 14; Employer's Exhibit 3. Thus, the administrative law judge acted within her discretion in finding that Dr. Hippensteel's opinion was not well-reasoned and was entitled to little weight. Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Similarly, the administrative law judge permissibly concluded that Dr. Castle's opinion, that claimant was not totally disabled because his arterial blood gas values did not meet the criteria for disability under the Act, was not well-reasoned and was entitled to little weight. Decision and Order at 14; Employer's Exhibits 1, 2. In so finding, the administrative law judge properly noted that a miner is not required to produce qualifying values on his pulmonary function studies or blood gas studies in order to establish a totally disabling pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv), and that although Dr. Castle acknowledged the presence of mild hypoxemia on exercise, he failed to compare this assessment with the exertional requirements of claimant's usual coal mine employment. Decision and Order at 14; *see Taylor v. Evans & Gambrel Co., Inc.*,

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physical labor, that he worked bent over in a coal seam five and one-half feet high, and that bags of rock dust weighed 50 pounds, timbers weighed 20 to 100 pounds, and concrete blocks weighed 70 to 100 pounds. Hearing Transcript at 12. The administrative law judge concluded that claimant's job involved moderate physical labor mixed with periods of heavy labor. Decision and Order at 12-13.

[5] The administrative law judge found that Dr. Rasmussen persuasively invalidated Dr. Hippensteel's blood gas study by explaining that it was grossly insufficient for assessing gas exchange in that a single sample was drawn during exercise that lasted only 2 minutes and 23 seconds, whereas Dr. Rasmussen's incremental treadmill study exercised claimant for 8 minutes with an indwelling line for blood samples. Decision and Order at 13; Director's Exhibits 13, 14.

12 BLR 1-83 (1988). Weighing all of the newly submitted relevant evidence together, like and unlike, the administrative law judge rationally found that claimant established total disability at Section 718.204(b)(2), *see Fields*, 10 BLR 1-19, and a change in an applicable condition of entitlement pursuant to Section 725.309(d), *see White*, 23 BLR at 1-3, and we affirm her findings thereunder, as supported by substantial evidence.

Turning to the issue of disability causation pursuant to Section 718.204(b), claimant contends that the administrative law judge erred in finding that the opinion of Dr. Rasmussen was not well-reasoned for failure to address whether claimant's obesity played a role in his exercise-induced hypoxemia or whether claimant's hospitalization for pulmonary problems supported his conclusions. Claimant argues that Dr. Rasmussen's opinion is well-reasoned because the physician provided a comprehensive review of the medical record and concluded that coal dust exposure was the principal cause of claimant's disabling impairment in gas exchange based on his 28 years of coal dust exposure, the pattern of impairment, scientific studies, the absence of other viable risk factors, and the absence of any smoking. Claimant asserts that Dr. Rasmussen was aware of claimant's weight and hospitalization, but addressed only the evidence that he deemed to be relevant. Claimant thus maintains that the administrative law judge improperly substituted her own opinion for that of a medical expert, and raised the bar too high for what constitutes a well-reasoned opinion. Claimant's Brief at 3. Claimant's arguments are without merit. As Dr. Hippensteel opined that claimant's mild degree of hypoxemia was unrelated to coal dust exposure but was consistent with ventilation perfusion mismatching in a person who was obese, with some contribution from non-industrial bronchitis, acute exacerbations and sleep apnea, and Dr. Castle attributed claimant's ventilation perfusion mismatching to periodic bronchospasm, the administrative law judge could reasonably expect Dr. Rasmussen to address what role, if any, these conditions played in claimant's disability. Decision and Order at 8-9, 18, 20-21; *see Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-294 (1984). As no other physician attributed claimant's disability to pneumoconiosis, and substantial evidence supports the administrative law judge's findings at Section 718.204(c), we affirm her finding that claimant failed to establish disability causation thereunder.

Because claimant failed to establish disability causation, an essential element of entitlement, we affirm the administrative law judge's denial of benefits and need not reach the parties' arguments on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a). *See Anderson*, 12 BLR at 1-112.

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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BETTY JEAN HALL
Administrative Appeals Judge