BRB No. 11-0342 BLA

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| PAUL D. HEADY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| PEABODY COAL COMPANY | ) | DATE ISSUED: 12/14/2011 |
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| 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul D. Heady, Sturgis, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2008-BLA-5272) of Administrative Law Judge Joseph E. Kane (the administrative law judge) rendered on a subsequent claim filed on January 22, 2007, 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 claimant established twenty-four years of underground coal mine employment. The administrative law judge further found that the newly submitted evidence of record is insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory impairment pursuant to 20 C.F.R.

§718.204(b), elements of entitlement previously adjudicated against claimant.[1] The administrative law judge, therefore, found that the evidence is 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 generally challenges the administrative law judge's denial of benefits. In particular, claimant contends that his claim should be considered under Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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 (1989).

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[1] Claimant's prior claim, filed in March of 2002, was denied in March of 2005 for failure to establish any element of entitlement. *See* Director's Exhibits 1-3.

[2] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption of totally disabling pneumoconiosis, if a claim was filed after January 1, 2005, was pending on or after March 23, 2010, and if claimant establishes at least fifteen years of employment in an underground coal mine employment, or at a mine with conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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 (1989) (*en banc*).

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). In this case, claimant's prior claim was denied because he failed to establish any element of entitlement. The administrative law judge, therefore, had to find that at least one of the elements of entitlement was established in order for claimant's subsequent claim to be reviewed on the merits.

**Total Disability – 20 C.F.R. §718.204(b)**

In finding that total respiratory disability was not established pursuant to Section 718.204(b)(2)(i), the administrative law judge properly found that a preponderance of the new pulmonary function study evidence does not establish total respiratory disability pursuant to Section 718.204(b)(2)(i), because only one new pulmonary function study is qualifying, while the other two new studies are non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(i); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further, the administrative law judge properly found that the reliability of the new pulmonary function study evidence is questionable because the results of the studies were determined to be invalid due to the poor effort claimant exhibited in performing the studies. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Turning to the new blood gas study evidence, the administrative law judge properly found that it does not establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), as both of the new blood gas studies are non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(ii); *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. Likewise, the administrative law judge properly found that total respiratory disability is not established pursuant to Section 718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the new medical opinion evidence, the administrative law judge found that it failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), because the opinion of Dr. Simpao, that claimant is totally disabled, is outweighed by the opinions of Drs. Fino and Repsher, that claimant is not totally disabled. Specifically, the administrative law judge noted that, although all three medical opinions are "credible and entitled to probative weight," Decision and Order at 15, the opinions of Drs. Fino and Repsher are the most persuasive because they are "more consistent with the record as a whole, including the objective testing." *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 15-16. Further, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino and Repsher over the opinion of Dr.

Simpao, based on their superior qualifications.[4] *See Dillon*, 11 BLR at 1-114. Additionally, on weighing all of the relevant new evidence together, both like and unlike, pursuant to Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that claimant failed to establish total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). We, therefore, affirm the administrative law judge's finding that the new evidence does not establish total respiratory disability at Section 718.204(b). Further because the record reflects that the prior claim contained no credible evidence of a totally disabling respiratory impairment, an essential element of entitlement, we need not consider the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as claimant would not be entitled to benefits pursuant to 20 C.F.R. Part 718. *See* 20 C.F.R. §725.309(d)(2); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Because claimant failed to establish total respiratory disability pursuant to Section 718.204(b), he is not entitled to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[4] The administrative law judge noted that both Drs. Fino and Repsher are Board-certified in Internal Medicine with a subspecialty in pulmonary diseases, while Dr. Simpao holds no Board certifications. *See* Decision and Order at 6, 7, and 12.

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