BRB No. 05-0468 BLA

ANGELO D. RAGUGINI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 02/03/2006
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (03-BLA-6505) of Administrative Law Judge Robert D. Kaplan in a subsequent miner's claim filed pursuant

[1]Claimant is Angelo D. Ragugini, the miner, who filed his second claim for benefits on June 27, 2002. Director's Exhibit 2. Claimant's first claim for benefits was filed on November 12, 1980. Director's Exhibit 1. On April 15, 1987, the Board affirmed Administrative Law Judge Daniel L. Leland's denial of benefits because claimant failed to establish total respiratory disability. *Id.* Claimant appealed to the

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). The administrative law judge found that the record supports the stipulation of the parties to 8.25 years of coal mine employment and the concession of the Director, Office of Workers' Compensation Programs (the Director), to the existence of pneumoconiosis arising out of coal mine employment, August 26, 2004 Hearing Transcript at 4-5. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 5-8. Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d). *Id.* at 8. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to allow claimant to submit the January 4, 2005 opinion of Dr. Levinson. Claimant's Brief at 4-6. Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to Section 718.204(b)(2)(iv). *Id.* at 1-4. The Director responds, urging affirmance of 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).

Claimant's second claim was filed on June 27, 2002, after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) 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

United States Court of Appeals for the Third Circuit, but his appeal was dismissed, by agreement of the parties, on September 4, 1987. *Id.*

[2]We affirm the administrative law judge's finding of 8.25 years of coal mine employment and his findings that the new evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(2004). Claimant's first claim was denied because claimant failed to establish total respiratory disability. Director's Exhibit 1.

We first address claimant's assertion that the administrative law judge erred in refusing to reopen the record to allow him to submit the January 4, 2005 opinion of Dr. Levinson. On January 10, 2005, claimant submitted a 2005 report by Dr. Levinson, which responded to Dr. Talati's supplemental report dated October 15, 2004.[3] The Director objected to claimant's submission of Dr. Levinson's 2005 report as untimely because claimant did not request, at the August 26, 2004 hearing, an opportunity to submit evidence in response to the additional evidence, requested to be admitted by the Director, nor did he request an opportunity to have Dr. Talati's supplemental report reviewed after claimant received it in October 2004. Claimant responded to the Director's objection to claimant's submission of Dr. Levinson's 2005 report by stating that he would have requested additional time had he known that he would be receiving another report from Dr. Levinson.

The administrative law judge denied claimant's motion to reopen the record as untimely. Decision and Order at 2 n.3. In doing so, the administrative law judge noted that Dr. Talati's supplemental report was submitted by the Director on October 18, 2004 and that claimant stated in his January 10, 2005 letter, requesting submission of Dr. Levinson's 2005 report, that he requested another report from Dr. Levinson on October 21, 2004. *Id.* However, as the administrative law judge further noted, claimant did not request to submit any additional evidence either at the hearing or after Dr. Talati's supplemental report was received by him in October 2004. *Id.* Furthermore, the administrative law judge stated that even though claimant was granted two extensions of time to submit his final brief, he did not note in these requests that he needed additional time because he was awaiting Dr. Levinson's report, nor did he request the opportunity to submit this report. *Id.* The administrative law judge additionally stated that claimant contradicted himself, in his response to the Director's objection, by stating that he was unaware that Dr. Levinson was going to provide an additional report because claimant

[3]At the August 26, 2004 hearing, Dr. Levinson testified that based on the pulse oximetry study he performed, he found claimant to be totally disabled from performing his coal mine employment. Hearing Transcript at 33. Because the Director, Office of Workers' Compensation Programs (the Director), had not seen the results of Dr. Levinson's pulse oximetry study, he requested an opportunity to have a physician review and respond to the results of this study. *Id.* at 58. The administrative law judge granted the request of the Director to submit a report in response to the results of Dr. Levinson's pulse oximetry study. *Id.* at 59. On October 18, 2004, the Director submitted the October 15, 2004 report of Dr. Talati. Director's Exhibit 21.

stated, in his January 10, 2005 letter, that he had requested an additional report from this physician on October 21, 2004.[4] *Id.*

An administrative law judge is given broad discretion to handle procedural matters. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). On the facts of this case, we find no abuse of discretion in the administrative law judge's decision to deny claimant's request to reopen the record because it was untimely. Accordingly, we affirm the administrative law judge's exclusion of Dr. Levinson's 2005 report.

On the merits, claimant asserts that the administrative law judge erred in failing to explain why total respiratory disability was not established based on Dr. Levinson's April 12, 2004 report. The record contains the newly submitted opinions of Drs. Levinson, Talati, and Cali. In his April 2004 report, Dr. Levinson opined that claimant's mild pulmonary impairment precludes him from performing his usual coal mine employment. Claimant's Exhibit 1. Dr. Talati opined that claimant has no respiratory impairment. Director's Exhibit 19. Dr. Cali found no evidence of impairment from coal dust exposure and noted that claimant's pulmonary function study was normal. Director's Exhibit 8. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge reviewed the new medical opinion evidence and found that the reports of Drs. Levinson, Talati, and Cali were "reasoned and well-documented." Decision and Order at 7-8. Noting that the pulmonary function and blood gas studies do not demonstrate total respiratory disability, the administrative law judge stated "that the medical opinion evidence [also] fails to support a finding of total disability because the opinions of Drs. Cali and Talati that Claimant is not totally disabled outweigh Dr. Levinson's contrary opinion." *Id.* at 8.

Claimant has the burden of establishing each element of entitlement by a preponderance of the evidence. *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); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Contrary to claimant's assertion, the administrative law judge was not compelled to find total disability based on the medical opinion of Dr. Levinson. Rather, the administrative law

[4]In his brief, claimant asserts that because he received no timely response to his October 21, 2004 letter from Dr. Levinson, he did not expect to receive a response and, therefore, did not request the record be reopened. Claimant's Brief at 5. However, this assertion does not explain claimant's failure to timely request that the record be reopened when he initially sent his October 21, 2004 letter to Dr. Levinson, at which time he could have reasonably expected a response from this physician.

judge noted the uniformly non-qualifying[5] new pulmonary function and blood gas studies and weighed them along with the new medical opinions of record to find that claimant had not met his burden of establishing total respiratory disability. *Ondecko*, 512 U.S. at 280, 18 BLR at 2A-12. Moreover, contrary to claimant's contention, the administrative law judge did not err in declining to accord Dr. Levinson's opinion "controlling weight pursuant to [20 C.F.R. §] 718.104(d)." Decision and Order at 7 n.4. In this regard, the administrative law judge permissibly found that Dr. Levinson "does not qualify as a treating physician" because he "had only seen Claimant on two other occasions at the time he testified concerning this matter." *Id*; *see* 20 C.F.R. §718.104(d)(5); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As it is based on substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2) based on the new medical evidence. *Ondecko*, 512 U.S. at 280, 18 BLR at 2A-12; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Based on the foregoing, we affirm the administrative law judge's finding that claimant's subsequent claim fails, pursuant to Section 725.309, because claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. Therefore, claimant's entitlement to benefits is precluded pursuant to Section 725.309(d).

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

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