BRB No. 05-0728 BLA

HARVEY BEGLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GAJK COAL CORPORATION	)	DATE ISSUED: 02/21/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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 appeals the Decision and Order – Denial of Benefits (04-BLA-5210) of Administrative Law Judge Daniel J. Roketenetz rendered on a claim filed pursuant 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

parties stipulated to twenty years of coal mine employment.[1] Decision and Order at 3 n. 3, 5; Hearing Transcript at 8-9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 5. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 10, 12-13. The administrative law judge therefore concluded that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[3]

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[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. 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*).

[2] Claimant's initial claim for benefits, filed on August 22, 1983, was denied on January 29, 1991 because claimant did not establish the existence of pneumoconiosis. Claimant filed a second claim form on March 25, 1991, which was a request for modification as it was filed within one year of the denial. On April 5, 1991, the district director informed claimant that no further action would be taken on the modification request and the matter would be closed unless claimant submitted additional evidence. Claimant apparently acquiesced in the district director's decision, and, more than one year later, on April 22, 1992, he filed another application for benefits. Claimant's second, duplicate claim was denied on September 2, 1998 because claimant did not establish the existence of pneumoconiosis. Claimant filed a request for modification on September 15, 1998, but at a hearing on June 27, 2001, he requested withdrawal of his claim and employer did not object to the request. In a Decision and Order issued on July 5, 2001, Administrative Law Judge Rudolf L. Jansen granted claimant's request to withdraw his claim. Director's Exhibit 1; *but see Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*).

[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2),(a)(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*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 shall be limited to 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 the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge noted accurately that both readings of the October 4, 2001, and November 11, 2001, x-rays were negative for the existence of pneumoconiosis. Decision and Order at 7-8; Director's Exhibit 7. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the medical opinions of record, Dr. Broudy's October 4, 2001, medical report, Dr. Hussain's November 9, 2001, medical report, and Dr. Branscomb's December 16, 2002, consultative review, did not contain a diagnosis of pneumoconiosis. Substantial evidence supports this finding. As the administrative law judge found, Dr. Broudy diagnosed claimant with mild chronic obstructive pulmonary disease (COPD) due to smoking, Dr. Hussain diagnosed claimant with emphysema due to smoking and (COPD), but did not

link the COPD to claimant's coal mine employment, and Dr. Branscomb's report was incomplete. Director's Exhibits 7, 9, 10; *see* 20 C.F.R. §718.201(a)(2). In addition, the administrative law judge noted that although Dr. Hussain diagnosed hypoxemia based on blood gas study results, Dr. Hussain did not indicate whether the hypoxemia was a "chronic" disease.[4] Decision and Order at 8; *see* 20 C.F.R. §718.201(a)(2)(defining pneumoconiosis as including any "chronic lung disease or impairment" arising out of coal mine employment).

Since the administrative law judge properly found that the record contains no medical opinion evidence of pneumoconiosis, claimant's contention that the administrative law judge substituted his own interpretation of the medical evidence for the conclusion of a physician lacks merit. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis.[5] Consequently, we affirm the administrative law judge's finding that claimant did not establish that the applicable condition of entitlement changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). *See White*, 23 BLR at 1-7.

[4] Moreover, Dr. Hussain indicated that claimant did not have an occupational lung disease caused by coal mine employment. Director's Exhibit 7.

[5] Because the total disability element was not addressed in claimant's prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2). Therefore, we need not address the administrative law judge's findings that the new evidence did not establish that claimant is totally disabled. 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denial of 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