BRB No. 09-0507 BLA

THOMAS ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONECOAL BRANCH MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/26/2010
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Thomas Adkins, Cyclone, West Virginia, *pro se*.

William P. Margelis (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (08-BLA-5378) of Administrative Law Judge Richard A. Morgan (the

administrative law judge), rendered on a miner's subsequent claim,[1] filed on February 8, 2007. The administrative law judge credited claimant with thirty-one years of coal mine employment,[2] and found that the new evidence did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. 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 response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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, 1-177 (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 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 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. 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

[1] Claimant's initial claim for benefits, filed on July 1, 1999, was denied by the district director on January 12, 2000, for failure to establish total disability. Director's Exhibit 1. The record does not reflect that claimant took any further action, until filing his second claim for benefits on May 21, 2001, which was denied by the district director on August 7, 2002, for failure to establish total disability. Director's Exhibit 2. The record does not reflect that claimant took any further action until filing the instant claim for benefits.

[2] The record indicates that claimant was last employed in the coal mining industry in West Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

"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 did not establish that he was totally disabled. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

In this case, substantial evidence supports the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See McFall*, 12 BLR at 1-177.

Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge correctly found that the two new pulmonary function and blood gas studies of record[3] are non-qualifying.[4] Decision and Order at 6, 11. Consequently, we affirm the administrative law judge's finding that the new pulmonary function and blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii).

Because the record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Rasmussen, Repsher, and Dahhan. As each of these physicians opined that claimant retains the respiratory capacity to return to his previous coal mine work, Director's Exhibit 12; Employer's Exhibits 1, 2, the administrative law judge rationally determined that claimant did not establish total disability under Section 718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(b)(2)(iv).

As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish total disability, based on the new evidence,

[3] The record contains new pulmonary function studies and blood gas studies that were conducted on May 21, 2007, and April 22, 2008. Director's Exhibit 12; Employer's Exhibit 1.

[4] A "qualifying" pulmonary function study or 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).

pursuant to 20 C.F.R. §718.204(b)(2).[5] *See McFall*, 12 BLR at 1-177. Consequently, we affirm the administrative law judge's attendant finding that claimant did not establish a change in the applicable condition of entitlement, and we affirm the denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[5] The record contains no evidence of complicated pneumoconiosis. Therefore, the administrative law judge correctly found that the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, is inapplicable. Decision and Order at 11. Thus, claimant cannot establish total disability by means of the irrebuttable presumption. *See* 20 C.F.R. §718.204(b)(1).