BRB No. 10-0326 BLA

CECIL ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACK GOLD TRUCKING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/15/2011
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

S. Parker Boggs, Harlan, Kentucky, for employer

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5373) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim filed pursuant to 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).[1] This case is before the Board for a second time.[2] In a Decision and Order issued on September 12, 2006, Administrative Law Judge Janice K. Bullard denied benefits, finding that claimant failed to establish total disability, based on the newly submitted evidence, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed, asserting that, insofar as the administrative law judge found that Dr. Simpao, who performed the examination on behalf of the Department of Labor (DOL), did not address whether claimant is totally disabled, he did not receive a credible and complete pulmonary evaluation, as required under the regulations. Based on the concession by the Director, Office of Workers' Compensation Programs (the Director), that Dr. Simpao's opinion was incomplete on the issue of total disability, the Board vacated the denial of benefits, and remanded the case for the Director to satisfy his obligation pursuant to 20 C.F.R. §725.406. *See C.R.* [*Roberts*] v. *Black Gold Trucking Co.*, BRB No. 07-0129 BLA, slip op. at 5-6 (Aug. 27, 2007) (unpub.).

On remand, the district director obtained a supplemental report from Dr. Simpao dated December 7, 2007. Director's Exhibit 25. Thereafter, the case was returned to the Office of Administrative Law Judges, where it was assigned to Judge Craft (the administrative law judge). After a hearing was held on June 11, 2008, the administrative law judge issued her Decision and Order Denying Benefits, dated January 5, 2010, which is the subject of this appeal. The administrative law judge credited claimant with eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, because the newly submitted evidence did not establish total disability under 20 C.F.R. §718.204(b), claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed his claims prior to January 1, 2005.

[2] The procedural history of this case is set forth in the Board's prior decision. *See C.R.* [*Roberts*] v. *Black Gold Trucking Co.*, BRB No. 07-0129 BLA, slip op. at 2 n.1 (Aug. 27, 2007) (unpub.). In summary, claimant filed a prior claim on August 24, 1988, and a denial of benefits was affirmed by the Board in *Roberts v. Black Gold Trucking Co.*, BRB No. 97-1717 BLA (Aug. 7, 1998) (unpub.). Director's Exhibit 1. Claimant took no action with regard to the denial, until he filed his subsequent claim on October 7, 2003. Director's Exhibit 3.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When 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."[4] 20 C.F.R. §725.309(d); *see 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). The evidence in claimant's prior claim, filed on August 24, 1988, failed to establish total disability. Hence, the claim was denied and claimant must submit new evidence establishing that he is totally disabled, in order for the administrative law judge to review his claim on the merits. *See White*, 23 BLR at 1-3.

Claimant asserts that the administrative law judge erred in finding the opinion of Dr. Simpao to be insufficient to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] We disagree. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

[4] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[5] The administrative law judge found that the two newly submitted pulmonary function studies, dated October 28, 2003 and February 14, 2004, were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12. She further found that the two newly submitted arterial blood gas studies, dated October 28,

administrative law judge considered two new medical opinions submitted in conjunction with the subsequent claim. Dr. Simpao examined claimant on October 28, 2003, at the request of the DOL, and diagnosed a moderate respiratory impairment, but he did not address whether claimant was totally disabled. Director's Exhibit 10.

In a supplemental report dated December 7, 2007, Dr. Simpao opined that claimant is totally disabled by his pulmonary impairment based on the presence of mild hypoxemia and "wide Aa gradient of 25" seen on arterial blood gas testing. Director's Exhibit 25. He explained that an "Aa gradient is a calculation of the efficiency of oxygen passage, which provides an accurate picture of overall lung health. The higher the [Aa] gradient, the more problem there is with oxygen passage into the blood." *Id*. He opined that claimant is totally disabled and explained:

> Comparing [claimant's] pulmonary status with the usual job requirement of a truck drive[r] for the coal industry[,] I find that he is totally disabled from this pulmonary impairment. His description on form CM-913 is not complete and does not offer an accurate account of the physical demands required of a truck drive[r] for the coal industry. Typical truck driver[s] for the coal industry are required to climb in and out of the truck several times a day[;] often they are required to perform general maintenance on the truck. And usually have to shovel coal daily. [sic] He does report on CM-913 that he stopped coalmine [sic] employment due to "breathing problems." I realize that his objective testing does not meet the disability standard set in the federal register, but I also realize the physical demands place[d] on [claimant] and the limitation[s] that are evident by his testing.

Id.

In contrast, Dr. Dahhan examined claimant on December 14, 2004, and opined that the pulmonary function tests showed mild respiratory impairment, and that the arterial blood gas studies showed minimal hypoxemia. Director's Exhibit 25. He stated

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2003 and February 14, 2004, were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id*. Additionally, because the record did not contain any evidence to establish that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 11-12. We affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

that claimant "retains the respiratory capacity to continue his previous coal mining work or job of comparable physical demand . . . ." *Id.* In a supplemental report dated January 11, 2008, Dr. Dahhan indicated that he had reviewed Dr. Simpao's December 7, 2007 report, and stated in response to Dr. Simpao's comments, that claimant's "increased [Aa] gradient for oxygen is partially due to age." *Id.* He also disagreed with Dr. Simpao that claimant would be unable to perform the work of a truck driver. *Id.*

In weighing the conflicting medical opinions, the administrative law judge found that Dr. Simpao misstated the exertional requirements of claimant's job and that Dr. Dahhan's opinion was better supported by the objective evidence and entitled to controlling weight. Decision and Order at 12. Claimant states that the administrative law judge was required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 4, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant states that, "[i]t can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that, "[t]aking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment." Claimant's Brief at 4. According to claimant, the administrative law judge erred because "she made no mention of claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability." *Id.* Claimant's assertions of error are without merit.

Contrary to claimant's contention, a medical opinion advising claimant against further coal dust exposure cannot establish the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Additionally, the administrative law judge specifically discussed the exertional requirements of claimant's usual coal mine work and found that Dr. Simpao did not have an accurate understanding of the physical demands of claimant's job as a truck driver:

> In response to interrogatories from the [e]mployer, the [c]laimant said the hardest part of his job was repair of the truck. He said he sat for [six to ten] hours per day. He testified before Judge Kane that he loaded coal into his truck with a loader or in a hopper. He testified before Judge Mosser that he did not have to do any shoveling. . . .

Decision and Order at 4 (internal citations omitted). Based on this evidence, the administrative law judge reasonably found that Dr. Simpao's disability opinion was

undermined by evidence that claimant's job was less physically demanding than the doctor described:

> Relying on his knowledge of the typical driver in the coal industry, Dr. Simpao believed that[,] in addition to driving, [claimant] was required to climb in and out of the truck several times a day, perform general maintenance on the truck, and shovel coal daily. Careful review of the record discloses that the [claimant's] job required him to perform all of these tasks except shoveling. Thus it appears that [claimant's] job may have been less physically demanding than is typical. Moreover, Dr. Simpao relied heavily on the Aa gradient to assess the overall functioning of [claimant's] lungs in oxygen transfer. But he did not administer any exercise blood gas testing due to [claimant's] high blood pressure. On the other hand, Dr. Dahhan did perform exercise testing, which did not show a drop in [claimant's] pO2 relative to the test at rest.

Id. at 12. Furthermore, the administrative law judge explained that she credited Dr. Dahhan's opinion, that claimant does not have a totally disabling respiratory impairment, because it "is consistent with the weight of the medical evidence as a whole, including the non-qualifying pulmonary function and arterial blood gas studies." *Id*. at 12-13.

The administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). Because the administrative law judge has explained the basis for her credibility determinations, we affirm her finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and her finding that the newly submitted evidence, as a whole, was insufficient to establish total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[6] S*ee Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12-13.

[6] Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work . . . ." Claimant's Brief at 4-5. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge's findings as to total disability must be based

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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REGINA C. McGRANERY
Administrative Appeals Judge

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solely on the medical evidence contained in the record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).