BRB No. 12-0250 BLA

WALTER M. PROWSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 02/11/2013
	)	
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.

Walter M. Prowse, Nortonville, Kentucky, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2008-BLA-5221) of Administrative Law Judge Joseph E. Kane, with respect to a subsequent claim filed on April 23, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1]

[1] Claimant filed an initial claim for benefits on March 10, 1986, which was denied by Administrative Law Judge W. Ralph Musgrove on October 18, 1988, for failure to establish a totally disabling respiratory impairment. Director's Exhibit 1. The Board affirmed the denial of benefits. *Prowse v. Island Creek Coal Co.*, BRB No. 88-3952

After crediting claimant with thirty-two years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, based on the newly submitted evidence, claimant did not establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant generally appeals the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[2] 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).

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." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 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). Claimant's prior claim was denied because he failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

BLA (June 28, 1991)(unpub.). Claimant did not take any further action until he filed the present subsequent claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

The newly submitted evidence relevant to 20 C.F.R. §718.204(b)(2) consists of three non-qualifying[3] pulmonary function studies, three non-qualifying blood gas studies, and the opinions of Drs. Simpao, Selby, and Repsher. *See* Director's Exhibits 15, 19; Employer's Exhibits 1, 2, 3, 4-7, 10. Because none of the pulmonary function studies and blood gas studies were qualifying, and there was no evidence of cor pulmonale with right-sided congestive heart failure, we affirm the administrative law judge's determinations that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), Dr. Simpao stated that claimant's "objective studies do not meet the federal disability standards, but he is still totally disabled from his pulmonary status due to the physical demands of his last job title in the coal mines" because "[h]e does not have the respiratory capacity to climb the tipple stair[s] (4 stories) multiple times a day while carrying supplies."[4] Director's Exhibit 19. Drs. Repsher and Selby both found that claimant is capable, from a respiratory standpoint, of doing his last coal mine work as a painter or any job requiring hard labor. Employer's Exhibits 1, 4, 6, 7, 10.

The administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Repsher and Selby were entitled to the greatest weight because they were well reasoned, well documented, and consistent with the underlying objective testing. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 18. Further, the administrative law judge acted within his discretion in giving less weight to Dr. Simpao's opinion because he did not adequately explain how the objective studies, which Drs. Repsher and Selby described as producing normal results, supported his diagnosis of a

[3] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The administrative law judge found that claimant's last coal mine employment was as a utility man. Decision and Order at 17, *citing* Director's Exhibit 5. The administrative law judge noted that, as a utility man, claimant performed various tasks, but most often painted pipes, and was required to carry "a couple gallons of paint up about 30 feet" and lift twenty pounds multiple times daily. Decision and Order at 17, *quoting* Director's Exhibit 5; *see also* Director's Exhibit 15; Employer's Exhibits 1, 4.

totally disabling respiratory impairment.[5] *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 18; Employer's Exhibits 1, 4, 6 at 10, 7 at 13-14, 10. We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Consequently, we affirm the denial of benefits.[6]

[5] In considering the pulmonary function studies, the administrative law judge rationally gave more weight to the opinion of Dr. Fino, that the May 15, 2007 study, administered by Dr. Simpao, is invalid, because he found Dr. Fino is a Board-certified pulmonologist, whereas, Dr. Simpao is a general practitioner. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 15. The administrative law judge also permissibly found that the December 11, 2008 pulmonary function study, performed by Dr. Repsher, is invalid, based on Dr. Repsher's statement that claimant "was unable to seal his lips around the mouthpiece." Employer's Exhibit 4; *see* 20 C.F.R. Part 718, Appendix B at (2)(ii); Decision and Order at 15-16. In addition, the administrative law judge noted correctly that non-conforming pulmonary function studies are not necessarily unreliable, particularly when the values produced are non-qualifying. Decision and Order at 16, *citing Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983). Therefore, the administrative law judge permissibly determined that, although invalid, the May 15, 2007 and December 11, 2008 pulmonary function studies were still probative evidence of the absence of a totally disabling respiratory impairment. *See Crapp*, 6 BLR at 1-478-79.

[6] On March 23, 2010, amendments to the Act, that affect claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). Relevant to the present subsequent claim, amended Section 411(c)(4) provides for a rebuttable presumption of total disability due to pneumoconiosis, if the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and he also suffered from a totally disabling respiratory impairment. However, as claimant did not establish that he has a totally disabling respiratory impairment, the amended Section 411(c)(4) presumption does not apply.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge