BRB No. 12-0303 BLA

CHARLES E. BRIGMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HARLAN BLOCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	DATE ISSUED: 02/25/2013
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5047) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[2] The administrative law judge accepted employer's stipulation that claimant had at least eighteen years of coal mine employment, and found that the medical evidence developed since the prior denial of benefits did not establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant did not show a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Id*. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief.

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,

[1] Claimant filed his first claim for benefits on May 21, 1991. Director's Exhibit LM 1 at 89. The district director denied the claim because claimant failed to establish a totally disabling respiratory impairment. Claimant took no further action regarding that claim. He filed the current claim on April 24, 2003. Director's Exhibit 3.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because the instant claim was filed before January 1, 2005, the amendments do not apply to the instant case.

[3] The administrative law judge's finding that the new evidence fails to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 12 BLR 1-710 (1983).

and in accordance with applicable law.[4] 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 establish entitlement to benefits under the Act, a claimant must establish 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. 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.*, 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 the existence of a totally disabling respiratory impairment. Consequently, to obtain review of the merits of his claim, claimant has to submit new evidence establishing a totally disabling respiratory impairment. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Fino, and Dahhan. Dr. Baker reported that claimant's pulmonary function and blood gas studies do not meet the federal guidelines for disability and he opined that claimant has no significant respiratory impairment. Director's Exhibit 80 at 57. Dr. Fino reported that claimant's pulmonary function and blood gas studies are non-qualifying, but nonetheless opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 80 at 19, 22 and 29. Dr. Dahhan found that claimant's pulmonary function study and blood gas study are non-qualifying and that he does not have a totally disabling respiratory impairment. Director's Exhibit 16 at 4, 6. The administrative law judge concluded:

> [c]onsidering the medical reports together, I cannot find that the [c]laimant has established total [respiratory] disability by a preponderance of the evidence. Focusing on the more recent reports by Drs. Baker and Fino, the physicians are equally qualified as they are both [B]oard-certified in internal medicine and pulmonary disease. Dr. Baker's finding of no significant respiratory impairment is consistent with the non-qualifying nature of the studies he obtained, whereas Dr. Fino provides no compelling explanation for his opinion of total [respiratory] disability notwithstanding

[4] Because claimant's most recent coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

> the non-qualifying nature of the studies…. Dr. Dahhan's opinion, though older, also stands in the way of a finding of total [respiratory] disability. Because it is ultimately the [c]laimant's responsibility to demonstrate that one of the applicable conditions of entitlement has changed – in this case, that he is totally disabled from a respiratory or pulmonary standpoint – I find that the [c]laimant has failed to establish total [respiratory] disability based upon the evidence generated since the previous denial.

Decision and Order at 18-19.

Claimant contends that the administrative law judge erred in rejecting Dr. Fino's opinion, that claimant has a totally disabling respiratory impairment, because it is based solely on a non-qualifying pulmonary function study and a non-qualifying blood gas study.[5] Contrary to claimant's contention, however, the administrative law judge did not reject Dr. Fino's opinion solely because it is based on a non-qualifying pulmonary function study and non-qualifying blood gas study. Rather, the administrative law judge rejected Dr. Fino's opinion because he found that it "provides no compelling explanation for his opinion of total [respiratory] disability notwithstanding the non-qualifying nature of the studies." Decision and Order at 18. In so doing, the administrative law judge acknowledged that "the non-qualifying nature of the objective studies … does not preclude a finding of total [respiratory] disability." Decision and Order at 18; *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge, however, properly found that:

> in order for a physician's opinion to be reasoned[,] the physician must provide some explanation for how the objective data supports his conclusion. *See Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Similarly[,] a physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosalt*[*e*]*r v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). An inadequately reasoned opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).
>
> With these principles in mind, considering Dr. Fino's opinion by itself, I am struck by the lack of any explanation or real discussion of the [c]laimant's functional capacity in light of the non-qualifying nature of the objective studies…. Dr. Fino does not provide any insight into the thinking which led him to conclude that the [c]laimant [is] totally disabled

[5] Claimant does not contend that the administrative law judge erred in his evaluation of the opinions of Drs. Baker and Dahhan.

> notwithstanding his normal pulmonary function testing…. I find this lack of explanation discrediting. It may be that Dr. Fino was relying heavily on the symptomatology he obtained, but if so, he did not explain how the [c]laimant's symptomatology factored into his disability opinion and whether the objective studies supported such a symptomatology or, if they did not, why he credited the symptomatology over the objective studies.

Decision and Order at 18.

Consequently, the administrative law judge properly rejected the opinion of Dr. Fino as unreasoned. *See Clark*, 12 BLR at 1-155; *Cosalter*, 6 BLR at 1-1184; *Duke*, 6 BLR at 1-675.

We also reject claimant's argument that, because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be assumed that his condition has worsened, and that his ability to do his usual coal mine work or comparable and gainful work has been adversely affected. Claimant's Brief at 5. An administrative law judge's findings must be based, not on assumptions, but only upon medical evidence in the record. *See* 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8. As claimant raises no further arguments regarding the evaluation of the new medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

We, therefore, affirm the administrative law judge's findings that claimant has not established that he suffers from a totally disabling respiratory impairment based on the new evidence pursuant to Section 718.204(b), and has failed, therefore, to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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