BRB No. 04-0478 BLA
and 04-0478 BLA-A

GORDON LEE BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICES CORPORATION	)	DATE ISSUED: 01/27/2005
	)	
Employer/Carrier-Cross-Petitioner	)	
	)	
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.

Gordon Lee Bailey, Harper, West Virginia, *pro se*.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order--Denying Benefits (03-BLA-5356) of Administrative Law Judge Richard M. Morgan 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).[1] Claimant's most recent, and fourth, prior application for benefits, filed on January 20, 1998 was finally denied on September 13, 1999 because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000).[2] Director's Exhibit 1. On February 13, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order--Denying Benefits issued on January 30, 2004, the administrative law judge credited claimant with eighteen years of coal mine employment,[3] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The current claim is claimant's fifth. Claimant's first claim, filed on April 24, 1990, was finally denied by the district director on October 17, 1990. Director's Exhibit 1. Claimant's second and third claims, filed on September 22, 1992 and June 29, 1995, respectively, were subsequently withdrawn by claimant. Director's Exhibit 1.

[3] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. Employer also cross-appeals, challenging the administrative law judge's exclusion of evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's evidentiary rulings.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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). 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 that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm the administrative law judge's denial of benefits on the grounds that claimant failed to establish a total pulmonary or respiratory disability at 20 C.F.R. §718.204(b), and thus failed to establish a change in the applicable condition of entitlement previously adjudicated against him. In

considering the new pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge permissibly found that although the record contains a November 7, 2001 pre-bronchodilator study which is qualifying,[4] that study is outweighed by the remaining pulmonary function studies of record, including the post-bronchodilator study dated November 7, 2001, a pre-bronchodialtor study dated May 8, 2001, and pre and post-bronchodilator studies dated March 17, 2003, all of which are non-qualifying. *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*); Director's Exhibits 12, 22, 23; Employer's Exhibit 5; Decision and Order at 6. The administrative law judge must weigh any contrary probative evidence in determining whether total disability is established. *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty*, 16 BLR at 1-13-14. Because substantial evidence supports the administrative law judge's findings regarding the pulmonary function study evidence, we affirm the administrative law judge's finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i).

Considering the new blood gas study evidence of record, the administrative law judge properly found that as all of the blood gas studies are non-qualifying,[5] claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Collins*, 21 BLR at 1-191 (1999); *Beatty*, 16 BLR at 1-13-14; Director's Exhibits 11, 22; Employer's Exhibit 5; Decision and Order at 6. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge further properly found that the record contains no medical evidence that shows that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 12.

Finally, the administrative law judge properly found that the only medical opinion of record supportive of a finding of total disability is that of Dr. Gaziano dated May 8, 2001. Decision and Order at 7, 10. The administrative law judge permissibly accorded little weight to Dr. Gaziano's opinion as unreasoned because in response to a pre-printed question regarding the severity of any impairment from a pulmonary or respiratory disease, the physician simply stated, without providing any explanation or rationale for his conclusion, that claimant is "Totally disabled for coal mining." Director's Exhibit 10; Decision and Order at 7, 10. The administrative law judge added that Dr. Gaziano's

[4] A qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[5] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

"cursory opinion" on the issue of total disability is outweighed by the better reasoned and documented opinions of Drs. Zaldivar and Crisalli, whose opinions, that claimant does not suffer from a totally disabling pulmonary or respiratory impairment, he found to be more consistent with the credible, objective medical data, including the preponderance of the pulmonary function and blood gas studies. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Director's Exhibit 22; Employer's Exhibits 4, 5; Decision and Order at 10. Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b). Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Because we affirm the denial of benefits, we need not address employer's cross-appeal.

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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JUDITH S. BOGGS
Administrative Appeals Judge