BRB No. 08-0576 BLA

C.S. (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/29/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

C.S., Nampa, Idaho, *pro se*.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM**:**

Claimant[1] appeals, without the assistance of counsel, the Decision and Order (05-BLA-6070) of Administrative Law Judge Robert D. Kaplan denying benefits 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).[2] This case involves a

[1] Claimant died on January 27, 2006. Claimant's Exhibit 1. Claimant's claim is being pursued by his son.

[2] 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

subsequent claim filed on July 11, 2002.[3] After crediting claimant with nine years, six months, and ten days of coal mine employment,[4] the administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior 1992 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. The administrative law judge found that the evidence, as a whole, established the existence of pneumoconiosis. The administrative law judge also found that the evidence established that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

(2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[3] Claimant filed two previous claims. Director's Exhibits 1, 2. Claimant initially filed a claim for benefits on November 3, 1975. Director's Exhibit 1. In a Decision and Order dated October 4, 1983, Administrative Law Judge Vivian Schreter Murray found that claimant did not have clinical pneumoconiosis and did not suffer from a totally disabling respiratory or pulmonary impairment due to his coal mine employment. *Id.* Accordingly, Judge Murray denied benefits. There is no indication that claimant took any further action in regard to his 1975 claim.

Claimant filed a second claim on December 3, 1992. Director's Exhibit 2. In a Proposed Decision and Order dated May 3, 1993, the district director found that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The district director, therefore, denied claimant's 1992 claim. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

[4] The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In considering whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the medical evidence submitted in conjunction with the prior claims was not as probative as evidence submitted with claimant's 2002 claim. Noting that the previously submitted medical evidence is "at least nine years older than the evidence in the current record," the administrative law judge found that "the evidence related to the earlier claims is stale and has little bearing on [c]laimant's medical condition in the year 2002 . . . ." Decision and Order at 11. Because the administrative law judge acted within his discretion, we affirm his conclusion that the new evidence is the most probative as to whether claimant suffers from a totally disabling respiratory or pulmonary impairment. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004).

The administrative law judge noted that the only pulmonary function study and the only arterial blood gas study submitted in connection with claimant's 2002 claim[5] were non-qualifying.[6] Decision and Order at 7, 10. We, therefore, affirm the administrative

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[5] The evidence submitted in connection with claimant's 2002 claim includes a pulmonary function study conducted on September 30, 2002 and an arterial blood gas study conducted on September 30, 2002. *See* Director's Exhibits 11, 12.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Because there is no evidence record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10.

In considering whether the medical opinion evidence established total disability, the administrative law judge considered the medical reports of Drs. Pottmeyer, Afzal, Tretheway, Sadaj, and Kennedy. The administrative law judge correctly noted that Dr. Pottmeyer did not express an opinion as to whether claimant was totally disabled.[7] Decision and Order at 10; Director's Exhibit 16. Although the administrative law judge noted that Dr. Afzal opined that claimant suffered from "severe dyspnea," the administrative law judge correctly found that the doctor did not opine that claimant was precluded from performing his last coal mine employment.[8] Decision and Order at 10; Director's Exhibit 10. The administrative law judge, therefore, properly found that Dr. Afzal's opinion did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Although the administrative law judge noted that Dr. Tretheway opined that claimant was not able to work "due to shortness of breath," the administrative law judge permissibly discredited his opinion because the doctor failed to provide any reasoning or rationale for his conclusion.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

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[7] In an October 7, 2002 letter, Dr. Pottmeyer noted that he had performed aortic valve replacement surgery on claimant. Director's Exhibit 16. Dr. Pottmeyer noted that, during the operation, he observed that claimant's lungs had moderately severe anthracosis. *Id.* The doctor did not address the extent of any pulmonary impairment.

[8] In a report dated October 31, 2002, Dr. Afzal listed the results of claimant's non-qualifying September 30, 2002 pulmonary function study. Dr. Afzal noted that claimant's FEV1 value of 3.23 was 115% of predicted and that his FVC value of 4.31 was 98% of predicted. Director's Exhibit 10. Dr. Afzal characterized claimant's FEV1/FVC ratio of 75% as "supernormal." *Id.* Dr. Afzal also listed the results of claimant's non-qualifying September 30, 2002 arterial blood gas study. *Id.*

[9] Dr. Tretheway's entire discussion of claimant's pulmonary condition is limited to a single sentence in a March 27, 2003 letter. The sentence reads: "[Claimant] has documented Black Lung Disease and cannot work due to shortness of breath." Director's Exhibit 17.

(1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10; Director's Exhibit 17. The administrative law judge also properly found that Dr. Sadja's opinion, that claimant was "unable to work as a miner" was not sufficiently reasoned.[10] *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 10; Claimant's Exhibit 1. Finally, the administrative law judge correctly found that Dr. Kennedy's opinion did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] Decision and Order at 10; Director's Exhibit 24. Because it is based on substantial evidence, the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.[12]

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[13] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[10] Dr. Sadaj, claimant's "consulting" physician from October 8, 2004 through November 17, 2004, limited his discussion of claimant's condition to a one page letter dated April 10, 2007. In the letter, Dr. Sadaj states: "When I last saw [claimant] on November 17, 2004, it was my opinion he was unable to work as a miner." Claimant's Exhibit 1. Dr. Sadaj provided no explanation or documentation to support his finding.

[11] After reviewing the medical evidence, Dr. Kennedy submitted responses to a questionnaire on August 30, 2007. Dr. Kennedy indicated that the evidence did not support a finding of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 24. Dr. Kennedy noted that claimant's pulmonary function and arterial blood gas studies were "normal." *Id.*

[12] In a letter filed in support of his appeal, claimant's son contends that claimant's death certificate and autopsy report support a finding of total disability. We disagree. Neither of these documents supports a finding that claimant suffered from a totally disabling respiratory or pulmonary impairment prior to his death. Claimant's Exhibit 1.

[13] In his appeal to the Board, claimant's son requests survivor's benefits. The administrative law judge properly noted that there was no survivor's claim before him. However, claimant's son may file a survivor's claim if he believes that he is entitled to benefits under the Act. 20 C.F.R. §§725.301, 303. There is no time limit on the filing of a claim by the survivor of a miner. *See* 20 C.F.R. §§725.303, 725.308(a).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge