BRB No. 11-0375 BLA

HOWARD LILLY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY & HYLTON, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/20/2012
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Betty J. Lilly, Mount Hope, West Virginia, *pro se*.[1]

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

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

PER CURIAM:

[1] The claimant, Howard Lilly, Jr., died on May 28, 2010 while his claim was pending. His widow, Betty J. Lilly, has filed a *pro se* appeal of the administrative law judge's denial of his claim.

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2009-BLA-05495) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim filed on June 6, 2008, pursuant to the provisions of 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). The administrative law judge found that seventeen years of coal mine employment were established, based on claimant's Social Security employment record, and that at least fifteen of those years were spent in coal mining in conditions substantially similar to those of underground coal mining.[2] Decision and Order at 12-13. The administrative law judge went on to find, however, that the newly submitted evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant.[3] The administrative law judge, therefore, found that a change in an applicable condition of entitlement was not established pursuant to 20 C.F.R. §725.309, and that claimant was not, therefore, entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(4), or entitlement pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Carrier responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to the appeal.

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). We 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

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a 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. 30 U.S.C. §921(c)(4).

[3] Claimant's most recent claim was denied on June 29, 2006 for failure to establish total respiratory disability. The Board affirmed that denial on April 26, 2007. *See* Decision and Order at 3, 20; Director's Exhibit 3.

with 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 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. 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); *White v. New White Coal Co.*, 23 BLR 1-1 (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 administrative law judge found that claimant's prior claim was denied for failure to establish total respiratory disability. Therefore, in order to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d)(2), claimant must establish total respiratory disability pursuant to Section 718.204(b).

Total Disability – 20 C.F.R. §718.204(b)

Considering the issue of total respiratory disability, the administrative law judge considered the relevant new evidence under each subsection of Section 718.204(b). The administrative law judge properly found that the new pulmonary function study evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i). The administrative law judge found that there were two new pulmonary function studies. She found that the June 2008 study was non-qualifying, while the May 2007 pulmonary function study was qualifying. She properly accorded no weight to the May 2007 qualifying study, however, because it was invalidated by Dr. Fino, a Board-certified pulmonary specialist, who stated that the results were invalid because the results exhibited:

> a premature termination to exhalation and a lack of reproducibility in the expiratory tracings. There was also a lack of an abrupt onset to exhalation. The values recorded for this spirometry represent at least the minimal lung function that this man could perform and certainly not this man's maximum lung function.

[4] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Decision and Order at 17-18; Employer's Exhibit 8.

Based on this invalidation of the qualifying pulmonary function study by a well-qualified physician,[5] and the fact that the other new pulmonary function study was non-qualifying, the administrative law judge permissibly found that the new pulmonary function studies did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i). *See* 20 C.F.R. §718.204(b)(2)(i); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability by the new pulmonary function studies pursuant to Section 718.204(b)(2)(i).

Turning to the new blood gas study evidence, the administrative law judge properly found that it does not establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), as both of the new blood gas studies were non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(ii); *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. Consequently, we affirm the administrative law judge's finding that total respiratory disability was not established by the new blood gas study evidence pursuant to Section 718.204(b)(2)(ii).

Likewise, the administrative law judge properly found that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(iii). That finding is, therefore, affirmed.

Considering the new medical opinion evidence, the administrative law judge found that it failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge found that the opinion of Dr. Villanueva, that claimant is totally disabled, was outweighed by the opinions of Drs. Fino and Rasmussen, that claimant showed no significant loss of lung function. The administrative law judge properly accorded less weight to Dr. Villanueva's opinion because the record did not contain evidence of his credentials, and the record reflected that both Dr. Fino and Dr. Rasmussen are Board-certified in Internal Medicine, with

[5] The administrative law judge noted that the record did not contain any evidence regarding the credentials of Dr. Jafary, the physician who administered the May 2007 qualifying pulmonary function study. Decision and Order at 17.

specialties in pulmonary disease.[6] *See Dillon*, 11 BLR at 1-114; Decision and Order at 4 and 6. The administrative law judge, therefore, properly found that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iv), based on the medical opinion evidence, and that finding is affirmed.

Ultimately, the administrative law judge properly concluded that, based on his consideration of all of the relevant new evidence together, both like and unlike, pursuant to Section 718.204(b)(2)(i)-(iv), claimant failed to establish total respiratory disability. *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). We, therefore, affirm the administrative law judge's finding that the new evidence failed to establish total respiratory disability at Section 718.204(b), and cannot, therefore, establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See White*, 23 BLR at 1-3. Further, because claimant failed to establish total respiratory disability pursuant to Section 718.204(b), the administrative law judge properly found that claimant is not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis. 30 U.S.C. §921(c)(4); *see* Decision and Order at 13.

[6] The administrative law judge also noted that the record contained a handwritten note, on a prescription pad, from Dr. Jafary, stating that claimant "is unable to perform any productive job due to COPD/black lung & coal dust exposure." Decision and Order at 18, n.13; Claimant's Exhibit 1. The administrative law judge properly determined, however, that Dr. Jafary's note was not entitled to any weight because Dr. Jafary failed to discuss the evidence on which his note was based. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

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