BRB No. 12-0225 BLA

JOSEPH WARNETSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/10/2013
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Law Offices of Harry T. Coleman), Carbondale, Pennsylvania, for claimant.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (08-BLA-5646) of Administrative Law Judge Ralph A. Romano rendered on a subsequent claim[1]

[1] Claimant's prior claim for benefits, filed on September 10, 2001, was finally denied on October 29, 2004, because claimant did not establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. Claimant filed his current claim for benefits on September 13, 2006. Director's Exhibit 3.

filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time.[2]

Initially, the administrative law judge credited claimant with thirty years of coal mine employment,[3] and found that the medical evidence developed since the denial of claimant's prior claim did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). In analyzing the new medical opinion evidence on that issue, the administrative law judge found that Dr. Levinson, who examined claimant on behalf of the Department of Labor pursuant to Section 413(b), 30 U.S.C. §923(b), was unable to provide an opinion on whether claimant is totally disabled. The only other new medical opinion, from Dr. Talati, stated that claimant is not totally disabled.[4] The administrative law judge therefore found that claimant did not establish a change in the applicable condition of entitlement, and denied benefits pursuant to 20 C.F.R. §725.309(d).[5]

Pursuant to claimant's appeal, and a Motion to Remand by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated the administrative law judge's denial of benefits. In his Motion to Remand, the Director conceded that he failed to meet his obligation to provide a complete pulmonary evaluation because Dr. Levinson did not address the issue of total disability. Accordingly, the Board remanded the case to the administrative law judge for further evidentiary development consistent with the Director's Motion to Remand,[6] and for the administrative law judge to

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[2] The full procedural history of this case is set out in *Warnetsky v. Director, OWCP*, BRB No. 09-0821 BLA (Aug. 19, 2010)(unpub.), slip op. at 1 n.1; *see also* Director's Exhibit 1.

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

[4] The administrative law judge discounted Dr. Talati's opinion because Dr. Talati did not indicate whether he understood that claimant's usual coal mine employment required heavy labor.

[5] Alternatively, assuming arguendo that the new evidence established total disability, the administrative law judge found that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[6] In his Motion to Remand, the Director informed the Board that he would obtain a supplemental report from Dr. Levinson addressing whether claimant is totally disabled, in

reconsider whether the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Warnetsky v. Director, OWCP*, BRB No. 09-0821 BLA (Aug. 19, 2010)(unpub.), slip op. at 5. The Board further instructed the administrative law judge, on remand, to consider whether the new evidence established that claimant is entitled to the presumption at Section 411(c)(4)[7] of the Act, 30 U.S.C. §921(c)(4).

On remand, the Director obtained a supplemental medical report from Dr. Levinson, which the administrative law judge admitted into the record. In the supplemental report, Dr. Levinson opined that, "[b]ased upon the improved effort and improved results of the November 30, 2006 pulmonary function study[,] it does not appear that [claimant] has a substantial pulmonary impairment that would prevent him from performing his current or last coal mine job . . ." Unmarked Exhibit (Dr. Levinson's February 18, 2011 supplemental report).

In his decision, the administrative law judge reiterated his previous determination that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Levinson's supplemental medical report did not establish total disability, and that "no physician of record opined that [c]laimant suffer[s] a totally disabling respiratory impairment." Decision and Order on Remand at 4. As claimant did not establish total disability, the administrative law judge concluded that claimant did not invoke the Section 411(c)(4) presumption, and did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established based on Dr. Levinson's supplemental medical

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light of the results of a pulmonary function study that Dr. Levinson administered on November 30, 2006, to replace an earlier, invalid pulmonary function study.

[7] Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)).

report at 20 C.F.R. §718.204(b)(2)(iv).[8] The Director responds, urging affirmance of the denial of benefits.

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, and 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).

To establish entitlement to benefits under the Act, 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. 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, 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 claimant did not establish total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Levinson's supplemental report dated February 18, 2011. Dr. Levinson stated, in relevant part:

> Based upon the improved effort and improved results of the November 30, 2006 pulmonary function study[9] it does not appear that [claimant] has a

[8] The administrative law judge's findings that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are unchallenged on appeal. Claimant's Brief at 10. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] Dr. Levinson performed two pulmonary function studies. The first one, performed on October 19, 2006, was qualifying but was invalidated by Dr. Spagnolo, due to claimant's poor effort. Director's Exhibit 10 at 1. In his supplemental report, Dr. Levinson agreed with Dr. Spagnolo that the October 19, 2006 pulmonary function study was invalid. Unmarked Exhibit (Dr. Levinson's February 18, 2011 supplemental report). The second pulmonary function study, performed by Dr. Levinson on November 30, 2006, was valid but non-qualifying. A "qualifying" pulmonary function study yields

> substantial pulmonary impairment that would prevent him from performing his current or last coal mine job of one years (sic) duration. I understand that he has been found to have the presence of simple coal workers' pneumoconiosis but from the functional examination it does not appear that this has caused a significant condition of pulmonary impairment.

Unmarked Exhibit (Dr. Levinson's February 18, 2011 supplemental report). The administrative law judge found that Dr. Levinson's supplemental report did not establish that claimant is totally disabled. Decision and Order on Remand at 4. The administrative law judge further found that there is no new evidence of record that establishes that claimant is totally disabled. The administrative law judge therefore determined that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and did not invoke the Section 411(c)(4) presumption.

Claimant argues that Dr. Levinson's supplemental report cannot establish that claimant is not totally disabled because it does not take into account his usual coal mine employment. Claimant also argues that Dr. Levinson's supplemental report is unreasoned because it is couched in equivocal language. Claimant further argues that the administrative law judge erred in relying on Dr. Levinson's supplemental report without commenting upon Dr. Levinson's initial report. Claimant's contentions lack merit.

The record reflects that Dr. Levinson recorded claimant's usual coal mine employment as a slate picker, driller, and shucker, in his initial report. Director's Exhibit 6 at 1. Thus, Dr. Levinson was aware of claimant's usual coal mine employment, in rendering his supplemental report. *See Hunley v. Director, OWCP*, 8 BLR 1-323, 1-326 (1985). The administrative law judge, therefore, rationally relied on Dr. Levinson's supplemental report in finding that it did not "support [c]laimant's assertion of disability; [and] in fact, it directly contradicts it." *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989); *W.C.* [*Cornett*] *v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-30 (2008); Decision and Order on Remand at 4.

Moreover, contrary to claimant's contention, Dr. Levinson's supplemental report is not unreasoned merely because the physician opined that, "*it does not appear* that [claimant] has a substantial pulmonary impairment that would prevent him from performing his current or last coal mine job." Unmarked Exhibit (Dr. Levinson's February 18, 2011 supplemental report)(emphasis added). A physician's use of cautious language does not necessarily reflect equivocation by the doctor. *See Perry v. Mynu*

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values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Coals, Inc., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 n.12, 23 BLR 2-82, 2-98 n.12 (3d Cir. 2004); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-75 (2008).

Lastly, the administrative law judge committed no error on remand in not discussing Dr. Levinson's initial report in determining that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The Director conceded that Dr. Levinson's initial report did not address total disability, and thus did not meet the Director's statutory duty to provide claimant with a complete pulmonary evaluation. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-147 (en banc). As we reject all of claimant's contentions, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *White*, 23 BLR at 1-6-7.

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant did not establish that the applicable condition of entitlement changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(d).[11] Thus, we affirm the denial of benefits.

[10] Claimant's argument, that the administrative law judge erred in failing to discuss his testimony that he has difficulty climbing stairs, cutting grass, removing snow, and hunting, lacks merit. *See* Claimant's Brief at 7-8. The administrative law judge summarized claimant's testimony in his initial decision. Decision and Order at 4. However, in a living miner's claim, lay testimony is insufficient to establish total respiratory disability, unless it is corroborated by at least a quantum of medical evidence indicating a respiratory or pulmonary impairment. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987). Because we affirm the administrative law judge's finding that the new medical evidence did not establish total disability, claimant's testimony is insufficient to carry his burden to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999).

[11] The administrative law judge correctly determined that the amended Section 411(c)(4) presumption was not invoked, because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand 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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REGINA C. McGRANERY
Administrative Appeals Judge