

BRB No. 05-0296 BLA

DONALD E. WILLIAMS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	DATE ISSUED: 07/21/2005
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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 appeals the Decision and Order – Denial of Benefits (2003-BLA-5784) of Administrative Law Judge Thomas F. Phalen, Jr. on a subsequent¹ claim filed pursuant

¹ Claimant’s prior claim was filed on October 28, 1992 and was denied by Administrative Law Judge George P. Morin in a Decision and Order issued on May 3, 1995. Director’s Exhibit 1. Judge Morin found that while claimant had pneumoconiosis arising out of coal mine employment, claimant had failed to establish total disability due to pneumoconiosis. The Board affirmed Judge Morin’s Decision and Order denying benefits. *Williams v. Director, OWCP*, BRB No. 95-1465 BLA (Sep. 27, 1995) (unpub.).

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). After accepting the parties' stipulation that claimant engaged in at least sixteen years of coal mine employment, the administrative law judge found that the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(v), and thus failed to establish a "material change in conditions" pursuant to 20 C.F.R. §725.309(d). Decision and Order-Denial of Benefits at 8. Accordingly, the administrative law judge denied benefits pursuant to 20 C.F.R. §725.309(d).

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish total disability under Section 718.204(b)(2)(iv). In response, the Director, Office of Workers' Compensation Programs argues that the administrative law judge's denial of benefits is supported by substantial evidence.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 725.309(d) provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. Because the prior claim was denied based upon claimant's failure to establish total disability, total

Claimant filed the current subsequent claim on April 26, 2001. Director's Exhibit 3. The administrative law judge conducted a formal hearing on November 18, 2003.

² We affirm as unchallenged the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and his finding crediting claimant with at least sixteen years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disability is the element of entitlement relevant to this subsequent claim. Decision and Order – Denial of Benefits at 7. Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), claimant contends that in finding that the newly submitted evidence was insufficient to establish total disability, the administrative law judge made no mention of his usual coal mine work in conjunction with the opinions of Drs. Baker and Hussain. Claimant’s Brief at 3.

The administrative law judge properly found that Dr. Hussain’s opinion is the only medical opinion submitted with this subsequent claim. Decision and Order – Denial of Benefits at 8. The administrative law judge further found that the irrebutable presumption of §718.304 does not apply and that claimant failed to show a “material change in condition,” *i.e.*, total disability, based on the newly submitted evidence consisting of a non-qualifying pulmonary function and blood gas study and the opinion of Dr. Hussain. Decision and Order-Denial of Benefits at 8. The administrative law judge found that Dr. Hussain “did not conclude that Claimant was totally disabled” as he opined that although claimant had a mild impairment related to congestive heart failure, he had the respiratory capacity to perform the work of a coal miner.³ *Id.*; Director’s Exhibit 10.

Although a mild impairment may be totally disabling, *see Cornett*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124, the administrative law judge acknowledged that the exertional requirements of claimant’s job as a heavy equipment operator involved lifting twenty-five pounds several times per day and reasonably found that the non-qualifying objective studies and Dr. Hussain’s opinion that claimant had the respiratory capacity to perform his work are insufficient to carry claimant’s burden to establish total disability under Section 718.204(b)(2). Decision and Order – Denial of Benefits at 8; Director’s Exhibit 4, 6, 8; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon en banc*, 9 BLR 1-236 (1987). Unlike *Cornett*, there is no conflicting evidence that would allow the administrative law judge to reach a different conclusion.

Further, contrary to claimant’s argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant’s age, education, and work experience since these factors are relevant to determining the miner’s ability to perform comparable and gainful work, not to establishing whether claimant is totally disabled from

³ Because Dr. Baker’s opinion was submitted with the prior claim, the administrative law judge did not have to consider his opinion in conjunction with his determination of a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(3); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003).

performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(2); *White v. New White Coal Co.* 23 BLR 1-1, 1-6-7; *see Fields*, 10 BLR at 1-21. We also reject claimant’s argument that “because pneumoconiosis is proven to be a progressive and irreversible disease” it can be concluded that claimant’s condition has worsened and, therefore, that his ability to perform his usual coal mine employment or comparable and gainful work is adversely affected, as an administrative law judge’s findings must be based solely on the medical evidence contained in the record. Claimant’s Brief at 4. *See* 20 C.F.R. §725.477(b). Accordingly, we reject claimant’s contention, and affirm the administrative law judge’s finding that the evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2).

Because of our affirmance of the administrative law judge’s findings that the newly submitted medical evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant, claimant has failed to establish a change in the applicable condition of entitlement since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

Accordingly, the administrative law judge’s Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge