BRB No. 05-0327 BLA

KAY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/29/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of 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.

Jeffrey S. Goldberg (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-5802) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The administrative law judge found the instant case to be a subsequent claim filed on March 6, 2001. Decision and Order at 3. The administrative law judge credited claimant with twenty-nine years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718. The administrative law judge considered the newly submitted evidence and found that it was insufficient to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, he determined that the new evidence was not sufficient to establish that one of the applicable conditions of entitlement has changed since the denial of the

previous claim.[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted evidence is insufficient to establish a total respiratory disability. Claimant also contends that the Department of Labor has failed to provide claimant with a complete, credible pulmonary evaluation. In response, the Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, urging affirmance of the administrative law judge's weighing of Dr. Baker's opinion, but also stating that he does not oppose claimant's request to remand for a new pulmonary evaluation.[2]

The Board's scope of review is defined by statute. The administrative law judge's

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[1] Claimant filed his initial application for benefits on June 22, 1987. Director's Exhibit 1. Following a formal hearing, Administrative Law Judge Bernard J. Gilday denied benefits, based on his determination that claimant failed to establish the existence of pneumoconiosis. *Id*. Pursuant to claimant's appeal, the Board vacated Judge Gilday's Decision and Order and remanded the case for him to reassess the medical opinion evidence on the issue of the existence of pneumoconiosis. *Bowling v. Blue Diamond Coal Co.*, BRB No. 89-0826 BLA (Jan. 25, 1991)(unpub.); Director's Exhibit 1. On remand, Judge Gilday found the evidence sufficient to establish the existence of pneumoconiosis, but denied benefits because claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed Judge Gilday's denial of benefits. *Bowling v. Blue Diamond Coal Co.*, BRB No. 91-1564 BLA (Oct. 15, 1992)(unpub.).

On August 16, 1993, claimant requested modification of Judge Gilday's denial of benefits. In a Decision and Order issued on April 9, 1997, Administrative Law Judge Richard E. Huddleston denied benefits, finding that claimant established a change in conditions, but that the record as a whole failed to establish a total respiratory disability. Director's Exhibit 1. The Board affirmed Judge Huddleston's denial of benefits. *Bowling v. Director, OWCP*, BRB No. 97-1112 BLA (May 22, 1998)(unpub.); Director's Exhibit 1. In an Order issued on June 11, 1998, the Board denied claimant's motion for reconsideration. *Bowling v. Director, OWCP*, BRB No. 97-1112 BLA (Jun. 11, 1998)(Order)(unpub.); Director's Exhibit 1. Claimant sought modification of the denial of benefits, which was denied by the district director on August 6, 1999. Director's Exhibit 1. Claimant filed his current application for benefits on March 6, 2001. Director's Exhibit 2.

[2] Because no party has challenged the administrative law judge's finding of twenty-nine years of coal mine employment, or his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim 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; *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). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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., Inc.*, 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 based on the determination that the evidence of record was insufficient to establish a totally disabling respiratory impairment. The administrative law judge, herein, considered the evidence submitted since the prior denial and found it insufficient to establish a total respiratory disability pursuant to Section 725.309(d).

In challenging the administrative law judge's denial of benefits, claimant contends that Dr. Baker's opinion is well reasoned and documented, and that it is sufficient for "invoking the presumption of total disability." Claimant's Brief at 4. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. However, the *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to 20 C.F.R. Part 718, the Part 727 regulations are not applicable.[3]

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative

[3] Even assuming the applicability of the 20 C.F.R. Part 727 regulations, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the interim presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. In particular, claimant contends that the non-qualifying nature of the pulmonary function studies relied upon by Dr. Baker does not establish the absence of a respiratory impairment. Claimant's Brief at 4-5. Claimant also argues that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Dr. Baker's opinion of total disability and did not consider claimant's age, education or work experience in conjunction with his assessment that claimant was not totally disabled, citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). Claimant's Brief at 6. Lastly, claimant contends that since pneumoconiosis is a progressive and irreversible disease, claimant's pneumoconiosis has worsened, and that such worsening would adversely affect his ability to perform his usual coal mine employment. Claimant's Brief at 6. These contentions are without merit.

With respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant's "FEV1 and vital capacity are both greater than 80% and therefore he would have a Class I impairment, based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 10. Dr. Baker then stated that:

> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 10.

The administrative law judge determined that Dr. Baker's opinion does not support a finding of total disability under Section 718.204(b)(2)(iv), as the doctor "has not accurately addressed whether Claimant's condition prevents him from engaging in his usual coal mine employment or comparable gainful employment." Decision and Order at 9-10. We affirm this finding as it is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker did not render a diagnosis of a totally disabling respiratory or pulmonary impairment, as his report does not include an assessment of claimant's physical limitations nor did he diagnose an impairment which would prevent claimant from performing his usual coal mine employment.[4] Director's Exhibit 10; *Cornett v. Benham*

[4] A Class I impairment, based upon the "*Guides to the Evaluation of Permanent Impairment*," corresponds to a 0% impairment of the whole person. American Medical

Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). The administrative law judge also properly determined that Dr. Baker's statement that claimant should avoid further coal dust exposure does not constitute a diagnosis of total respiratory or pulmonary disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Furthermore, contrary to claimant's assertion, the administrative law judge did not err by failing to compare the exertional requirements of claimant's coal mine employment with claimant's physical limitations. *Cornett*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc); see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). As indicated above, Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment. Director's Exhibit 10. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under Part C of the Act.[5] *See* 20 C.F.R. §718.204; *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As claimant does not otherwise challenge the administrative law judge's weighing of Dr. Baker's opinion, we affirm his finding that Dr. Baker's opinion is insufficient to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).

However, claimant requests that we remand this case for the district director to provide him with an updated complete pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406. The Director states that he does not oppose claimant's request. Director's Brief at 2. We therefore remand this case to the district director. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Association *Guides to the Evaluation of Permanent Impairment*, Table 5-12 (5th ed. 2000).

[5] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which we did not reach in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

Accordingly, the administrative law judge's Decision and Order – Denial of benefits is affirmed in part, vacated in part and the case is remanded to the district director.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge