BRB No. 06-0261 BLA

BROWN H. SIZEMORE Claimant-Petitioner v. COAL POWER CORPORATION and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/28/2006 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6460) of Administrative Law Judge Edward Terhune Miller 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). This case involves a subsequent claim filed on June 11, 2001.[1] 20 C.F.R. §725.309. Based on a stipulation of the parties, the administrative law judge credited claimant with thirty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found that the new evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant's 1989 claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director),

[1] Claimant filed his initial application for benefits on November 29, 1972 with the Social Security Administration (SSA), which was denied. Director's Exhibit 1. Claimant then filed a claim with the Department of Labor on September 24, 1976, which was denied by the district director on April 18, 1980 and June 20, 1980. *Id.* Subsequent to his filing of the 1976 claim, claimant filed an Election Card on April 4, 1978, seeking SSA review of his denied 1972 claim, which was again denied. *Id.* Because no further action was taken on either claimant's 1972 or 1976 claims, they were considered finally denied. Claimant filed a second claim with the Department of Labor on January 4, 1989, which was denied by Administrative Law Judge George A. Fath on July 14, 1993, based on findings that while the evidence was sufficient to establish the existence of pneumoconiosis, claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit 1. Claimant filed a petition for modification on July 14, 1994, which was denied by the district director on October 25, 1994. *Id.* No further action was taken on this claim.

responds that he met his obligation to provide claimant with a credible pulmonary evaluation.[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 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 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 because he failed to establish a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).[3]

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[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has thirty years of coal mine employment, that employer is the properly named responsible operator, and that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment took place in Kentucky. Decision and Order at 2; Director's Exhibits 1, 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish total disability. Claimant argues that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Baker's medical assessments of claimant's respiratory impairment. Claimant's Brief at 8. Claimant also contends that it is error for the administrative law judge to reject a medical opinion merely because it is based on a nonconforming or non-qualifying pulmonary function study. Claimant's Brief at 7. 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 8. These contentions are without merit.

With respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment based on the FEV1 and vital capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 9. 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 9.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *accord Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988). Consequently, the administrative law judge rationally found that Dr. Baker's opinion is not supportive of a finding of total disability. Moreover, the administrative law judge acted within his discretion in determining that Dr. Baker did not diagnose a totally disabling respiratory or pulmonary impairment, as his report did 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] Thus, contrary to claimant' assertion, in considering Dr. Baker's

[4] The *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class I impairment as involving no impairment to the whole person.

opinion, 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. Decision and Order at 10-11; Director's Exhibit 9; *Cornett v. Benham 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).

Claimant further alleges that the administrative law judge erred in according less weight to Dr. Baker's diagnosis because he relied upon nonconforming and/or non-qualifying objective studies. We disagree. As indicated above, the administrative law judge did not accord less weight to Dr. Baker's opinion because it was not adequately documented, but rather, found that Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment and therefore, his opinion was not supportive of claimant's burden. Director's Exhibit 9. 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 did not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Because an administrative law judge's findings must be based solely on the medical evidence of record, we also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Moreover, as claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm the finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 10-11; *see 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*); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant also alleges that the Director failed to provide him with a complete, credible pulmonary evaluation. Claimant contends that because the administrative law judge found that Dr. Hussain had understated claimant's smoking history, and found that his report was ambiguous, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5-6. The Director responds that a remand for Dr. Hussain to clarify his opinion regarding a total respiratory disability would serve no purpose, because either of Dr. Hussain's statements "establishes the lack of that [totally disabling] condition." Director's Brief at 1-2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The

issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 10. The administrative law judge did not find nor does claimant allege that Dr. Hussain's opinion was incomplete. When considering Dr. Hussain's opinion under Section 718.204(b)(2)(iv), the administrative law judge set forth the various statements made by Dr. Hussain relevant to claimant's ability to perform his usual coal mine work.[5] Decision and Order at 11. In determining whether Dr. Hussain's opinion was sufficient to establish total disability, the administrative law judge fully credited Dr. Hussain's diagnosis of a moderate impairment and rationally found that Dr. Hussain's explicit statement that claimant could perform sedentary work did not support a finding of total disability under Section 718.204(b)(2)(iv).[6] *Id.*; Director's Exhibit 10; Employer's Exhibit 4 at 11; *see 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). Consequently, because Dr. Hussain's report was complete and the administrative law judge did not discredit it on the issue of total disability, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because the administrative law judge's finding that the newly submitted evidence of record did not establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2) is supported by substantial evidence and in accordance with law, claimant

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[5] Dr. Hussain diagnosed a moderate impairment and indicated that claimant is totally disabled from performing the work of a coal miner, but also stated that claimant does not have a functional pulmonary impairment. Director's Exhibit 10; Employer's Exhibit 4 at 7-8, 12, 15. Dr. Hussain further stated that although claimant cannot perform work requiring significant exertion, he can perform sedentary work. Employer's Exhibit 4 at 11.

[6] The administrative law judge found that claimant's job as a coal loader "was essentially a sedentary position." Decision and Order at 11. We affirm this finding as unchallenged on appeal. *Skrack*, 6BLR at 1-711.

has failed to establish the element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18. Consequently, we affirm the denial of benefits in this subsequent claim and we need not address claimant's other arguments regarding the existence of pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge