BRB No. 06-0986 BLA

R.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STERLING SMOKELESS COAL COMPANY/EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/31/2007
	)	
Employer-Respondent	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2005-BLA-5435) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a subsequent 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).[1] The

[1] Claimant filed his first claim for benefits on July 10, 1973. Director's Exhibit 1. That claim was denied by the Department of Labor on February 29, 1980, because claimant failed to establish total respiratory disability. *Id.* Claimant filed a second claim

administrative law judge concluded that the newly submitted evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant. Decision and Order at 3-5. The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 5. Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in failing to fully assess all of the requirement of claimant's usual coal mine employment in finding that the evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv) and erred therefore in finding that an applicable condition of entitlement had not changed pursuant to Section 725.309(d). Claimant contends that the administrative law judge did not consider that claimant's usual coal mine work "involved considerable work underground even if it did not always involve heavy lifting." Claimant's Brief at p. 4. Claimant also asserts that the administrative law judge failed to fully address Dr. Rasmussen's opinion which found that claimant's pulmonary impairment was such that he could not perform his usual coal mine employment, in addition to stating claimant could not perform heavy manual labor.[2] *Id.* Employer responds urging that the administrative law judge's decision denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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on July 6, 1983, which was denied by Administrative Law Judge Reno E. Bonfanti because claimant failed to establish total respiratory disability. Director's Exhibit 2. The Board affirmed the denial of benefits. [*R. P.*] *v. Eastern Assoc. Coal Co.*, BRB No. 88-0724 BLA (May 11, 1990)(unpub.). Claimant filed a third claim, the instant claim, on May 7, 2003. Director's Exhibit 3.

[2] Claimant does not allege that the new pulmonary function studies or blood gas studies establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (ii). Claimant's Brief at 3-4.

Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *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.*, 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 finally denied because he failed to the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b); *see* Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*).[3] The new evidence relevant to total disability includes: a July 14, 2003 pulmonary function study with qualifying pre-bronchodilator and non-qualifying post-bronchodilator results; an October 8, 2003 pulmonary function study with qualifying pre and post-bronchodilators results; July 14, 2003 and October 8, 2003 qualifying blood gas studies; the opinion of Dr. Rasmussen that claimant was disabled from performing very heavy manual labor; and Dr. Zaldivar's opinion that claimant was unable to do heavy labor. Director's Exhibits 13, 14.

In assessing the requirements of claimant's usual coal mine employment, the administrative law judge found, based on claimant's testimony, that claimant's usual coal mine employment was as an above ground foreman, supervising the stripping department. Decision and Order at 2; Hearing Transcript at 11-12. The administrative law judge also found, based on claimant's testimony, that claimant was never required to lift more than two or three pounds and was not required to do any carrying. *Id.* The administrative law judge found, therefore, that claimant's coal mine employment "involved at most light labor." Decision and Order at 5; Hearing Transcript at 11-12.

Considering the newly submitted medical evidence along with the evidence regarding the exertional requirements of claimant's usual coal mine employment, the administrative law judge concluded that, despite the presence of newly submitted

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

qualifying pulmonary function studies and blood gas studies,[4] the newly submitted evidence, as a whole, failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), based on a comparison of the medical opinion evidence and the exertional requirements of claimant's usual coal mine employment. The administrative law judge concluded that Dr. Rasmussen's opinion that claimant was disabled from performing "very heavy manual labor," Director's Exhibit 14, and Dr. Zaldivar's opinion that claimant was "unable to do heavy labor," Director's Exhibit 13, did not establish total disability in light of the fact that claimant's usual coal mine employment "involved at most light labor." Decision and Order at 5. This was rational. 20 C.F.R. §718.204(b)(2)(iv); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986); *aff'd on recon.*, 9 BLR 1-236 (1987); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

Contrary to claimant's argument, the fact that some of claimant's work may have been "underground" does not establish a basis for finding total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). Nor, contrary to claimant's argument, can Dr. Rasmussen's opinion that claimant had "minimal to moderate loss of lung function," and could not "peform very heavy manual labor," establish that claimant was incapable of performing "light" work.[5] Director's Exhibit 14; *see Walker v. Director, OWCP*, 927 F.3d 181, 15 BLR 2-16 (4th Cir. 1991).

In the absence of any further challenge to the administrative law judge's findings, we have no substantive issue to review. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). We, therefore, affirm the administrative law judge's determination that the newly submitted evidence has failed to establish a totally disabling respiratory impairment, 20 C.F.R. §718.204(b), and thus affirm the determination that claimant has failed to establish a change in an applicable

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values.

[5] Dr. Rasmussen conducted a physical examination, pulmonary function study, blood gas study and took claimant's family, social, work, and medical histories. Dr. Rasmussen noted that claimant's last five years in coal mine employment was as a surface mining foreman where he walked and climbed. Dr. Rasmussen stated that this was minimal labor. Dr. Rasmussen opined that claimant's resting blood gas study indicate a minimal to moderate loss of lung function and that claimant was not able to perform "very heavy manual labor." Director's Exhibit 14.

condition of entitlement subsequent to the prior denial. 20 C.F.R. §725.309(d)(2), (3); *see Rutter*, 86 F.3d at 1363, 20 BLR at 2-237. Because claimant has failed to establish the presence of a totally disabling respiratory impairment, a requisite element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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