BRB No. 07-0821 BLA

W.O.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/16/2008
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

W.O.D., Northfork, West Virginia, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Rejection of Claim (2005-BLA-5577) of Administrative Law Judge Edward Terhune Miller with respect to 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). The miner's subsequent claim was filed on March 29, 2004.[1]

[1] Claimant filed his initial claim for benefits on May 4, 1982, which was denied by Administrative Law Judge Eric Feirtag in a Decision and Order issued on October 27,

Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with at least twenty-five years of coal mine employment, based on a stipulation by the parties. In addition, the administrative law judge overruled claimant's objection to the submission of Dr. Zaldivar's November 7, 2005 medical report, finding the report admissible pursuant to 20 C.F.R. §725.414(a)(3)(i). Weighing the evidence submitted since the prior denial, the administrative law judge found the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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.[2] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

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1986. Director's Exhibit 1. Judge Feirtag found that the evidence was insufficient to establish total disability. *Id*. No further action was taken on this claim. Claimant filed a second claim on April 10, 1991, which was denied by Administrative Law Judge Edward J. Murty, Jr. Director's Exhibit 2. In a Decision and Order issued on August 2, 1993, Judge Murty found that the evidence submitted since the prior denial was insufficient to establish total disability and, therefore, failed to establish a material change in condition. *Id*. Claimant took no further action until filing his current application.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *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 denied because he failed to establish that he had a totally disabling respiratory or pulmonary impairment.[3] Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his current claim. 20 C.F.R. §725.309(d)(2), (3); Decision and Order at 12-13.

Evidentiary Limitations

Initially, we address the administrative law judge's finding that Dr. Zaldivar's second medical report, dated November 7, 2005, was properly admissible pursuant to Section 725.414(a)(3)(i). The administrative law judge determined that Dr. Zaldivar's original medical report, dated October 4, 2004, was based on his July 28, 2004 examination and testing of claimant, and that Dr. Zaldivar's November 7, 2005 medical report was based on his review of the medical evidence of record as enumerated in the report. Decision and Order at 3; Employer's Exhibits 2, 7. The administrative law judge considered claimant's objection at the hearing to the admission of Dr. Zaldivar's 2005 medical opinion as exceeding the evidentiary limitations on the basis that it should be considered as an additional medical report, separate and distinct from Dr. Zaldivar's 2004 report. The administrative law judge however found that "Dr. Zaldivar's consulting report can reasonably and properly be treated as conceptually integral to a single medical report by Dr. Zaldivar." Decision and Order at 4. In addition, the administrative law

[3] The administrative law judge also found that the newly submitted evidence was insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). However, because this element of entitlement was not a condition upon which the prior denial was based, the administrative law judge was not required to adjudicate this issue. 20 C.F.R. §725.309(d); Director's Exhibit 2.

judge found that while Dr. Zaldivar's review of the medical record included evidence from the miner's prior claims, this evidence was properly admitted into the record pursuant to Section 725.309(d)(1) and, therefore, Dr. Zaldivar's 2005 medical opinion is not excludable due to his reliance on inadmissible evidence. Decision and Order at 3-4. Consequently, the administrative law judge overruled claimant's objection and admitted Dr. Zaldivar's supplemental report. *Id*.

Section 725.414(a)(1) defines a medical report as a "written assessment of the miner's respiratory or pulmonary condition" that has been "prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). Because the regulations do not require that a physician's medical opinion be contained in a single document, we affirm the administrative law judge's finding that Dr. Zaldivar's November 7, 2005 supplemental report, based on his review of the medical record, does not constitute a separate medical report exceeding the evidentiary limitations set forth at Section 725.414(a)(3)(i). Rather, the administrative law judge rationally found that Dr. Zaldivar's two reports, one based on his examination of claimant and the second based on his review of the medical record, can reasonably be "treated as conceptually integral to a single medical report." Decision and Order at 4; 20 C.F.R. §725.414(a)(1), (a)(3)(i). Moreover, the administrative law judge reasonably found that Dr. Zaldivar's November 7, 2005 report is not excludable because it was based, in part, on evidence contained in the record of claimant's prior claims, which was properly admissible pursuant to Section 725.309(d)(1).[4] Decision and Order 3-4; 20 C.F.R. §§725.309(d)(1), 725.414(a). Accordingly, because the administrative law judge's conclusions regarding the admissibility of Dr. Zaldivar's two medical reports are rational, we affirm his finding that the admission of Dr. Zaldivar's November 7, 2005 report does not exceed the evidentiary limitations set forth at Section 725.414(a)(3)(i). 20 C.F.R. §725.414(a); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

20 C.F.R. §718.204(b)

Pursuant to Section 718.204(b)(2)(i), the record contains references to five new pulmonary function studies. Director's Exhibits 11, 12; Employer's Exhibits 2, 5. The administrative law judge found the April 14, 2004 pulmonary function study, referenced in Dr. Forehand's medical report, to be of little probative value because the study was not in the record, and had been invalidated by Dr. Gaziano. Decision and Order at 6; Director's Exhibit 11. In addition, the administrative law judge did not accord probative

[4] Under 20 C.F.R. §725.309(d)(1), evidence submitted in connection with any prior claim is made a part of the record in the subsequent claim, unless it was specifically excluded when the prior claim was adjudicated. 20 C.F.R. §725.309(d)(1).

weight to the non-qualifying pulmonary function study[5] administered by Dr. O'Neill on April 21, 2004, because no tracings were submitted with the test results. Decision and Order at 6; Director's Exhibit 12. The administrative law judge then found that the three remaining pulmonary function studies, dated May 27, 2004, July 28, 2004 and July 18, 2005, although based on effort determined to be variable and/or poor, nonetheless, all yielded non-qualifying results. Decision and Order at 6; Director's Exhibit 11; Employer's Exhibits 2, 5. Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence fails to demonstrate a totally disabling pulmonary or respiratory impairment, as it is supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 6, 13.

Moreover, the administrative law judge properly determined that the three newly submitted arterial blood gas studies, dated April 14, 2004, July 28, 2004 and July 18, 2005, all produced non-qualifying values. Director's Exhibit 11; Claimant's Exhibit 5; Employer's Exhibits 2, 5. Consequently, we affirm the administrative law judge's determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). 20 C.F.R. §718.204(b)(2)(ii); *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 7, 13. Likewise, we affirm the administrative law judge's finding that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 13.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Forehand, O'Neill, Zaldivar and Crisalli, submitted since the prior denial. Dr. Forehand examined claimant on April 14, 2004 and, based on his physical examination and accompanying testing, opined that a "significant respiratory impairment is present. Insufficient residual ventilatory capacity remains to return to [his] last coal mining job. Unable to work. Totally and permanently disabled." Director's Exhibit 11. Dr. O'Neill examined claimant on April 21, 2004 and, based on her examination of claimant and the objective testing, opined that "[a]lthough his pulmonary function tests only show a mild decline, I think because of other intervening illnesses, his lung disease is having a severe impact on his lifestyle." Director's Exhibit 12.

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[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values. Under the regulations, pulmonary function tests can establish disability when they are qualifying. *Id*.

Dr. Zaldivar examined claimant on July 28, 2004 and, based on that examination, stated that he was unable to determine whether there was any pulmonary impairment. Employer's Exhibit 2. However, he further stated that at present, claimant "is incapacitated by a great deal more than his lungs. He is incapacitated due to severe arthritis and poor circulation," and that claimant is not capable of performing his usual coal mine employment because of these conditions and his advanced age. *Id.* In a supplemental medical report dated November 7, 2005, based on his review of the medical evidence of record, Dr. Zaldivar opined that, based on the available information, claimant's respiratory capacity is normal, that "his lungs have not caused any burden on his overall health." Employer's Exhibit 7. Dr. Zaldivar opined that there is no pulmonary impairment and that no pulmonary condition or disease exists. *Id.* Dr. Crisalli examined claimant on July 18, 2005 and also reviewed the medical evidence of record. Based on both his examination and review of the medical evidence, Dr. Crisalli opined that there is no indication of a "pulmonary functional impairment" and that, based on the available data, claimant retains the pulmonary functional capacity to perform his previous coal mine employment. Employer's Exhibit 5. However, Dr. Crisalli further stated that claimant is limited by other illnesses which are not related to coal dust exposure. *Id.*

Weighing these medical opinions, the administrative law judge noted that Drs. O'Neill, Zaldivar and Crisalli are Board-certified pulmonologists, whereas Dr. Forehand is not a Board-certified pulmonologist. Decision and Order at 14. In addition, he found that Dr. Forehand based his opinion of total disability primarily on an invalid pulmonary function study.[6] *Id.*; Director's Exhibit 11. The administrative law judge further found that Dr. O'Neill's diagnosis of total disability was poorly reasoned. Decision and Order at 14; Director's Exhibit 12. However, he found that the opinions of Drs. Zaldivar and Crisalli, that claimant is not totally disabled from a pulmonary or respiratory standpoint, are consistent with the credible objective evidence, including the non-qualifying blood gas studies and pulmonary function studies, and are "credibly reasoned." Decision and Order at 14; Employer's Exhibits 2, 5, 7, 8, 9. Consequently, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv), by a preponderance of the evidence.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v.*

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[6] Dr. Forehand's report was dated April 14, 2004 and based on the physical examination and medical testing of the same date. Director's Exhibit 11. The pulmonary function study dated April 14, 2004, was invalidated by Dr. Gaziano and the results of the study are not in the record. *Id.* Dr. Forehand administered a second pulmonary function study on May 27, 2004, which yielded non-qualifying values. *Id.*

Bishop Coal Co., 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1994), and to determine whether an opinion is reasoned, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge rationally addressed the comparative credentials of the physicians, the documentation underlying their medical opinions, and the explanations for their conclusions, in according greater weight to the opinions of Drs. Zaldivar and Crisalli over the opinion of Dr. O'Neill, whose opinion the administrative law judge found poorly reasoned, and the opinion of Dr. Forehand, who is not a Board-certified pulmonologist. *See Hicks*, 138 F.3d at 533, 536, 21 BLR at 2-335, 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Because substantial evidence supports his conclusions, we affirm the administrative law judge's finding that the weight of the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Moreover, we affirm the administrative law judge's finding that the newly submitted evidence, when weighed together, is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). 20 C.F.R. §718.204(b); *see Fields*, 10 BLR at 1-22; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 14.

Because we affirm the administrative law judge's determination that the new evidence failed to establish total respiratory disability pursuant to Section 718.204(b), claimant has failed to establish a change in the applicable condition of entitlement pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

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