BRB No. 07-0662 BLA

P.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LIVE OAK MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/13/2009
	)	
Employer/Carrier-Respondents	)	
	)	
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.

P.B., Verner, West Virginia, *pro se.*

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (2006-BLA-5278) of Administrative Law Judge Daniel L. Leland rendered 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 stated that the claim before him, filed on February 3, 2005, was a subsequent claim pursuant to 20 C.F.R. §725.309(d), and noted that claimant's most

recent prior application for benefits, filed on August 30, 2001, had been finally denied by the district director on November 6, 2002, because claimant did not establish that he was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).[1] The administrative law judge considered the newly submitted evidence and determined that it was insufficient to establish total disability under Section 718.204(b)(2); he concluded, therefore, that claimant had not demonstrated a change in an applicable condition of entitlement as required by Section 725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contests the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (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

[1] Claimant's initial claim for benefits was filed on October 15, 1993, and was finally denied by the district director on March 31, 1994, as claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant's second application for benefits was filed on March 5, 1996, and was finally denied by the district director on June 20, 1996, because claimant did not establish that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Claimant's third application for benefits was filed on August 4, 1997, and was finally denied by the district director on November 2, 1999, as claimant failed to prove that he is totally disabled pursuant to 20 C.F.R. §718.204. Director's Exhibit 3. Claimant's fourth application for benefits was filed on August 30, 2001, and was finally denied by the district director on November 6, 2002, based on claimant's failure to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 7.

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. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

When a miner files an application 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 was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 4. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm the administrative law judge's denial of benefits on the ground that claimant failed to establish total disability under Section 718.204(b) and, thus, failed to establish a change in an applicable condition of entitlement under Section 725.309(d). Pursuant to Section 718.204(b)(2)(i), the administrative law judge determined correctly that the newly submitted pulmonary function studies did not support a finding of total disability because they did not produce qualifying values.[3] Decision and Order at 3, 5; Director's Exhibit 13; Employer's Exhibits 1, 10. The administrative law judge rationally found that the newly submitted blood gas studies were insufficient to establish total disability under Section 718.204(b)(2)(ii), as the resting and exercise arterial blood gas studies from May 12, 2005, reflected values that were merely close to qualifying and the subsequent blood gas studies produced non-qualifying values that were significantly higher.[4] *See Collins v. J*

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The blood gas study obtained by Dr. Rasmussen on May 12, 2005, produced a resting pO2 of 67 and a resting pCO2 of 36. Director's Exhibit 13. After exercise, claimant's pO2 was 66 and his pCO2 was 36. *Id*. The blood gas study obtained by Dr. Zaldivar on November 16, 2005, produced a resting pO2 of 80 and a resting pCO2 of 34.

& L Steel, 21 BLR 1-181, 1-191 (1999); Decision and Order at 4, 5-6; Director's Exhibit 13; Employer's Exhibits 1, 10. In addition, the administrative law judge properly found that claimant had not proven that he is totally disabled pursuant to Section 718.204(b)(2)(iii), because the record contains no evidence that claimant is suffering from cor pulmonale with right-sided congestive heart failure. Decision and Order at 6.

Under Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Rasmussen, Zaldivar and Castle. Dr. Rasmussen examined claimant on May 12, 2005 and indicated that claimant last worked as a roof bolter, which involved "considerable heavy[,] and some very heavy[,] manual labor." Director's Exhibit 13. Dr. Rasmussen diagnosed a totally disabling pulmonary impairment based upon the exercise blood gas study, which he described as showing a marked impairment in oxygen transfer. *Id*.

Dr. Zaldivar examined claimant on November 16, 2005 and reported that claimant last worked in the mines as a roof bolter and that claimant described his job as requiring heavy labor. Employer's Exhibit 1. Dr. Zaldivar also reviewed the results of his prior examination of claimant on June 17, 1998 and Dr. Rasmussen's newly submitted medical report. *Id*. Dr. Zaldivar concluded that claimant has a very mild pulmonary impairment, which is of no clinical significance, and that claimant is capable of performing his usual coal mine work. *Id*. At a deposition taken on August 15, 2006, Dr. Zaldivar reiterated his findings. Employer's Exhibit 15 at 15-19. Dr. Zaldivar was also asked at his deposition to review the objective data from Dr. Castle's examination of claimant on July 11, 2006. Dr. Zaldivar indicated that although the results of the pulmonary function study obtained by Dr. Castle could be indicative of an impairment that would disable a person from performing medium to heavy manual labor, he believed that the study was invalid or reflected an acute problem. *Id*. at 23-24.

As indicated *supra*, Dr. Castle examined claimant on July 11, 2006. Employer's Exhibit 10. In addition, Dr. Castle reviewed the evidence submitted with the prior claims, and the newly submitted reports of Drs. Rasmussen and Zaldivar. Dr. Castle determined that claimant has mild airway obstruction, but retains the respiratory capacity to perform his usual coal mine work as a roof bolter, which Dr. Castle noted involved heavy labor. *Id*. Dr. Castle reiterated his findings in a deposition taken on August 4, 2006. Employer's Exhibit 14 at 15-20.

Employer's Exhibit 1. The post-exercise pO2 was 82 and the post-exercise pCO2 was 36. *Id*. On July 11, 2006, Dr. Castle obtained only a resting blood gas study because claimant reported that he could not perform an exercise study due to back pain and shortness of breath. Employer's Exhibit 10. Claimant's resting pO2 was 71.9 and his resting pCO2 was 37.1. *Id*.

Upon considering the newly submitted medical opinion evidence, the administrative law judge determined that Dr. Rasmussen was the only physician who found that claimant is totally disabled and that he based his diagnosis on the marked impairment in oxygen transfer shown on claimant's exercise blood gas study. Decision and Order at 6. The administrative law judge found that the opinions of Drs. Zaldivar and Castle were "well reasoned and documented and they [were] based on more objective studies than Dr. Rasmussen's opinion[,] which relied solely on blood gas values that were not found in subsequent tests." *Id*. The administrative law judge concluded, therefore, that the opinions of Drs. Zaldivar and Castle were entitled to more weight than Dr. Rasmussen's opinion. Accordingly, the administrative law judge found that claimant did not establish total disability under Section 718.204(b)(2)(iv). *Id*.

We affirm the administrative law judge's determination that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as it is supported by substantial evidence and in accordance with law. The administrative law judge rationally found that the opinions of Drs. Zaldivar and Castle were entitled to more weight than Dr. Rasmussen's opinion because their conclusions, that claimant is not totally disabled, were based upon a larger set of objective data than Dr. Rasmussen's conclusion that claimant has a totally disabling respiratory impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 6. The administrative law judge also acted within his discretion as fact-finder in determining that the credibility of Dr. Rasmussen's diagnosis of a totally disabling impairment was undermined by his reliance upon an exercise blood gas study that produced values that were disparately lower than the results of the subsequent studies. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 6.

In light of our affirmance of the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(i)-(iv), we also affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). We must also affirm, therefore, the denial of benefits. *See White*, 20 BLR at 1-3.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge