

BRB No. 13-0061 BLA

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| ORVILLE BAISDEN               | ) |                         |
|                               | ) |                         |
| Claimant-Petitioner           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| BIG BOTTOM COAL COMPANY       | ) |                         |
|                               | ) | DATE ISSUED: 07/19/2013 |
| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5295) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim on February 24, 2010.<sup>1</sup> Director's Exhibit 4.

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<sup>1</sup> This is claimant's third claim for benefits. His first claim, filed in 1973, was initially denied by the Social Security Administration, and was later denied by the district

In his Decision and Order issued October 9, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

After crediting claimant with at least sixteen years of underground coal mine employment,<sup>2</sup> the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant failed to invoke the Section 411(c)(4) presumption. The administrative law judge also found that the new evidence failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and for that reason, that claimant failed to 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 argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>3</sup> Employer responds in support of the administrative law judge's

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director in 1981, for claimant's failure to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant's second claim, filed in 1986, was denied by Administrative Law Judge Ralph A. Romano in 1992, for failure to establish that he had pneumoconiosis, and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

<sup>2</sup> Claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and 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).

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. When 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 pneumoconiosis, and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis, or that he is totally disabled. 20 C.F.R. §725.309(d).

Claimant argues that the administrative law judge failed to explain his reasons for discrediting Dr. Gaziano's opinion that claimant has a totally disabling respiratory impairment. Claimant's Brief at 4. This argument lacks merit. The administrative law judge discredited Dr. Gaziano's opinion because he found that Dr. Gaziano "relied solely upon his own testing in reaching his conclusion and did not explain the implications of" the non-qualifying pulmonary function and arterial blood gas studies that he performed.<sup>4</sup> Decision and Order at 28; Director's Exhibit 15. The administrative law judge instead

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<sup>4</sup> A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge noted that Dr. Gaziano's pre-bronchodilator pulmonary function study produced qualifying results, but that his post-bronchodilator study did not, and that Dr. Gaziano "did not explain the implications of that" in finding that claimant is totally disabled. Decision and Order at 27; Director's Exhibit 15. Dr. Gaziano's arterial blood gas studies also produced non-qualifying values. Decision and Order at 27; Director's Exhibit 15.

credited the opinions of Drs. Rosenberg and Basheda, both of whom, he found, “considered a comprehensive panoply of medical evidence related to the miner and . . . diagnosed no total disability.” Decision and Order at 28. The administrative law judge adequately explained his rational decision to discount Dr. Gaziano’s opinion, because it was based on comparatively limited evidence, and because Dr. Gaziano failed to address or explain the non-qualifying pulmonary function and arterial blood gas studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore affirm the administrative law judge’s finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant raises no other arguments regarding total disability. Thus, we affirm the administrative law judge’s finding that claimant failed to establish that he is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 28. We also affirm the administrative law judge’s finding that claimant failed to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 31.

Finally, claimant contends that the administrative law judge erred in finding that the new evidence failed to establish a change in an applicable condition of entitlement, because that conclusion was inconsistent with this statement, which the administrative law judge wrote at the beginning of his analysis: “As discussed below, I find the claimant has established one of the applicable conditions of entitlement has changed since the prior denial[.]” Decision and Order at 17; Claimant’s Brief at 3. Claimant’s argument lacks merit, because the administrative law judge went on to weigh all the evidence and to find that claimant failed to establish the existence of pneumoconiosis, failed to establish that he is totally disabled and, ultimately, failed to establish a change in an applicable condition of entitlement. Decision and Order at 25, 28, 34. Reviewing the administrative law judge’s Decision and Order as a whole, we conclude that the administrative law judge’s statement on page seventeen of his Decision and Order contains an editorial error. We, therefore, reject claimant’s allegation of error, and affirm the administrative law judge’s finding that claimant failed to establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d).

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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REGINA C. McGRANERY  
Administrative Appeals Judge