BRB No. 06-0108 BLA

ROBERT J. HINKLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 06/23/2006
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employer/Carrier-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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIUM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6598) of Administrative Law Judge William S. Cowell 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). Claimant's prior application for benefits, filed on November 26, 1996, was finally denied on March 19, 1997 because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibit 1. On August 8, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order Denying Benefits issued on August 31, 2005, the administrative law judge credited claimant with eighteen years of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response brief contending that claimant received a complete pulmonary evaluation as contemplated by Section 725.406(a).[2]

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of eighteen years of coal mine employment and his findings that claimant failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 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. Failure to establish any one 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).

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). 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 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant initially contends that in analyzing the medical opinion evidence relevant to the issue of total disability, the administrative law judge improperly accorded diminished weight to Dr. Baker's opinion. Claimant's Brief at 3. We disagree.

In weighing the medical opinion evidence of record, the administrative law judge initially found that "Drs. Baker and Simpao opined that the claimant is totally disabled while Drs. Broudy and Repsher did not…." Director's Exhibits 5, 14; Employer's Exhibits 9, 10; Decision and Order at 15. The administrative law judge further found that the "opinions of Drs. Baker and Simpao are belied by the pulmonary function and blood gas studies they administered," which were non-qualifying. Director's Exhibits 5, 9, 11, 14; Decision and Order at 16. By contrast, the administrative law judge found the opinions of Drs. Broudy and Repsher, as "supported by the pulmonary function and blood gas study results…bolstered by their clinical findings," and "well reasoned and documented" were entitled to "probative weight." *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Employer's Exhibits 9, 10; Decision and Order at 16.

Turning to Dr. Baker's opinion, the administrative law judge summarized Dr. Baker's findings, noting that in a report dated September 8, 2001, Dr. Baker diagnosed coal workers' pneumoconiosis, mild resting hypoxemia, chronic obstructive airways disease, and bronchitis by history. Referring to the pulmonary function study results, Dr. Baker opined that claimant has a "Class II impairment with the FEV_1 and vital capacity both being between 60% and 79% of predicted" as defined by the fifth edition of the *Guides to the Evaluation of Permanent Impairment*. Director's Exhibit 14; Decision and Order at 11. Dr. Baker further stated, pursuant to the *Guides*, that claimant "has a second impairment" because "persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 14; Decision and Order at 11.

With respect to Dr. Baker's opinion that claimant was also 100% disabled for work in a dusty environment, the administrative law judge permissibly accorded it less weight as being a recommendation against further coal dust exposure and, therefore, insufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order at 16. While claimant is correct that the administrative law judge did not compare Dr. Baker's additional diagnosis of a Class II respiratory impairment with the exertional requirements of claimant's coal mine work, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000)(holding that even a "mild" impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of the miner's usual coal mine employment), as the administrative law judge specifically acknowledged Dr. Baker's opinion that claimant was totally disabled, but found Dr. Baker's opinion to be unsupported by the objective studies, *see Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6, such a comparison was not required.

We also reject claimant's assertion that the administrative law judge discredited the opinion of Dr. Simpao, that claimant's respiratory impairment would prevent him from performing the work of a coal miner or similar work, and that, therefore, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[3] Contrary to claimant's arguments, the administrative law judge did not discredit Dr. Simpao's opinion, but instead "discounted" his opinion, and found it "undermined" because the

[3] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

physician did not explain his conclusion that claimant is totally disabled from a respiratory standpoint in light of his diagnosis of a mild respiratory impairment or the non-qualifying objective test results he obtained.[4] *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6.

Therefore, as the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Simpao than to the contrary opinions of Drs. Repsher and Broudy, and as the administrative law judge further properly weighed the medical opinion evidence together with the pulmonary function and blood gas study results of record, all of which were either invalid or non-qualifying, we affirm the administrative law judge's determination that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 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); *see also Anderson*, 12 BLR at 1-113; Decision and Order at 16. A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

[4] In addition, we note that, as the Director asserts, while Dr. Simpao stated that the September 13, 2001 pulmonary function study "appears to have parameters that may have effected the test results due to patient effort, cooperation and comprehension," the physician specifically characterized the test results as "acceptable and reproducible" and stated that claimant's effort was "fair." Director's Exhibit 11. Thus, we hold that Dr. Simpao's opinion is based on a valid pulmonary function study, in satisfaction of 20 C.F.R. §725.406(b).

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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JUDITH S. BOGGS
Administrative Appeals Judge