BRB No. 06-0112 BLA

JAMES M. SKIDMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HORIZONS COAL, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 06/29/2006
	)	
THE HARTFORD INSURANCE COMPANY	)	
	)	
	)	
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 - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

David L. Murphy (Clark & Ward, PLLC), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6319) of Administrative Law Judge Thomas F. Phalen 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 credited claimant with twenty-eight years of coal mine employment.[1] Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 8. After determining that the instant claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 9-11. Consequently, the administrative law judge concluded that claimant failed to establish a "change in conditions", and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 11-12.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[3]

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).

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 6.

[2] Claimant's initial claim for benefits, filed on March 27, 1998, was finally denied on July 28, 1998 because claimant failed to establish any element of entitlement. Director's Exhibit 1. The administrative law judge found that claimant filed a second claim in 2000, but withdrew it. It was therefore considered by the administrative law judge not to have been filed. *See* 20 C.F.R. §725.306; Decision and Order at 2; Director's Exhibit 1. Claimant filed his current claim on November 5, 2001. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment finding, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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. 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*).

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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered Dr. Baker's treatment notes that diagnosed pneumoconiosis and the contrary opinions by Drs. Hussain, Broudy, and Dahhan. Director's Exhibits 16; Employer's Exhibits 2-3. Additionally, the administrative law judge noted that Drs. Eubank and Colton from the Clover Fork Clinic did not mention in their treatment records from 1999 through 2002 coal workers' pneumoconiosis or any occupational disease, and the records primarily related to claimant's other health conditions. Decision and Order at 6; Director's Exhibit 15.

Claimant contends that the administrative law judge erred in rejecting the opinion of Dr. Baker, arguing that his diagnosis was based on physical examination, a review of the medical and work histories and the results of two pulmonary function studies and chest x-rays. The administrative law judge acknowledged Dr. Baker's qualifications as a Board-certified internist and pulmonologist, and that he ordered pulmonary function studies and x-rays. The administrative law judge correctly found however that in 2001 Dr. Baker diagnosed "CWP" but his comments explaining his diagnosis "are largely illegible." Decision and Order at 6-7; Director's Exhibit 14. Additionally, the administrative law judge correctly noted that on the 2002 evaluation form, Dr. Baker recorded claimant's vital signs and merely circled "COPD", "CWP" and "CWP." *Id.* The administrative law judge therefore reasonably found that Dr. Baker failed to provide

a basis for his diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 7, 10. Based on the medical reports of Drs. Broudy and Dahhan, the administrative law judge found that claimant did not establish the existence of pneumoconiosis. *Id*. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Drs. Dahhan, Hussain, and Broudy concluded that claimant has no respiratory or pulmonary impairment. Director's Exhibits 8, 10; Employer's Exhibits 1-3. The administrative law judge noted further that the treatment notes from Dr. Baker and the Clover Fork Clinic did not address the issue of total disability. Decision and Order at 11. Based on the new medical opinion evidence, the administrative law judge found that claimant did not establish that he is totally disabled. *Id*.

Claimant asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 4-5, citing *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984).

The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being an electrician helper on the mine site. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Phalen made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

Claimant's Brief at 4. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge found that Dr. Baker did not offer an opinion on claimant's disability. Thus, it was unnecessary for him to compare the exertional requirements of claimant's job duties with Dr. Baker's reports. *Lane v. Union*

Carbide Corp., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Because an administrative law judge's findings must be based solely on the medical evidence of record, we also reject claimant's argument that since pneumoconiosis is a progressive disease that must have worsened, it has detrimentally affected his ability to perform his usual coal mine employment. *White*, 23 BLR at 1-7 n.8. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled. Consequently, we affirm the administrative law judge's finding that claimant did not establish one of the applicable conditions of entitlement changed since the denial of his prior claim and we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge