BRB No. 07-0801 BLA

J.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LABELLE PROCESSING COMPANY	)	DATE ISSUED: 06/20/2008
	)	
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 at Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Peter J. Daley (Peter J. Daley & Associates, P.C.), California, Pennsylvania, for claimant.

James M. Poerio (Poerio, Walter & Mason, Inc.), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-05939) of Administrative Law Judge Daniel L. Leland on 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).[1] The administrative law judge determined

[1] Claimant filed an initial claim for benefits on June 13, 1984. Director's Exhibit 1. Administrative Law Judge Michael H. Schoenfeld denied benefits on January 12, 1988, finding the evidence failed to establish that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further

that the newly submitted evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and therefore, he found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (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 was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement in order for the

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action on the claim. *Id.* Claimant filed his subsequent claim on August 5, 2005. Director's Exhibit 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

administrative law judge to proceed to consider the merits of his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) (holding under former provision that claimant must establish one of the elements of entitlement that was previously adjudicated against him).

On appeal, claimant states that his pulmonary and respiratory impairments forced him to leave the coal mining industry in 1984. Claimant specifically argues that the administrative law judge "erred by relying heavily" upon the reports of Drs. Fino and Renn in finding that he is not totally disabled.[3] We disagree.

In considering whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Wodzinski, Fino, Renn, Ewald, and Martin.[4] Dr. Wodzinski conducted a physical examination on September 30, 2005, and opined that claimant was unable to work due to arthritis and an elevated right hemidiaphragm of unknown etiology. Director's Exhibit 11. Dr. Fino examined claimant on March 23, 2006, where he obtained a negative chest x-ray, and normal pulmonary function and arterial blood gas studies. Employer's Exhibit 1. Dr. Fino also reviewed claimant's medical records and opined that claimant retained the pulmonary capacity to perform his last job in the coal mines. *Id.* Dr. Renn examined claimant on September 12, 2006, and diagnosed chronic bronchitis, without obstruction, and normal ventilatory function. Employer's Exhibit 2. He opined that claimant was not totally disabled from a respiratory or pulmonary standpoint. *Id.*

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[3] The administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii), since none of the newly submitted pulmonary function studies or arterial blood gas studies were qualifying for total disability under those subsections. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 5. The administrative law judge also found that, since there was no evidence that claimant suffered from cor pulmonale, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 5. We affirm the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii) as they are unchallenged by claimant on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[4] Dr. Ewald examined claimant on May 19, 2005 and diagnosed pneumoconiosis, but he did not state whether claimant was totally disabled. Claimant's Exhibit 1. Dr. Martin examined claimant on February 21, 2006 and diagnosed pneumoconiosis and chronic bronchitis, but he also did not opine whether claimant had any respiratory disability. Director's Exhibit 13; Claimant's Exhibit 1.

Contrary to claimant's assertion, the administrative law judge properly found that he was not totally disabled since none of the physicians of record has diagnosed a totally disabling respiratory or pulmonary impairment sufficient to satisfy claimant's burden of proof. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 5. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv). We further affirm the administrative law judge's determination that the newly submitted evidence fails to establish total disability at Section 718.204(b)(2) and his finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309.[5] *See Swarrow*, 72 F.3d at 317, 20 BLR at 2-94; *White*, 23 BLR at 1-1-3; *Allen v. Mead Corporation*, 22 BLR 1-63, 1-66-67 (2000) (*en banc*).

[5] Because we affirm the administrative law judge's finding at Section 718.204(b)(2), we need not address claimant's other arguments with respect to the existence of pneumoconiosis.

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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BETTY JEAN HALL
Administrative Appeals Judge