BRB No. 07-0574 BLA

S.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 03/14/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Gregory F. Jacob, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05786) of Administrative Law Judge Adele Higgins Odegard 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). The administrative law judge found that the parties stipulated that claimant had at least sixteen years of coal mine employment and that the record supported the stipulation. The administrative law judge also found that subsequent to the denial of the prior claim, the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Decision and Order at 2-5. Based on this concession, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R.

§725.309(d).[1] Decision and Order at 5. The administrative law judge found, however, that the evidence failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 6-11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Baker's opinions did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The Director responds and urges that the denial of benefits be affirmed.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Administrative Law Judge Thomas F. Phalen, Jr., denied claimant's prior claim because claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total disability at 20 C.F.R. §718.204(c)(1)-(4)(2000)(now 20 C.F.R. §718.204(b)(2)(i)-(iv)). In affirming that denial, the Board affirmed, as unchallenged on appeal, Judge Phalen's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3) and his findings that total respiratory disability was not established at 20 C.F.R. §718.204(c)(1)-(3)(2000). The Board also affirmed Judge Phalen's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(c)(4)(2000). Because the Board affirmed the administrative law judge's finding that total respiratory disability, an essential element of entitlement, was not established, the Board declined to address claimant's argument on pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4). The Board held that any error made by the administrative law judge at those subsections would be harmless. [*S.B.*] *v. New Horizons Coal, Inc.*, BRB No. 98-0546 BLA (Feb. 11, 1999)(unpub.). Subsequent to issuance of the Board's decision, employer was dismissed as a party. Order of February 5, 2007.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, the finding that claimant suffered from pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(b), the finding that a change in an in applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, and the finding that total respiratory disability was not established by the newly submitted evidence at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 12.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

If 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 any of the elements of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). In this case, because the administrative law judge found that the Director conceded the existence of pneumoconiosis arising out of coal mine employment, elements previously adjudicated against claimant, the administrative law judge considered whether total respiratory disability was established.

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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The administrative law judge found that the newly submitted opinions of Drs. Jarboe and Baker did not establish total respiratory disability at Section 718.204(b)(2)(iv) because both doctors understood the exertional requirements of claimant's usual coal mine employment, and opined that claimant retained the respiratory capacity to perform his usual coal mine employment. Specifically, regarding Dr. Baker's opinions, the administrative law judge determined that even though Dr. Baker opined, at one point, that claimant had a minimal respiratory impairment, he also opined that claimant had no respiratory impairment and found that claimant was able to perform his regular coal mine work. Decision and Order at 9; Director's Exhibits 8, 34. Thus, the administrative law judge permissibly found that Dr. Baker's opinions did not support claimant's burden of demonstrating total respiratory disability. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Contrary to claimant's assertion, the administrative law judge is not required to consider the exertional

requirements of claimant's usual coal mine employment if the doctor finds that claimant does not have a respiratory disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). As claimant has not raised any other arguments concerning the administrative law judge's evaluation of the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge's finding that total respiratory disability was not established thereunder is affirmed.[4]

Claimant's general assertion that he must be totally disabled because pneumoconiosis is a progressive and irreversible disease is without merit as claimant bears the burden of establishing that he is totally disabled based on medical evidence in the record. *White*, 23 BLR at 1-7 n.8; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Because claimant has failed to raise any meritorious allegations of error with respect to the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, that finding is affirmed. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] As there was no medical evidence in the prior claim supporting a finding of total respiratory disability, *see* Director's Exhibit 1, the administrative law judge's failure to consider the previously submitted evidence constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).

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