

BRB No. 07-0575 BLA

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

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (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 - Denial of Benefits (05-BLA-05969) of Administrative Law Judge Donald W. Mosser on a subsequent claim<sup>1</sup> 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). In a decision dated February 26, 2007, the

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<sup>1</sup> Claimant filed his initial claim for benefits on June 25, 1991. Director's Exhibit 1. Following three modification proceedings, that claim was finally denied on May 30, 2002, for failure to establish total disability. *Id.* Claimant filed his current claim for benefits on August 25, 2004. Director's Exhibit 3.

administrative law judge credited claimant with nineteen years of coal mine employment<sup>2</sup> and found that because the weight of the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204, 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 contends that the administrative law judge erred in finding that he was not totally disabled pursuant to Section 718.204(b)(2)(iv).<sup>3</sup> The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's denial of benefits.

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'Keefe 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).

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

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<sup>2</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). While the administrative law judge did not make a specific finding pursuant to Section 718.204(b)(2)(iii), the record contains no evidence of cor pulmonale with right-sided congestive heart failure.

establish that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element 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).

Claimant asserts that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at Section 718.204(b)(2)(iv). Claimant's Brief at 3. Claimant initially contends that in finding that the opinions of Drs. Simpao and Baker did not establish total disability, the administrative law judge did not consider the exertional requirements of claimant's usual coal mine work. We disagree.

The administrative law judge specifically found that claimant worked as a pump operator, roof bolter and miner operator, and that his work involved heavy manual labor. Decision and Order at 3. In considering the medical opinion evidence relevant to whether claimant could perform this work, the administrative law judge properly noted that Dr. Simpao diagnosed a minimal pulmonary impairment that was not totally disabling. Decision and Order at 7-8; Director's Exhibit 23. The record reflects that in concluding that claimant's minimal impairment was not totally disabling, Dr. Simpao indicated that he was aware that claimant's jobs, including those as a roof bolter and a miner operator, were "very physical." Director's Exhibit 23. Therefore, as the administrative law judge could rationally conclude that Dr. Simpao understood the demands of claimant's coal mine work, we hold that the administrative law judge permissibly concluded that Dr. Simpao's opinion, that claimant is not totally disabled, was well documented and reasoned, and entitled to great weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552, (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 124, (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

With respect to Dr. Baker's opinion, the administrative law judge accurately stated that Dr. Baker diagnosed a minimal impairment, but offered no opinion as to whether claimant was totally disabled. Decision and Order at 8; Director's Exhibit 15. Contrary to claimant's assertion, because the administrative law judge permissibly credited the opinion of Dr. Simpao, who considered the physical demands of claimant's coal mine work and concluded that claimant's minimal impairment was not totally disabling, the administrative law judge was not required to compare Dr. Baker's similar diagnosis of a minimal impairment with the exertional requirements of claimant's usual coal mine employment. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We, thus, reject claimant's initial argument.

Claimant additionally argues that given the progressive, irreversible nature of pneumoconiosis and the considerable amount of time that has passed since claimant was

first diagnosed, it can be concluded that claimant is totally disabled. Claimant's Brief at 3. Claimant's argument is without merit, as an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we reject claimant's argument and affirm the administrative law judge's finding that the weight of the newly submitted medical opinion evidence did not establish the existence of a totally disabling pulmonary impairment pursuant to Section 718.204(b)(iv), as supported by substantial evidence.

Because claimant failed to establish total disability, the condition of entitlement upon which the prior claim was denied, we affirm the administrative law judge's denial of benefits at 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

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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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge