BRB No. 08-0546 BLA

G.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/26/2009
	)	
ACTION COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS	)	
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet Walker Rundle & Associates), Pineville, West Virginia, for claimant

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (07-BLA-5235) of Administrative Law Judge Daniel L. Leland rendered 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). Claimant filed seven previous claims for benefits, all of which were finally denied. Director's Exhibits 1-7. Claimant's seventh claim, filed on January 17, 2002, was denied by the district director on November 13, 2002, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 7. Claimant filed this eighth and subsequent claim for benefits on February 14, 2006. Director's Exhibit 9.

The administrative law judge credited claimant with twenty-three years of coal mine employment,[1] and found that he established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as stipulated by the parties. The administrative law judge further found that the medical evidence developed since the denial of claimant's previous claim did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in the applicable condition of entitlement, as required by 20 C.F.R. §725.309(d), to be entitled to review of the merits of his claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in considering only the new pulmonary function studies under 20 C.F.R. §§718.204(b)(2)(i), 725.309(d), rather than comparing them to the old studies submitted in the previous claims. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[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. 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. Where a miner files a claim for benefits more than one year after the final

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 10.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 did not establish total disability. Director's Exhibit 7. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the two new pulmonary function studies, dated March 14 and April 13, 2006, were non-qualifying,[3] and thus did not establish total disability. Decision and Order at 4; Director's Exhibits 17, 20. Claimant argues that the administrative law judge erred by not considering the earlier pulmonary function studies of record. Claimant asserts that the administrative law judge should have compared the old pulmonary function studies with the new to determine whether claimant's condition has actually worsened over time, to determine whether the required change in the applicable condition was established. Claimant's Brief at 6, citing *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480, 23 BLR 2-44, 2-65-66 (6th Cir. 2003) and *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 609, 22 BLR 2-288, 2-300 (6th Cir. 2001). Claimant's argument lacks merit.

Under 20 C.F.R. §725.309(d), the administrative law judge's threshold inquiry is limited to the new evidence. Specifically, "the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). Therefore, we reject claimant's argument that the administrative law judge was required to conduct a qualitative comparison of the old and new pulmonary function studies under 20 C.F.R. §725.309(d).[4]

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[4] The Sixth Circuit cases upon which claimant relies are inapposite for this purpose because they construed the prior version of 20 C.F.R. §725.309, while the current claim was filed after the effective date of the amendments to this regulation. Director's Exhibit 9; *see* 20 C.F.R. §725.2(c). Under revised 20 C.F.R. §725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, as a threshold matter, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in

Substantial evidence supports the administrative law judge's finding that the new pulmonary function studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The finding is therefore affirmed.

Because claimant does not otherwise challenge the administrative law judge's finding that total disability was not established by the new evidence pursuant to 20 C.F.R. §718.204(b)(2), the finding is affirmed.[5] *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); n.2, *supra*. Consequently, we affirm the administrative law judge's finding that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the denial of benefits. *See White*, 23 BLR at 1-7.

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connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 65 Fed. Reg. 79,968 (Dec. 20, 2000); 64 Fed. Reg. 54,984 (Oct. 8, 1999).

[5] In any event, the administrative law judge permissibly found that Dr. Mullins' new medical report diagnosing a "moderate" impairment did not establish total disability because Dr. Mullins "did not state that this impairment would prevent the miner from working at his last coal mine job as a continuous miner operator," and "made no effort to explain the extent to which the miner's pulmonary impairment is totally disabling." Decision and Order at 4; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*); Director's Exhibit 17.

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