BRB No. 08-0567 BLA

W.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 03/30/2009
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

W.N., Homer City, Pennsylvania, *pro se*.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order - Denying Benefits (07-BLA-5773) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a subsequent claim filed on December 16, 2005[2] pursuant to

[1] Claimant died on January 3, 2008, while his appeal was pending. Employer's Brief at 4, n.4.

[2] This is claimant's fourth claim. The claimant's third claim was denied on July 28, 1998 by Administrative Law Judge Michael Lesniak, because claimant failed 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 thirty-four years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge noted that the only issue before him was whether claimant's total disability was due to pneumoconiosis.[3] Considering the new evidence, the administrative law judge found that it failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order - Denying Benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence.[4] *Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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establish that his pneumoconiosis was totally disabling. Claimant's request for modification was denied on September 20, 2000. Claimant took no further action until filing the present claim.

[3] The administrative law judge noted employer's concession that claimant had pathological evidence of pneumoconiosis on biopsy and that he had a totally disabling respiratory impairment. *See* 20 C.F.R. §§718.202(a)(2), 718.204(b).

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

When a claimant 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 (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 total disability due to pneumoconiosis at Section 718.204(c). Consequently, in order to have his subsequent claim considered on the merits, claimant had to submit new evidence establishing that his total disability was due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, and consistent with applicable law. It must, therefore, be affirmed.[5] Considering the new evidence relevant to disability causation, the administrative law judge properly credited the opinions of Drs. Fino and Tuteur, attributing claimant's total disability to asthma and the effects of lung cancer surgery, because he found them to be well-reasoned. In particular, the administrative law judge noted that Drs. Fino and Tuteur were aware of claimant's extensive smoking history. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge properly rejected, as unreasoned, the opinions of Drs. Celko, Jethmalani, and Begley, who found that claimant was totally disabled due to pneumoconiosis, because they were unaware of claimant's very heavy smoking history[6] and they did not consider the effects of his lung cancer surgery. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the administrative law judge properly found that there was no new evidence showing that claimant's clinical pneumoconiosis was totally disabling. Thus, because it is supported by substantial

[5] Employer asserts that the administrative law judge should have applied the doctrine of collateral estoppel to preclude claimant from relitigating the issue of whether he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c), since that issue was decided against him in his previous claim. Contrary to employer's assertion, the doctrine of collateral estoppel is not applicable in subsequent claims. *See* 20 C.F.R. §725.309; 65 Fed. Reg. 79972, 79975 (Dec. 20, 2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

[6] Claimant's medical records reflect a smoking history of approximately forty years. *See* Director's Exhibit 1.

evidence, we affirm the administrative law judge's finding that the new evidence failed to establish total disability due to pneumoconiosis at Section 718.204(c). Moreover, because claimant failed to establish a change in an applicable condition of entitlement at Section 725.309, we affirm the administrative law judge's denial of benefits.

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