BRB No. 13-0251 BLA

CONLEY HORN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG FORK DEVELOPMENT, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 03/11/2014
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

James W. Herald (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-BLA-05722) of Administrative Law Judge Lystra A. Harris denying benefits on a claim filed pursuant to the provisions

of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This claim involves a subsequent claim filed on August 18, 2009.[1]

After crediting claimant with twenty-seven years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the applicable condition of entitlement had not changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

When 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(c);[3] *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable

[1] Claimant's initial claim, filed on November 23, 2005, was denied as abandoned on June 5, 2006. Director's Exhibit 1. Claimant's second claim, filed on January 10, 2008, was denied by the district director on July 17, 2008 because claimant failed to establish that he suffered from a totally disabling pulmonary impairment. Director's Exhibit 2.

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because the evidence did not establish the existence of a totally disabling pulmonary impairment. Director's Exhibit 2. Therefore, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. *See* 20 C.F.R. §725.309(c)(3), (4).

Claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] In considering whether the new medical opinion evidence established total disability, the administrative law judge considered the medical opinions of Drs. Rasmussen and Rosenberg.[5] Dr. Rasmussen opined that claimant's exercise blood gas study results "demonstrated progressive impairment in gas exchange up to a level of exercise that was less than that which would be required of his regular coal mine employment[,] and that were he to have exercised up to a level equivalent to that work, he would have been much more hypoxic." Claimant's Exhibit 7. Although Dr. Rasmussen acknowledged that the results of claimant's objective testing were non-qualifying, and opined that claimant could perform "medium and even heavy" labor, Dr. Rasmussen concluded that claimant is totally disabled because of an impairment that prevents him from performing "very heavy manual labor." Director's Exhibits 13, 16; Claimant's Exhibit 7 at 19, 41-42. Dr. Rosenberg opined that claimant suffers from a mild airflow obstruction that is not disabling. Director's Exhibit 17. Dr. Rosenberg further opined that claimant has no restriction, and noted that his oxygenation was generally preserved. *Id.* Dr. Rosenberg, therefore, opined that, "from a pulmonary perspective, [claimant] could perform his previous coal mine job or other similarly arduous types of labor." *Id.*

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8.

[5] The administrative law judge also considered Dr. Broudy's medical opinion. Dr. Broudy opined that claimant's pulmonary function study results showed a partially reversible impairment, and that claimant's arterial blood gas study results showed mild hypoxia at rest. Director's Exhibit 19. Dr. Broudy also noted that claimant's pulmonary function study results "exceed[ed] the minimum federal disability criteria." *Id.* The administrative law judge, however, found that because Dr. Broudy did not "translate the test results into what they mean regarding the limitations of [c]laimant," the doctor's opinion was of "little value" in determining whether claimant is totally disabled from a respiratory standpoint. Decision and Order at 14. Because no party's challenges the administrative law judge's finding regarding Dr. Broudy's opinion, it is affirmed. *Skrack*, 6 BLR at 1-711.

In considering whether the new medical opinion evidence established total disability, the administrative law judge initially addressed the exertional requirements of claimant's most recent coal mine employment as a continuous miner operator. The administrative law judge found that claimant "typically performed work requiring medium exertion and occasionally did heavier work when the [continuous] miner was non-operational." Decision and Order at 13. Because no party challenges the administrative law judge's finding regarding the exertional requirements of claimant's coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative further found that the opinions of Drs. Rasmussen and Rosenberg were entitled to equal weight:

> Both Dr. Rosenberg and Dr. Rasmussen considered the exertional limitations of the [c]laimant's job. Both reports indicated that the doctors had a good understanding of the exertional requirements involved. Both noted the general tasks performed as a continuous miner operator, as well as the additional tasks requiring more exertion performed by the [c]laimant, such as rock dusting and moving belt structure, when the [continuous] miner was non-operational. Dr. Rasmussen and Dr. Rosenberg relied on the [c]laimant's objective test results, primarily the results of the [c]laimant's arterial blood gas testing, in forming their opinions concerning the [c]laimant's total disability. However, after considering such testing, the doctors came to opposing conclusions. Based on the doctors' detailed analysis, reliance on objective testing and careful consideration of the [c]laimant's work requirements, I find that both opinions are well-reasoned and afford them equal weight.

Decision and Order at 14 (citations to exhibit numbers omitted). The administrative law judge, therefore, found that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4.

In considering whether the new medical opinion evidence established total disability, the administrative law judge considered the documentation and reasoning of the physicians' opinions, the physicians' qualifications, and the exertional requirements of claimant's job as a continuous miner operator. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Thereafter, the administrative law judge determined that the opinions of Drs. Rasmussen and Rosenberg were well-reasoned, and entitled to equal weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Claimant alleges no error in regard to the administrative law judge's determination that the opinions of Drs. Rasmussen and Rosenberg are entitled to equal weight. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.[6]

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309(d). We, therefore, affirm the denial of benefits.

[6] We further note it is questionable whether Dr. Rasmussen's opinion supports a finding of total disability, given the administrative law judge's unchallenged finding that claimant's usual coal mine employment required medium and occasionally heavy exertion. Dr. Rasmussen opined that claimant could, in fact, perform work requiring "medium and even heavy exercise." Claimant's Exhibit 7 at 42. Although Dr. Rasmussen opined that claimant could not perform "very heavy work," the administrative law judge did not find that claimant's usual coal mine employment, as a continuous miner operator, required such work.

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