BRB No. 13-0495 BLA

JOHN D. WARD, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/31/2014
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-BLA-5184) of Administrative Law Judge Richard A. Morgan 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 March 14, 2011.[1]

[1] Claimant's previous claim, filed on September 8, 1999, was denied by the district director on November 9, 1999, because claimant failed to establish the existence of a totally disabling pulmonary impairment. Director's Exhibit 1.

After crediting claimant with at least thirty-one 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)(2). 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 the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

[2] Claimant's last coal mine employment was in West Virginia. Hearing Transcript at 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth 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 1. 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] Claimant specifically argues that the administrative law judge erred in finding that Dr. Shamma-Othman's opinion did not establish the existence of a totally disabling pulmonary impairment. Dr. Shamma-Othman, who performed the Department of Labor's pulmonary evaluation of claimant on April 27, 2011, initially opined that claimant was "impaired" due to hypoxic respiratory failure, coal workers' pneumoconiosis, sleep apnea, and coronary artery disease. Director's Exhibit 15. During a deposition on October 11, 2012, Dr. Shamma-Othman, when asked whether claimant retained the pulmonary and respiratory capacity to return to his previous coal mine work, stated that:

> Looking at his examination that day, he had multiple . . . other medical problems, you know, besides the question of coal workers' pneumoconiosis. He has significant hypoxia at rest and he has sleep apnea and the coronary [disease], so with all this together, he cannot go back to work.

Employer's Exhibit 10 at 16.

The administrative law judge found that Dr. Shamma-Othman's initial report determination that claimant was "impaired," was "not tantamount to a total disability diagnosis." Decision and Order at 20 n.31. The administrative law judge further found that Dr. Shamma-Othman's deposition testimony did not support a finding of a totally disabling pulmonary impairment because the doctor's testimony merely supported a finding that claimant was disabled by his "multiple medical problems." *Id.* at 20.

Although claimant asserts that Dr. Shamma-Othman's opinion is entitled to the greatest weight because she was the only physician to review the physical evidence, claimant does not specifically challenge the administrative law judge's bases for finding Dr. Shamma-Othman's opinion insufficient to support a finding of a totally disabling

[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).

pulmonary impairment. Because claimant provides the Board with no basis upon which to review the administrative law judge's findings, we affirm the administrative law judge's determination that Dr. Shamma-Othman's opinion does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] *See* 20 C.F.R. §802.211(b); *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); *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983). The administrative law judge correctly stated that all of the remaining physicians who submitted new medical opinions, namely Drs. Bellotte and Fino, opined that claimant retains the pulmonary capacity to perform his previous coal mine employment.[6] Decision and Order at 20. Because it is based upon substantial evidence, we affirm 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).

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 denial of his prior claim.[7] 20 C.F.R. §725.309(c). We therefore affirm the denial of benefits.

[5] We note that claimant's assertion, that Dr. Shamma-Othman was the only physician to review the physical evidence, has no merit. Dr. Bellotte, like Dr. Shamma-Othman, personally examined claimant, and Drs. Bellotte and Fino each reviewed all of the medical evidence in the record, including the results of claimant's objective testing. Employer's Exhibits 1, 9.

[6] Drs. Bellotte and Fino both opined that claimant does not have a totally disabling pulmonary or respiratory impairment. Although Dr. Bellotte opined that claimant is disabled by "multiple other diagnosed medical conditions," he opined that claimant does not have a disabling pulmonary impairment. Employer's Exhibit 11 at 27-28. Dr. Fino opined that claimant is able, from a respiratory standpoint, to return to his last coal mine employment. Employer's Exhibit 12 at 5.

[7] Because we have affirmed the administrative law judge's finding that the evidence did not establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's determination that claimant failed to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

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