BRB No. 03-0715 BLA

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| FREDDIE L. ASHER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| LEECO, INCORPORATED | ) | DATE ISSUED: 05/24/2004 |
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| 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 Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order--Denying Benefits (2002-BLA-5176) of Administrative Law Judge Rudolph L. Jansen rendered on a 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).[1] Claimant's prior application for benefits

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

filed on April 9, 1997, was finally denied by the Board on September 29, 1999, because claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment.[2] Claimant had established the existence of pneumoconiosis arising out of coal mine employment in his former claim. Director's Exhibit 1. On February 8, 2001, claimant filed his current application, which is considered a duplicate claim because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3. The administrative law judge credited claimant with twenty-three years of coal mine employment[3] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that claimant failed to establish a material change in conditions. 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 his analysis of the medical opinion evidence relevant to the issue of total disability because he improperly accorded diminished weight to Dr. Baker's opinion. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[4]

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).

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[2] *Asher v. Leeco, Inc.*, BRB No. 99-0215 BLA (September 29, 1999) (unpublished).

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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*).

[4] The administrative law judge's findings that claimant has twenty-three years of coal mine employment and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where 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(d). 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 that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant contends that the administrative law judge should not have rejected Dr. Baker's opinion because it did not rely solely on claimant's work history or non-qualifying pulmonary function studies. Claimant also contends that the administrative law judge must consider the exertional requirements of claimant's usual coal mine employment in considering an opinion on total disability.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge noted that Dr. Baker was the only physician of record to find claimant totally disabled by opining that claimant could not perform his usual coal mine employment. The administrative law judge noted that Dr. Baker had administered a pulmonary function study which yielded normal results and a blood gas study which revealed mild hypoxemia. Decision and Order at 12; Director's Exhibit 14. The administrative law judge, citing *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), accorded less weight to Dr. Baker's opinion because it stated only that claimant was unable to work in a dusty environment. Further, in considering Dr. Baker's opinion, along with the opinions which did not find claimant to be totally disabled, and the non-qualifying pulmonary function study and blood gas study evidence, the administrative law judge concluded that the evidence failed to establish a totally disabling respiratory impairment. Decision and Order at 13.

In a report dated February 21, 2001, referring to objective testing, history, symptoms, and examination which were done, Dr. Baker found claimant to have a respiratory impairment. He also stated "that persons who develop pneumoconiosis

should limit further exposure to the offending agent." (coal dust) "This would imply … [claimant] is 100% occupationally disabled." Director's Exhibit 14.

On reviewing Dr. Baker's opinion and the administrative law judge's findings, we conclude that the administrative law judge permissibly accorded it less weight as being a recommendation against further coal dust exposure and, therefore, insufficient to establish total disability. *Zimmerman*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258; *see Anderson*, 12 BLR at 1-112. Further, contrary to claimant's arguments, Dr. Baker's opinion was not based solely on work history or non-qualifying objective studies. Director's Exhibit 14. Nor, did the administrative law judge fail to consider the nature of claimant's usual coal mine employment. Decision and Order at 6; *see Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984).[5] Additionally, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education or work experience in relation to his ability to work outside of the coal mine industry. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by the record, *see Anderson*, 12 BLR 1-111. Considering Dr. Baker's opinion, along with the other medical evidence of record, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*), and failed, therefore, to establish a material change in condition. *See Ross*, 42 F.3d 993, 19 BLR 2-10.

[5] The administrative law judge found that claimant's work consisted of operating the scoop, bolting machine and bridge carrier, and required lifting equipment and materials in excess of fifty pounds. Decision and Order at 6.

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

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment. The majority has held that the administrative law judge acted properly in according little weight to Dr. Baker's opinion because it was no more than a report opining that claimant should not be further exposed to coal mine dust which cannot be construed as an opinion finding claimant totally disabled. The majority, however, overlooks the fact that in addition to stating claimant should not be exposed to further dust, Dr. Baker also diagnosed mild resting arterial hypoxemia based on an arterial blood gas study and stated that claimant had a Class I respiratory impairment, based on pulmonary function study results, pursuant to the Fifth Edition of the A.M.A., Guides to the Evaluation of Permanent Impairment. Director's Exhibit 14. The administrative law judge found that claimant's work consisted of operating the scoop, bolting machine and bridge carrier, and required lifting equipment and materials in excess of fifty pounds. Decision and Order at 6. In addition, claimant testified that all of his coal mine employment had involved some degree of hard, manual labor. Director's Exhibit 22 at 14. Thus, Dr. Baker's findings may be sufficient to establish total respiratory disability when compared with the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Wilson v. Benefits Review Board*, 748 F.2d 198, 7 BLR 2-38 (4th Cir. 1984); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984); *Vargo v. Valley Camp Coal Co.*, 7 BLR 1-901 (1985); *Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983). The administrative law judge's Decision and Order denying benefits should,

therefore, be vacated and the case remanded for the administrative law judge to consider Dr. Baker's opinion in its totality and to determine whether it establishes a totally disabling respiratory impairment.

I acknowledge that the administrative law judge's failure to consider all of Dr. Baker's findings may have been harmless error, given the administrative law judge's ultimate reliance on the preponderance of non-qualifying pulmonary function and blood gas studies and the rest of the medical opinions of record which do not support a finding of total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-381 n.4 (1983). But I am reminded of the teaching of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983):

> When the [administrative law judge] fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the [administrative law judge] pursuant to 33 U.S.C. §921(b)(4) rather than attempting to fill in the gaps in the [administrative law judge's] opinion.

In light of claimant's specific argument that the administrative law judge failed to consider Dr. Baker's finding of a Class I respiratory impairment, I would remand this case to the administrative law judge to make the necessary findings pursuant to Section 718.204.

I concur in all other respects with the majority opinion.

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REGINA C. McGRANERY
Administrative Appeals Judge