

BRB No. 07-0744 BLA

L.A.)
)
 Claimant-Petitioner)
)
 v.)
)
 RAGLAND COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 05/28/2008
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND/BRICK)
 STREET)
)
 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charlestown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2005-BLA-05923) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge reviewed the newly submitted evidence and determined that it was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).¹ Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in assigning less weight to the opinion of Dr. Gaziano on the issues of whether claimant established the existence of legal pneumoconiosis and disability causation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a 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.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant filed a claim for benefits on June 22, 1993, which was denied by the district director on November 16, 1993, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on December 11, 1995. Director's Exhibit 2. The district director denied benefits, and claimant requested a hearing, which was scheduled for January 9, 1998. *Id.* When claimant failed to appear for the scheduled hearing, Administrative Law Judge Richard A. Morgan issued an Order to Show Cause why the claim should not be dismissed. *Id.* Claimant failed to respond to the Order to Show Cause and the claim was subsequently dismissed on February 12, 1998. *Id.* Claimant filed a third claim on July 25, 2001, which was denied by the district director on June 13, 2002. Director's Exhibit 3. The district director found that while claimant suffered from pneumoconiosis, the evidence was insufficient to establish that the disease arose out of coal mine employment or that claimant was totally disabled by pneumoconiosis. Director's Exhibit 3. Claimant next filed a request for modification, which was denied by the district director on May 2, 2003. *Id.* Claimant took no further action until he filed the current subsequent claim on June 3, 2004. Director's Exhibit 5. The district director issued a Proposed Decision and Order awarding benefits on February 4, 2005. Director's Exhibit 26. Employer requested a hearing, which was held on January 3, 2007. Thereafter the administrative law judge issued his Decision and Order – Denying Benefits on May 9, 2007.

² Because claimant's last coal mine employment was in Kentucky, 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*); Director's Exhibit 6.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 725.309(d), 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(d); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *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). A miner is required to submit new evidence demonstrating one of these elements of entitlement in order for the administrative law judge to proceed to consideration of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under the former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

In evaluating whether claimant established a change in an applicable condition of entitlement pursuant to Section 725.309, the administrative law judge noted that his “consideration of the ‘causal relationship’ issue requires that I also evaluate the ‘pneumoconiosis’ issue.” Decision and Order at 11. The administrative law judge determined that because the evidence failed to establish that claimant suffered from pneumoconiosis pursuant to Section 718.202(a)(1)-(4), claimant “cannot establish a causal relationship between the disease and his coal mine employment.” Decision and Order at 12. Furthermore, since claimant failed to establish the existence of pneumoconiosis, the administrative law judge found that claimant was unable to establish that he was totally disabled due to pneumoconiosis. Decision and Order at 13. The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309.

Claimant challenges the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).³ Claimant specifically argues:

When discussing Dr. Gaziano's report, the [administrative law judge] felt that Dr. Gaziano failed to provide sufficient rationale for his opinion. However, a review of the evidence clearly shows that Dr. Gaziano did in fact provide more than sufficient rationale for his conclusion that coal mining was part of the etiology of the impairments suffered by [claimant]. The rationale was sufficient enough for the Director to make an Award of Pneumoconiosis.

It is [claimant's] contention that the [administrative law judge] misconstrued the report and rationale of Dr. Gaziano and as such the [administrative law judge's] finding that [claimant] did not suffer from coal workers' pneumoconiosis was not supported by substantial evidence.

Claimant's Brief at 4. We disagree.

Contrary to claimant's suggestion, an administrative law judge is not bound by the findings of the district director. The regulations provide that "any party to a claim ... shall have the right to a hearing concerning any contested issue of fact or law unresolved by the district director." 20 C.F.R. §725.450; *see* 20 C.F.R. §725.455(a); *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *Rice v. Sahara Coal Co.*, 15 BLR 1-19, 1-20 (1991) (*en banc*); *Pruitt v. USX Corp.*, 14 BLR 1-129 (1990). Furthermore, 20 C.F.R. §725.455(a) specifically states:

The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in §725.421(b)(8), any finding or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge.

20 C.F.R. §725.455(a). We therefore reject claimant's argument that, in light of the district director's award of benefits, the administrative law judge erred in considering, *de novo*, the proper weight to accord Dr. Gaziano's opinion at Section 718.202(a)(4).

We also reject claimant's contention that the administrative law judge erred in rendering his credibility determinations. The administrative law judge properly

³ We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), as this finding is unchallenged by claimant on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

considered three new medical opinions at Section 718.202(a)(4). Dr. Gaziano examined claimant on June 22, 2004 and diagnosed chronic obstructive pulmonary disease (COPD) due to a combination of smoking, asthma, and coal mine employment. Director's Exhibit 16. Dr. Zaldivar examined claimant on November 3, 2004 and diagnosed that claimant suffered from severe, smoking-induced emphysema and opined that there was no evidence of clinical or legal pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 7. Dr. Crisalli also examined claimant on August 7, 2006 and diagnosed emphysema and chronic bronchitis, which he attributed to smoking and not coal dust exposure. Employer's Exhibit 8.

The administrative law judge noted that since Drs. Gaziano, Zaldivar, and Crisalli are Board-certified in pulmonary medicine, he was unable to resolve the conflict in the medical opinion evidence at Section 718.202(a) based on a comparison of the relative qualifications of the physicians. Decision and Order at 12. The administrative law judge, however, found Dr. Crisalli's opinion, that claimant did not have pneumoconiosis, to be the most persuasive. *Id.* The administrative law judge explained that he found Dr. Gaziano's diagnosis of COPD due, in part, to coal dust exposure, to be undermined by his reliance on a smoking history "less extensive than the one acknowledged by [c]laimant in his testimony at the formal hearing."⁴ Decision and Order at 6 n.3, citing Hearing Transcript at 16-19. The administrative law judge also properly found that Dr. Gaziano reviewed less objective evidence than Dr. Crisalli, and he had "failed to provide the rationale for his medical assessment, as requested on the [Department of Labor] form report." Decision and Order at 7; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989).

As the administrative law judge's credibility determinations are within his discretion as the trier-of-fact, we affirm the administrative law judge's decision to assign Dr. Gaziano's opinion less weight at Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Although claimant maintains that Dr. Gaziano's opinion is sufficiently reasoned to support an award of benefits, his argument amounts to no more than a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-112. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Because claimant failed to establish that he has pneumoconiosis, he was unable establish the requisite elements of causal relationship and disability causation, the two elements of entitlement previously

⁴ Dr. Gaziano noted that claimant smoked two packs every three weeks starting in 1959 and ending in the 1970's. Director's Exhibit 16. Claimant testified that he smoked one-half pack of cigarettes per day, beginning at the age of sixteen or seventeen (in the year of 1955 or 1956) and continuing until 1996. Hearing Transcript at 18.

adjudicated against claimant in his prior claim. Thus, we affirm the administrative law judge's finding that claimant failed to satisfy his burden to prove a change in an applicable condition of entitlement pursuant to Section 725.309 and we affirm the denial of benefits. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge