BRB No. 05-0410 BLA

FRANCIS L. BARKUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/22/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Onwudinjo), Pottsville, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6144) of Administrative Law Judge Paul H. Teitler 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).[1] The administrative law judge credited

[1] Claimant's initial claim, filed on February 18, 1997, was denied by Administrative Law Judge Robert Kaplan in a Decision and Order issued on October 8, 1998. Director's Exhibit 1. Judge Kaplan found that the evidence was sufficient to establish five years of coal mine employment and the existence of pneumoconiosis, but

claimant with five years of coal mine employment and determined that the newly submitted evidence of record was insufficient to establish that claimant's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge also found that the weight of the newly submitted evidence did not establish that claimant is disabled from a pulmonary standpoint pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, claimant could not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge further determined that claimant failed to establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.203(c) and 718.204. In response, the Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge's denial of benefits is supported by substantial evidence.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of

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insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment or that claimant was totally disabled. *Id.* Claimant appealed the decision to the Board. In a Decision and Order issued on October 20, 1999, the Board vacated the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(iv) and remanded the case to the district director to provide claimant with a complete, credible pulmonary evaluation. *Barkus v. Director, OWCP*, BRB No. 99-0201 BLA (Oct. 20, 1999) (unpub.). After the additional testing was performed, the district director found that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment or total disability pursuant to 20 C.F.R. §§718.202, 718.203, and 718.204, in a letter dated June 9, 2000. Director's Exhibit 1. Claimant took no further action until he filed this subsequent claim on June 9, 2003.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding crediting claimant with five years of coal mine employment and his finding that claimant did not establish total disability pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iii). *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§'718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

Because he credited claimant with less than ten years of coal mine employment, the administrative law judge initially considered whether the newly submitted evidence supported a finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). The administrative law judge discredited the reports in which Drs. Simelaro and Kraynak rendered opinions favorable to claimant because they relied upon claimant's inconsistent testimony. Decision and Order at 7. Claimant asserts that the newly submitted opinions of Drs. Simelaro and Kraynak are sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment, but claimant does not allege any error in the administrative law judge's determination that claimant's testimony and statements regarding the environmental conditions he encountered while employed by Bethlehem Steel were "highly inconsistent" and, therefore, entitled to little weight. Thus, we affirm the administrative law judge's determination to discredit the doctors' opinions because they were not supported by substantial evidence.[3] Decision and Order at 6-7; *Addison v. Director, OWCP*, 11 BLR

[3] The administrative law judge found that in his 1997 claim, claimant stated that he was exposed to dust, gas, and fumes while working for Bethlehem Steel, but in his subsequent 2003 claim, he stated that he was not exposed to dust, gas, or fumes while working with Bethlehem Steel. Decision and Order at 6; Director's Exhibits 1, 5. The administrative law judge further found that at the 1998 hearing, claimant testified that his work at Bethlehem Steel from 1954 through 1989 did not involve coal mining, while at the 2004 hearing, claimant testified that he was exposed to significant coal dust at Bethlehem Steel. Decision and Order at 6; Director's Exhibit 1; January 28, 1998 Hearing Transcript at 13; August 19, 2004 Hearing Transcript at 13-15. The administrative law judge further found that in a letter to Claims Examiner Karen Vilga, dated July 3, 1997, claimant's attorney stated that claimant was never engaged in coal mining with Bethlehem Steel. *Id*.

1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). The administrative law judge also rationally found that the probative value of these opinions was diminished by the physicians' failure to address the other forms of dust exposure claimant experienced while at Bethlehem Steel. Decision and Order at 7; Director's Exhibits 14, 41; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

With respect to Section 718.204(b)(2)(i), claimant argues that the pulmonary function studies obtained by Dr. Kraynak on September 23, 2003 and January 26, 2004 produced qualifying results which support a finding of total disability. This contention is without merit. The administrative law judge properly considered the highest of the three pre-bronchodilator attempts that claimant made on the FEV1, FVC, and MVV maneuvers and correctly determined that they did not produce qualifying values. Decision and Order at 8; 20 C.F.R. §718.204(b)(2)(i); Appendix B to 20 C.F.R. Part 718; Director's Exhibit 19; Claimant's Exhibit 2; *see Braden v. Director, OWCP*, 6 BLR 1-1083 (1984). The administrative law judge's finding is therefore affirmed.

Regarding the administrative law judge's determination that the medical opinion evidence does not support a finding of total disability under Section 718.204(b)(2)(iv), claimant asserts that Dr. Kraynak, claimant's treating physician, submitted a well-reasoned and documented opinion in which he diagnosed total respiratory disability. Claimant does not identify any error in the administrative law judge's finding that the weight of the medical opinion evidence establishes that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Dr. Kraynak's opinion was found to be outweighed by the opinions of Drs. Mariglio and Santarelli, who are more highly qualified than Dr. Kraynak and whose opinions were better supported by the objective evidence. Accordingly, we must affirm this finding. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because we have affirmed the administrative law judge's determination that claimant did not establish total disability pursuant to Section 718.204(b), we also affirm his finding that claimant cannot establish that he is totally disabled due to pneumoconiosis under Section 718.204(c). Consequently, we also affirm the administrative law judge's determination that claimant has not established a change in an

applicable condition of entitlement pursuant to Section 725.309(d).[4] *White*, 23 BLR at 1-3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] Claimant has chosen not to challenge the administrative law judge's decision that the existence of pneumoconiosis is not a relevant applicable condition of entitlement in this case. Thus, we will not address this issue. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We note that for the purposes of this appeal, the Director states that he accepts the administrative law judge's finding that the issue of pneumoconiosis was not decided adversely to claimant in the prior claim, but he does not concede that claimant has pneumoconiosis and reserves the right to contest the existence of pneumoconiosis in any additional proceedings. Director's Response Brief at 2, n.1.