BRB No. 06-0394 BLA

ABRAHAM COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	DATE ISSUED: 11/30/2006
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Abraham Collins, Manchester, Kentucky, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denial of Benefits (04-BLA-6227) of Administrative Law Judge Thomas F. Phalen, Jr. 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] After

---

[1] The administrative law judge properly found that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3; Director's Exhibits 4.

determining that the instant claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement that was previously adjudicated against him, and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director Office of Workers' Compensation Programs, has filed a letter supporting affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis arising out of coal mine employment or that he is totally disabled due to pneumoconiosis. 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).

---

[2] Claimant's initial claim for benefits, filed on March 6, 1985, was finally denied on July 19, 1989 because claimant failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Director's Exhibit 1. Claimant filed his current claim on February 7, 2001. Director's Exhibit 3. The administrative law judge was notified that claimant died on August 19, 2005.

Pursuant to Section 718.202(a)(1), the administrative law judge considered the newly submitted evidence which contains one interpretation of the April 10, 2001 x-ray by Dr. Burki as negative for pneumoconiosis and one quality-only interpretation by Dr. Sargent. Decision and Order at 4, 11; Director's Exhibits 9, 10. Because there are no positive readings in the record, the administrative law judge rationally found that claimant did not establish the existence of pneumoconiosis by a preponderance of the newly submitted x-ray evidence. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; Decision and Order at 2. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that there are no biopsy results to be considered, and none of the presumptions listed at 20 C.F.R. §718.202(a)(3) are applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. The administrative law judge therefore rationally found that claimant may not establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the newly submitted evidentiary record contains one reasoned medical opinion by Dr. Burki[3] that concluded that claimant does not suffer from pneumoconiosis, and treatment records by Drs. Ali, Collatz, Mahboob, Stinnett, Saleh, and Niazi that noted COPD and bronchitis but did not link this disease to coal mine dust exposure. Decision and Order at 12; Director's Exhibits 14, 22. Contrary to claimant's allegations, the record does not contain a new opinion by Dr. Baker that states claimant had pneumoconiosis. We therefore affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 12.

In considering whether claimant established that he is totally disabled by a respiratory or pulmonary impairment under Section 718.204(b)(2)(i), (ii) the administrative law judge properly found that the newly submitted pulmonary function and blood gas studies did not produce qualifying values or were invalidated. Decision and Order at 12, 13; Director's Exhibits 9, 14, 22. The administrative law judge also properly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure to permit claimant to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

---

[3] The administrative law judge found that Dr. Burki diagnosed chronic bronchitis due to cigarette smoke. Decision and Order at 12.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge determined correctly that Dr. Burki concluded that claimant was not totally disabled from a pulmonary standpoint and that the treatment records do not include a diagnosis of total respiratory disability. Decision and Order at 13; Director's Exhibit 9, 14, 22. The Board has considered the statement from claimant's widow that Dr. Burki told her and the miner that "he had the worst case of black lung [Dr. Burki] had ever seen." Claimant's Appeal Letter at 2. However, a finding of totally disabling pneumoconiosis may not be based solely on lay testimony. 20 C.F.R. §§718.202(c), 718.204(d). We affirm, therefore, the administrative law judge's finding that because there are no newly submitted medical reports diagnosing a total pulmonary or respiratory disability, claimant has failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1990); *Carson v. Westmoreland Coal Co.,* 19 BLR 1-16 (1994).

Because we have affirmed the administrative law judge's determination that claimant has not established a change in an applicable condition of entitlement that defeated the award of benefits in his prior claim, we must also affirm the denial of benefits. *See* 20 C.F.R. §725.309(d); *White,* 23 BLR at 1-3.

Accordingly, we affirm the administrative law judge's Decision and Order – Denial of Benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge