

BRB No. 07-0241 BLA

K.F.)
)
 Claimant-Petitioner)
)
 v.)
)
 HALL & HYLTON MINING COMPANY,)
 INCORPORATED)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: 11/21/2007
 COMPANY)
)
 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis), Hazard, Kentucky, for employer and carrier.

Rita Roppolo (Jonathan L. Snare, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05617) of Administrative Law Judge Adele Higgins Odegard 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 credited claimant with ten years of coal mine employment pursuant to the parties' stipulation, and adjudicated this subsequent claim, filed on September 4, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was insufficient to establish total respiratory disability.¹ The administrative law judge found that the new evidence submitted in support of this subsequent claim was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and therefore, claimant had failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv).² Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a).

¹ Claimant filed his original claim for benefits on January 26, 1990. Director's Exhibit 1. In a Decision and Order issued on February 1, 1993, Administrative Law Judge Bernard J. Gilday, Jr., denied benefits, finding that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but insufficient to establish total respiratory disability. On appeal, the Board affirmed Judge Gilday's denial of benefits. *K.F. v. Hall & Hylton Mining Co.*, BRB No. 93-1035 BLA (Aug. 22, 1994)(unpub.).

² Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. We note that 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 (2007). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, arguing that he met his obligation to provide claimant with a pulmonary evaluation that complies with the requirements of Section 413(b) of the Act.³

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.⁴ 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to 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 total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant maintains that the newly submitted opinion of Dr. Baker is reasoned, documented, and sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv), as Dr. Baker determined that claimant "has a Class 2 impairment with the FEV₁ between 60% and 79% of predicted. . . . based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. . . . [and]

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

has a second impairment, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. . . .[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.” Claimant’s Brief at 3; Director’s Exhibit 30. Claimant asserts that the administrative law judge should not have rejected the opinion for the reasons provided, but instead should have compared the exertional requirements of claimant’s usual coal mine employment with Dr. Baker’s assessment of disability. Claimant’s Brief at 3-5. Claimant further contends that, since pneumoconiosis has been proven to be a progressive and irreversible disease, and a considerable amount of time has passed since claimant’s initial diagnosis of pneumoconiosis, it can be assumed that claimant’s condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. Claimant’s Brief at 5. Claimant’s arguments are without merit.

The administrative law judge accurately reviewed Dr. Baker’s report, and permissibly determined that the physician’s assessment of a Class 2 impairment was insufficient to support a finding of total respiratory disability because Dr. Baker did not address whether the impairment would prevent claimant from performing the duties of his usual coal mine employment as a surface miner operating a rock drill. Decision and Order at 12-13, 20; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Moreover, since a physician’s recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988), the administrative law judge properly found that this portion of Dr. Baker’s opinion was insufficient to support a finding of total disability. Decision and Order at 20. Claimant’s argument that he must be assumed to be totally disabled because pneumoconiosis is a progressive and irreversible disease is rejected, as an administrative law judge’s findings of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8. As the administrative law judge’s findings with regard to Dr. Baker’s opinion are supported by substantial evidence, and as claimant has not challenged the administrative law judge’s determination that the remaining medical opinions of Drs. Hussain, Lane, Dahhan, and Fino also did not establish total disability, we affirm the administrative law judge’s finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Consequently, we affirm the administrative law judge’s finding that this subsequent claim must be denied because claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d)(2), (3). *See White*, 23 BLR at 1-7.

Lastly, claimant argues that the Director violated his duty under Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a), to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim, as the administrative law judge discounted Dr. Hussain's opinion on the issue of the existence of pneumoconiosis due to unexplained inconsistencies in the physician's two reports. Claimant's Brief at 5-6; Decision and Order at 15. Claimant's arguments are rejected. The administrative law judge found that the weight of the evidence established the existence of pneumoconiosis in the present claim as well as in the previous claim, and the flaws in Dr. Hussain's opinion identified by claimant are not pertinent to the dispositive issue in this case. Consequently, as the Director indicates, remand for clarification of Dr. Hussain's opinion on the issue of the existence of pneumoconiosis would be futile.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge