

BRB No. 07-0309 BLA

R.A. )  
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 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 11/23/2007  
 )  
 NALLY & HAMILTON ENTERPRISES )  
 )  
 and )  
 )  
 LIBERTY MUTUAL INSURANCE )  
 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 on Remand – Denial of Benefits of Larry S. Merck, 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 Law Offices), Hazard, Kentucky, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand –Denial of Benefits (03-BLA-6155) of Administrative Law Judge Larry S. Merck 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). Claimant filed this third and

instant claim on September 12, 2001.<sup>1</sup> Director's Exhibit 4. This case is before the Board for the second time. In *[R.A.] v. Nally & Hamilton Enters.*, BRB No. 05-0367 BLA (Feb. 9, 2006)(unpub.), the Board affirmed Administrative Law Judge Daniel J. Roketenetz's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), but vacated his determination that Dr. Baker did not diagnose legal pneumoconiosis, because Judge Roketenetz did not address the totality of Dr. Baker's pulmonary diagnoses which, if fully credited, could support a finding of legal pneumoconiosis. Thus, the Board remanded the case for reconsideration of whether Dr. Baker's opinion established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

On remand, the case was reassigned to Judge Merck (the administrative law judge), as Judge Roketenetz had retired. Upon consideration of Dr. Baker's opinion, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Consequently, the administrative law judge determined that the newly submitted evidence was insufficient to establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final pursuant to 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 finding that Dr. Baker's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (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,

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<sup>1</sup> Claimant filed his first claim for benefits on October 10, 1991, and it was finally denied by the Board because the evidence did not establish total disability. *[R.A.] v. Nally & Hamilton Enters.*, BRB No. 95-0944 BLA (July 28, 1995)(unpub.). Claimant filed his second claim on August 22, 1997, which was finally denied by the Board because the evidence did not establish the existence of pneumoconiosis. *[R.A.] v. Nally & Hamilton Enters.*, BRB Nos. 99-0815 BLA, 99-0815 BLA-A (Apr. 28, 2000)(unpub.).

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” 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 the existence of pneumoconiosis. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

On appeal, claimant asserts that Dr. Baker’s opinion is well reasoned and should not have been rejected for the reasons the administrative law judge provided. Claimant also asserts that the administrative law judge “appears to have” substituted his opinion for that of a medical expert. Claimant’s Brief at 3.

By report dated October 6, 2001, Dr. Baker diagnosed: “1. Chronic Obstructive Airway Disease with moderate obstructive ventilatory defect – based on pulmonary function testing;” “2. Mild resting arterial hypoxemia – based on arterial blood gas analysis;” and “3. Chronic Bronchitis – based on history.” Director’s Exhibit 12. In the “Causation” section of his report, Dr. Baker checked “yes” to indicate that any pulmonary impairment claimant has is the result of coal dust exposure. Dr. Baker explained, “Patient has a long history of dust exposure as well as a 30-pack year history of smoking. He has a moderate obstructive airway disease. It is felt that his dust exposure may have contributed to some extent to his obstructive airway disease.” *Id.*

Contrary to claimant’s contentions, the administrative law judge reasonably found that Dr. Baker’s diagnosis of chronic bronchitis was not well reasoned because it was based upon claimant’s reported symptoms and not on objective diagnostic tests or prior medical reports. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984); Decision and Order at 7; Director’s Exhibit 12. Moreover, the administrative law judge rationally found Dr. Baker’s opinion that claimant’s coal dust exposure “may have contributed to some extent” to his obstructive airway disease, to be equivocal.<sup>2</sup> *See Island Creek Coal*

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<sup>2</sup> We reject claimant’s assertion that the administrative law judge substituted his opinion for that of a medical expert at 20 C.F.R. §718.202(a)(4), in the absence of any supporting evidence.

*Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 7-8; Director’s Exhibit 12. Therefore, the administrative law judge permissibly accorded “little weight” to Dr. Baker’s opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 8.

Consequently, as claimant makes no other specific challenge to the administrative law judge’s weighing of the newly submitted medical opinion evidence of record with respect to the existence of pneumoconiosis, we affirm the administrative law judge’s finding that claimant did not establish that he has pneumoconiosis pursuant to Section 718.202(a)(4), based on the new evidence. *See White*, 23 BLR at 1-6-7. We therefore affirm the administrative law judge’s finding that claimant did not establish a change in the sole applicable condition of entitlement, and we affirm the administrative law judge’s denial of benefits.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge