BRB No. 09-0192 BLA

EDWARD MILLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STRAIGHT CREEK COAL RESOURCES c/o ACORDIA EMPLOYERS SERVICES	)	DATE ISSUED: 11/18/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
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 – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky), Barbourville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2003-BLA-6052) of Administrative Law Judge Larry S. Merck with respect to 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] This is the second time that this case has been before the Board. In its prior Decision and Order, the Board affirmed the administrative law judge's finding that employer was bound by its concession in the prior claim that claimant has pneumoconiosis. *Mills v. Straight Creek Coal Resources*, BRB No. 06-0842 BLA, slip op. at 8 (Aug. 29, 2007) (unpub.). The Board vacated, however, the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) by establishing total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id*., slip op. at 6-7. Consequently, the Board also vacated the administrative law judge's findings, on the merits, that claimant established total disability and total disability causation. *Id*., slip op. at 7, 9. Accordingly, the award of benefits was vacated and the case was remanded to the administrative law judge for reconsideration of the newly submitted pulmonary function studies (PFSs) and the medical opinions of Drs. Powers and Baker. *Id*.

On remand, the administrative law judge determined that the newly submitted PFSs, and the medical opinion of Dr. Baker, were sufficient to establish total disability at Section 718.204(b)(2) and, therefore, a change in an applicable condition of entitlement at Section 725.309. The administrative law judge further found, based upon a consideration of the entire record, that claimant proved that he is totally disabled due to pneumoconiosis under Section 718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.204(b)(2)(i), (iv), (c). Claimant has responded and urges affirmance of the award of benefits. Employer has submitted a

[1] Claimant filed his first claim for benefits on May 18, 1993. Director's Exhibit 1. In a Decision and Order issued on May 19, 1995, Administrative Law Judge Stuart A. Levin found that substantial evidence supported employer's concession that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1), (4)(2000). Judge Levin also found, however, that the evidence failed to establish the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(2000). Accordingly, benefits were denied. No further action was taken until the filing of the subsequent claim on April 17, 2002. Director's Exhibit 3.

reply brief in which it reiterates its contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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.[3] 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).

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 claimant's initial claim was denied based upon his failure to prove that he was totally disabled, claimant must establish that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b) to proceed with his claim. Director's Exhibit 1.

The administrative law judge determined on remand that the newly submitted PFSs were sufficient to establish total disability under Section 718.204(b)(2)(i). Employer argues, however, that the administrative law judge did not comply with the Board's instruction to consider statements in which Dr. Powers suggested that claimant's PFS results were attributable to heart disease, rather than to a respiratory or pulmonary impairment. This contention is without merit. Contrary to employer's assertion, the administrative law judge rationally found that Dr. Powers's comments did not alter his determination that the PFS evidence was sufficient to establish total disability pursuant to Section 718.204(b)(2)(i). As noted by the administrative law judge, Dr. Powers stated, in a letter to claimant's attorney dated August 18, 2004, that claimant "has coal workers' pneumoconiosis and has *restrictive and obstructive respiratory physiology* in association with a right thoracotomy and bypass heart surgery." Decision and Order at 8; Claimant's Exhibit 1. In addition, Dr. Powers reported, in a treatment note dated July 2, 2002, that

---

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was not established under 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 13.

[3] The Board will apply the law 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*); Director's Exhibit 2.

"[claimant's] spirometry is quite abnormal with *restrictive and obstructive abnormalities*[.]" Claimant's Exhibit 1 (emphasis added). Dr. Powers indicated, in a letter to claimant's internist dated July 2, 2002, that "[claimant] *has significant lung impairment*[.]" *Id*. (emphasis added). In a treatment note dated October 2, 2002, Dr. Powers reported, "[d]yspnea on exertion related to limited heart rate with beta-blocker (Toprol) as well as *significant lung impairment* due to thoracotomy, TB and [coal workers' pneumoconiosis] (*restrictive disease*). *Mild obstructive defect*." *Id*. (emphasis added).[4] Because Dr. Powers stated that claimant's PFS results were indicative of a respiratory or pulmonary impairment, and did not otherwise indicate that they were invalid, the administrative law judge acted within his discretion in declining to change his determination that the valid PFS evidence, which consists of two qualifying studies, was sufficient to establish total disability at Section 718.204(b)(2)(i).

Employer also argues that the administrative law judge did not properly weigh the newly submitted medical opinion of Dr. Baker under Section 718.204(b)(2)(iv). Employer alleges, in particular, that the administrative law judge did not comply with the Board's instruction to make a finding as to the exertional requirements of claimant's usual coal mine employment. Employer also maintains that the administrative law judge should have found that the determination in the prior claim that claimant's last job, as a high drill operator, required light to sporadically moderate labor was *res judicata* or constituted the law of the case.[5]

As an initial matter, we hold that, contrary to employer's argument, the administrative law judge did not err in failing to adopt the finding rendered in the prior claim regarding the nature of claimant's usual coal mine employment. The principles of *res judicata* and collateral estoppel generally do not apply in the context of subsequent claims pursuant to Section 725.309. *See Dotson v. Director, OWCP*, 14 BLR 1-10

---

[4] The administrative law judge acted within his discretion in according little weight to Dr. Powers's remark, in a treatment note dated January 8, 2003, that claimant responded to the application of a bronchodilator, as it pertained to a pulmonary function study that is not of record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); Decision and Order on Remand at 8; Claimant's Exhibit 1.

[5] We affirm the administrative law judge's decision to accord little weight to the opinions of Drs. Powers, Repsher and Woolum, pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is unchallenged by the parties on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 9, 11-12.

(1990) (*en banc*). Moreover, in contrast to employer's concession in the prior claim that claimant has pneumoconiosis, there is no regulatory provision mandating that an administrative law judge resolve questions of fact by reference to the disposition in the prior claim. *See* 20 C.F.R. §725.309(d)(4).

We also reject employer's allegation that the administrative law judge did not render an adequate finding regarding the exertional requirements of claimant's usual coal mine employment and did not properly consider Dr. Baker's newly submitted opinion at Section 718.204(b)(2)(iv). Consistent with the Board's remand instructions, the administrative law judge set forth the evidence pertaining to the exertional requirements of claimant's various coal mining jobs and indicated that each job required significant exertion.[6] Decision and Order on Remand at 6. In addition, the administrative law judge noted correctly that he could properly find a physician's opinion sufficient to establish total disability, even if the physician did not indicate that he or she had any knowledge of the exertional requirements of the miner's usual coal mine work, if the physician stated that the miner could not perform any work that required physical exertion. Decision and Order on Remand at 5-6, *citing Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002).

Moreover, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker's opinion complied with the Sixth Circuit's holding in *Napier*. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order on Remand at 5-6; Director's Exhibit 13. The administrative law judge rationally relied upon Dr. Baker's medical report listing claimant's last job as "highwall drill," his characterization of claimant's pulmonary

---

[6] The administrative law judge indicated that claimant worked as a drill helper from 1967 to 1970, a drill operator from 1970 to 1982, a truck driver from 1982 to 1986, and a mechanic from 1986 to 1991. Decision and Order on Remand at 5; Director's Exhibit 5. The administrative law judge noted claimant's statement that as a drill helper, he was required to stand for nine hours a day, shovel rock and dirt 100 times or more per day, lift 150 pounds several times per day, and throw material ten feet, up to 1,000 times per day. *Id*. The administrative law judge also reviewed claimant's testimony that, as a truck driver, he was required to climb a steep, high ladder to get into the cab, and the climb took considerable strength and rendered him short of breath. Decision and Order on Remand at 6; Hearing Transcript at 20-21. Lastly, the administrative law judge summarized claimant's testimony that, as a mechanic, he had to perform a great deal of heavy lifting. *Id*.

impairment as "severe," his statement that claimant is "totally disabled," and his checking of a "no" box, indicating that claimant does not have "the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment." Director's Exhibit 13; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). We affirm, therefore, the administrative law judge's finding that Dr. Baker's newly submitted opinion was sufficient to establish total disability at Section 718.204(b)(2)(iv) and his finding that claimant established total disability based upon a consideration of the newly submitted evidence as a whole. Accordingly, we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309 and his finding that claimant established total disability on the merits pursuant to Section 718.204(b)(2).

Regarding the issue of total disability causation under Section 718.204(c), employer argues that the administrative law judge erred in discrediting the opinions of Drs. Powers and Repsher. Employer also argues that the administrative law judge erred in determining that Dr. Baker's opinion was sufficient to establish that pneumoconiosis was a contributing cause of claimant's total disability. These contentions are without merit.[7]

The administrative law judge rationally determined that, because Dr. Powers attributed claimant's impairment to both heart disease and coal workers' pneumoconiosis, his opinion did not conflict with a finding of total disability due to pneumoconiosis. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; Decision and Order on Remand at 16-17; Claimant's Exhibit 1. Similarly, the administrative law judge acted within his discretion in according little weight to Dr. Repsher's opinion, that any impairment shown on claimant's PFSs was likely due to heart disease, as Dr. Repsher did not diagnose pneumoconiosis and relied upon his flawed interpretation of the validity of the PFSs. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; Decision and Order on Remand at 17; Employer's Exhibits 1-4. Lastly, the administrative law judge rationally found that Dr. Baker's opinion, that claimant is totally disabled due to chronic obstructive pulmonary disease caused by coal dust exposure, was well-reasoned and well-documented and, therefore, sufficient to establish total disability due to pneumoconiosis pursuant to

---

[7] We also reject employer's argument that the administrative law judge erred in omitting Dr. Dahhan's newly submitted medical opinion from consideration. The administrative law judge acted within his discretion in excluding this opinion because none of the parties designated it as evidence. 20 C.F.R. §725.414(a)(2), (3); *see Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); 2006 Decision and Order at 9 n.12.

Section 718.204(c). *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); Decision and Order on Remand at 17-18; Director's Exhibit 13. Thus, we affirm the administrative law judge's finding that claimant satisfied his burden of proof under Section 718.204(c).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge