BRB No. 09-0414 BLA

KENNETH R. VANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT COMPANY	)	
	)	
	)	DATE ISSUED: 11/18/2009
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 on Modification – Denying Benefits (08-BLA-5694) of Administrative Law Judge Richard A. Morgan denying claimant's request for modification of the denial of 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). This case involves a subsequent claim filed on March 25, 2002.[1] Director's Exhibit 39. In the initial decision, the administrative law judge found that the new evidence, the evidence submitted since the March 23, 2001 denial of claimant's 2000 claim, did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the applicable condition of entitlement had not changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant timely requested modification of his denied subsequent claim. Director's Exhibit 56. In a Decision and Order dated February 17, 2009, the administrative law judge credited claimant with at least twenty-nine years of coal mine employment,[2] and found that the evidence submitted subsequent to the denial of claimant's 2000 claim did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and thus 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 contends that the administrative law judge erred in his evaluation of the new medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer has not filed a brief in this appeal.[3] The Director, Office of Workers' Compensation Programs, has filed a response brief urging affirmance of the denial of benefits.

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,

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[1] Claimant filed previous claims for benefits in 1988, 1998, and 2000. Director's Exhibits 1-3. On March 23, 2001, the district director denied claimant's 2000 claim, the most recent prior claim, because the evidence did not establish the existence of a totally disabling respiratory impairment. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] As the administrative law judge found, the record indicates that employer was liquidated in bankruptcy, but the record does not contain any additional information regarding the bankruptcy proceedings. Decision and Order at 4; Director's Exhibits 39, 41.

and in accordance with applicable 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a).

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 2000 claim was denied because he did not establish the existence of a totally disabling respiratory impairment. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he was totally disabled. 20 C.F.R. §725.309(d)(2), (3).

However, in considering a request for modification of the denial of a subsequent claim (which, as here, has been denied based upon a failure to establish a change in an applicable condition of entitlement), an administrative law judge should initially address whether the new evidence alone is sufficient to support a change in an applicable condition of entitlement. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). If the evidence is sufficient to establish a change in an applicable condition of entitlement, the administrative law judge would proceed to the merits of the duplicate claim.

In the decision before us on appeal, the administrative law judge found that the new evidence that he previously addressed in his 2007 Decision and Order (evidence that was submitted subsequent to the denial of claimant's 2000 claim) did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 12-13. The administrative law judge further found that the most recent evidence submitted

in connection with claimant's request for modification did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 15-17. Weighing all of the new evidence submitted since the denial of claimant's prior 2000 claim together, the administrative law judge found that it did not establish total disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 17. The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

Claimant contends that the administrative law judge erred in his evaluation of the new medical opinion evidence relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] Specifically, claimant contends that the administrative law judge erred in finding that the opinions of Drs. Baker and Rao do not establish the existence of a totally disabling respiratory impairment. We disagree.

In support of his request for modification, claimant submitted medical reports from Drs. Baker and Rao. In a report dated September 23, 2008, Dr. Baker initially opined that claimant had a moderate respiratory impairment, and explained that while claimant's pulmonary function studies were technically non-qualifying under the federal criteria for disability,[5] the values were close enough to consider claimant totally disabled. Claimant's Exhibit 1. However, on the same page, in response to the question of whether claimant has the respiratory capacity to perform his usual coal mine work, or comparable work in a dust free environment, Dr. Baker responded "yes," and explained that claimant "has borderline respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment." *Id.* Contrary to claimant's argument, the administrative law judge did not "misread" Dr. Baker's opinion, but rather reasonably concluded that Dr. Baker failed to definitively state whether claimant is, or is not, totally disabled by a respiratory impairment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order 15; Claimant's Brief at 15. The administrative law judge thus acted within his discretion in concluding that Dr.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence does not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Baker's opinion was too inconsistent, inconclusive, and unclear to support a finding of total disability. *See Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 15-16.

We further reject claimant's assertion that the administrative law judge erred in discrediting Dr. Rao's opinion. Claimant's Brief at 16. In reports dated January 2, 2007 and January 10, 2008, Dr. Rao stated that claimant exhibited severe shortness of breath, but did not explicitly address whether claimant is totally disabled from performing his usual coal mine work or comparable dust-free work. Director's Exhibits 51, 55. The administrative law judge found that Dr. Rao, therefore, failed to provide a sufficiently clear and specific assessment of claimant's respiratory impairment to allow him to determine disability, by comparing the level of impairment with the exertional requirements of claimant's job duties. Decision and Order at 13, 16; Director's Exhibits 51, 55. Specifically, the administrative law judge found that while Dr. Rao stated, in his January 10, 2008 report, that claimant cannot walk more than ten yards or climb stairs, without having to stop and rest, Dr. Rao did not state that his assessment was based on his own observations, or otherwise explain how he reached this determination. Decision and Order at 17; Director's Exhibit 55. Thus, contrary to claimant's arguments, the administrative law judge acted with his discretion in discounting Dr. Rao's opinion as not well reasoned. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 17.

Claimant also argues that the administrative law judge should have accorded less weight to the earlier opinions of Drs. Ranavaya and Zaldivar, that claimant is capable of performing his usual coal mining work, because the opinions of Drs. Baker and Rao are based upon more recent evidence. *See* Director's Exhibits 11, 32. As discussed, *supra*, the administrative law judge acted within his discretion in finding that the opinions of Drs. Baker and Rao did not establish a finding of total disability pursuant to 20 C.F.R. §718.204(b). Moreover, the administrative law judge correctly found that the opinions of Drs. Ranavaya and Zaldivar do not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] Decision and Order at 12-13. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[6] In a report dated May 21, 2002, Dr. Ranavaya opined that claimant has a mild pulmonary impairment that would not prevent him from performing his usual coal mine employment. Director's Exhibit 11. In a report dated December 22, 2003, Dr. Zaldivar opined that, from a pulmonary standpoint, claimant is "fully capable of performing his usual coal mine work or work requiring similar exertion." Director's Exhibit 32.

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), we affirm that administrative law judge's fnding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Therefore, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge