BRB No. 05-0486 BLA

VERNON JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAMIESON CONSTRUCTION INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 10/24/2005
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	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.

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

Francesca L. Maggard (Lewis & Lewis Law Offices.), Hazard, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5613) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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).[1] The administrative law judge accepted the parties' stipulation of twenty-four years of coal mine employment and found that the evidence developed since the denial of claimant's prior claim did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate 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 consideration of the medical evidence pursuant to 20 C.F.R. §§718.202(a)(1), and 718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to comply with its statutory duty to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds that even if Dr. Baker's findings as to pneumoconiosis are questionable, Dr. Baker clearly found no totally disabling impairment. Consequently, according to the Director, remand for further development of Dr. Baker's opinion is not required, as it would not change this case's outcome.[2]

[1] Claimant's prior application for benefits, filed on June 15, 1993, was denied by Administrative Law Judge Richard E. Huddleston on August 23, 1996, because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed the denial of benefits. *Jackson v. Mountain Clay Inc.*, BRB No. 96-1593 BLA (Jun. 26, 1997)(unpub.). Claimant requested modification. On June 16, 1999, the district director denied modification because the evidence did not establish either the existence of pneumoconiosis or a totally disabling pulmonary impairment. Claimant took no further action on the claim. Director's Exhibit 1. Claimant filed his current application for benefits on March 5, 2001. Director's Exhibit 2.

[2] The administrative law judge's findings regarding the length of coal mine employment, that the existence of pneumoconiosis was not established pursuant to 20

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 either of these elements of entitlement to proceed with his claim. 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)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted accurately that none of the four readings of two new x-rays was positive for the existence of pneumoconiosis. Director's Exhibits 6, 20; Employer's Exhibits 1, 2. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

C.F.R. §§718.202(a)(2)-(a)(4), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)–(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that since both Drs. Baker and Broudy concluded that claimant has no respiratory impairment and is not totally disabled, claimant did not establish that he is totally disabled. Director's Exhibits 6, 20. Claimant argues that the administrative law judge did not compare claimant's exertional job requirements with "medical reports assessing a disability." Claimant's Brief at 5. Contrary to claimant's argument, because the administrative law judge credited opinions diagnosing claimant with no impairment, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a heavy equipment operator to these medical opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Moreover, contrary to claimant's additional contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White,* 23 BLR at 1-7. Furthermore, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Baker's June 9, 2001 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that a remand for Dr. Baker to clarify his opinion regarding the existence of pneumoconiosis would serve no purpose, because Dr. Baker concluded that claimant is not totally disabled. Director's Brief at 2-3.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lack credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 6. The administrative law judge did not find nor does claimant allege that Dr. Baker's opinion was incomplete. Although the administrative law judge found that Dr. Baker's opinion was contradictory on the issue of legal pneumoconiosis, with respect to the issue of total disability, the administrative law judge credited Dr. Baker's opinion that claimant has no impairment. Decision and Order at 10. Review of the record as whole, including the evidence submitted with claimant's prior claim, reveals no medical evidence supportive of a finding of total disability. Director's Exhibits 1, 6, 20. Because Dr. Baker's opinion regarding total disability was complete and the administrative law judge did not find that it lacked credibility, and this record as a whole contains no evidence of total disability, a remand to the district director is not required. *See Hodges*, 18 BLR at 1-88 n.3.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge