BRB No. 05-0531 BLA

PAUL E. ORMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/31/2005
	)	
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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Paul E. Orman, Jasonville, Indiana, *pro se*.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denial of Benefits (04-BLA-6306) of Administrative Law Judge Robert L. Hillyard with respect to a 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 his first application for benefits on September 10, 1986, which was denied by the district director because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second application for benefits on April 14, 1993. *Id*. Administrative Law Judge Daniel J. Roketenetz denied benefits on April 29, 1996, because claimant did not establish any element of entitlement. *Id*. The Board affirmed

the denial of benefits on February 13, 1997. *Id*.; *Orman v. Peabody Coal Co.*, BRB No. 96-1064 BLA (Feb. 13, 1997)(unpub.). Claimant filed his third and current application for benefits on January 8, 2002. Director's Exhibit 2.

In the Decision and Order that is the subject of this appeal, Administrative Law Judge Robert L. Hillyard (the administrative law judge) credited claimant with thirty-seven years of coal mine employment[1] based upon employer's concession and the evidence of record, and considered whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge found that the medical evidence developed since the previous denial of benefits did not establish either the existence of pneumoconiosis or total respiratory disability. The administrative law judge therefore found that claimant failed to satisfy his burden of proof under Section 725.309 and denied benefits accordingly.

On appeal, claimant asserts generally that the denial of benefits is erroneous. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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, 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

[1] The record indicates that claimant's last coal mine employment occurred in Indiana. Director's Exhibits 3, 5; Hearing Tr. at 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09, 21 BLR 2-113, 2-127 (7th Cir. 1997)(*en banc*)(holding under former provision that claimant must establish "that something capable of making a difference has changed since the record closed on the first application").

After consideration of the administrative law judge's Decision and Order and the newly submitted evidence, we affirm the denial of benefits in this case as the administrative law judge's findings are rational and supported by substantial evidence. *McFall*, 12 BLR at 1-177. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge determined correctly that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, as none of the x-rays was read as positive for pneumoconiosis. Decision and Order at 12; Director's Exhibits 17, 18, 33; Employer's Exhibits 1, 4; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-65 (1990). Additionally, the administrative law judge noted accurately that 20 C.F.R. §718.202(a)(2) and (a)(3) are inapplicable in this case because the record contains no biopsy evidence or any evidence of complicated pneumoconiosis, and because this claim is a living miner's claim filed after January 1, 1982. Decision and Order at 12; 20 C.F.R. §718.202(a)(2), (a)(3).

The administrative law judge also rationally determined that the newly submitted medical opinions did not support a finding of legal or clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge acted within his discretion in giving little weight to the opinion in which Dr. Harris diagnosed chronic bronchitis related to coal dust exposure and an obstructive pulmonary impairment, because Dr. Harris did not identify any objective evidence in support of his diagnosis of chronic bronchitis and stated his conclusion regarding the source of the pulmonary impairment in equivocal terms.[2] Decision and Order at 14; Director's Exhibit 13; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 151 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also rationally determined that the opinion in which Dr. Bhuptani diagnosed moderate chronic obstructive pulmonary disease (COPD) and asthma did not support a finding of pneumoconiosis, because Dr. Bhuptani did not state clearly that these conditions arose out of dust exposure in coal

[2] Dr. Harris indicated that claimant's chronic bronchitis and obstructive defect were due to coal dust exposure but that these conditions "could possibly be related to" congestive heart failure. Director's Exhibit 13 at 7.

mine employment.[3] Decision and Order at 16; Director's Exhibit 53; Employer's Exhibit 22; *Justice*, 11 BLR at 1-94.

Further, the administrative law judge was within his discretion in finding that the medical opinions of Drs. Reyes and Ratliff were entitled to little weight on the ground that these physicians did not explicitly identify the pulmonary function studies upon which they based their diagnoses of chronic lung disease related to dust exposure in coal mine employment. Decision and Order at 15-16; Director's Exhibit 53; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).[4] The administrative law judge also rationally determined that the opinions in which Drs. Renn and Repsher stated that claimant does not have legal or clinical pneumoconiosis are entitled to greater weight than the contrary opinions of Drs. Schmidt, Reyes, Ratliff, Harris, and Bhuptani, based upon their superior qualifications as Board-certified pulmonologists and because their opinions are better supported by the objective evidence of record. *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18, 1-22 (1994); *see also Clark*, 12 BLR at 1-151; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). In light of the administrative law judge's permissible findings with respect to the newly submitted medical opinion evidence, we affirm his finding that claimant did not establish that he is suffering from pneumoconiosis under any of the subsections of Section 718.202(a).

Pursuant to Section 718.204(b)(2), the administrative law judge weighed the newly submitted evidence relevant to the issue of total disability and properly determined that it was insufficient to prove that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge acted within his discretion in finding that the new pulmonary function and blood gas studies of record did not establish total disability under Section 718.204(b)(2)(i) and (ii). The administrative law judge permissibly determined that the qualifying pre-bronchodilator test dated May 15, 2003 was not valid based upon the administering physician's determination that claimant's effort and cooperation were "very poor." Decision and Order at 19; Employer's Exhibit 1; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). With respect to the remaining pulmonary function study, dated May 10, 2002, the administrative law judge found

[3] Dr. Bhuptani stated that claimant had reactive airways disease which "could be from bronchial asthma and/or exposure to coal dust." Director's Exhibit 53; Employer's Exhibit 22. The doctor also indicated that claimant's moderate COPD and asthma "could be secondary to exposure to coal, as [he] is a nonsmoker." *Id*.

[4] Drs. Schmidt and Reyes are treating physicians, but pursuant to *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), an administrative law judge must assess the probative value of a treating physician's opinion based upon the extent to which it is supported by medical reasons.

correctly that it did not produce qualifying values.[5] Decision and Order at 19; Director's Exhibit 15. In addition, the administrative law judge properly determined that the two newly submitted blood gas studies were nonqualifying. *Id*.

The administrative law judge addressed the newly submitted medical opinions under Section 718.204(b)(2)(iv) and rationally found that they did not establish that claimant is totally disabled. The administrative law judge acted within his discretion in determining that Dr. Renn's opinion, that claimant is capable of performing his last mining job as a foreman from a respiratory standpoint, outweighed the other opinions of record based upon Dr. Renn's superior qualifications and because his opinion was better-supported by the relevant evidence of record. Decision and Order at 20-21; Employer's Exhibit 13; *Carson*, 19 BLR at 1-22; *see also Clark*, 12 BLR at 1-151. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled under Section 718.204(b)(2).

Because the administrative law judge properly found that the newly submitted evidence did not establish a change in an applicable condition of entitlement, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3.

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

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