BRB No. 07-0226 BLA

J. M. Claimant-Petitioner v. AJJ TRUCKING COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/24/2007 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5988) of Administrative Law Judge William S. Colwell denying benefits on 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's prior application for benefits, filed on September 11, 1998, was finally denied on July 7, 1999 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 2. On December 3, 2002, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order Denying Benefits issued on October 26, 2006, the administrative law judge credited claimant with eighteen years of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). 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 analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and to the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

[2] The administrative law judge's finding of eighteen years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), or the existence of total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *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).

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 a finding of 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). The administrative law judge determined that claimant's prior claim was denied because he failed to establish any of the conditions of entitlement. Consequently, claimant had to submit new evidence establishing one of the required elements. 20 C.F.R. §725.309(d)(2),(d)(3).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant contends that, in determining that claimant did not establish the existence of pneumoconiosis, or that he is totally disabled by a respiratory or pulmonary impairment, the administrative law judge erred in failing to accord controlling weight to the opinion of Dr. Baker, based on his status as claimant's treating physician. Claimant's Brief at 8. We disagree.

In considering the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Dahhan and Broudy, that claimant does not have pneumoconiosis or any totally disabling respiratory impairment, than to the contrary opinions of Drs. Baker and Simpao, because he found their opinions to be better reasoned, better documented, and better supported by the weight of the objective evidence.[3] 20 C.F.R. §§718.202(a)(4); 718.204(b)(2)(iv); Decision and Order at 15, 16-

[3] Dr. Baker, claimant's treating physician since November 15, 1999, diagnosed coal workers' pneumoconiosis, and chronic obstructive pulmonary disease (COPD) due to a combination of coal dust exposure and smoking. Director's Exhibit 21; Claimant's Exhibit 1. Dr. Baker concluded that claimant is totally disabled from a respiratory standpoint. Director's Exhibit 21; Claimant's Exhibit 1. Dr. Simpao diagnosed coal workers' pneumoconiosis due to coal dust exposure, and opined that claimant has a mild

17; Director's Exhibits 8, 10, 21; Claimant's Exhibit 1; Employer's Exhibit 1. This finding was rational and within the administrative law judge's discretion. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Contrary to claimant's argument, the administrative law judge specifically recognized that Dr. Baker is claimant's treating physician, and he discussed the factors set forth at 20 C.F.R. §718.104(d) regarding the evaluation of treating physicians' opinions. Decision and Order at 9-10, 14; Claimant's Brief at 9. The administrative law judge permissibly concluded, however, that Dr. Baker's opinion was not sufficiently reasoned and documented to warrant controlling status or to outweigh the better reasoned and better supported opinions of Drs. Dahhan and Broudy. *See* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003), *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); Decision and Order at 15, 16; Director's Exhibits 10, 21; Claimant's Exhibit 1; Employer's Exhibit 1.

As claimant does not raise any further challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), or the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 15-17; *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and we further affirm the denial of benefits. *See White*, 23 BLR at 1-7.

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respiratory impairment. Director's Exhibit 8. Drs. Dahhan and Broudy each opined that claimant does not suffer from pneumoconiosis or any coal dust related disease of the lungs, but suffers from COPD entirely due to smoking. Both Dr. Dahhan and Dr. Broudy opined that claimant retains the respiratory capacity to perform his usual coal mine work. Director's Exhibit 10; Employer's Exhibit 1.

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