BRB No. 08-0318 BLA

P. D. Claimant-Petitioner v. HUBB CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/31/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-5622) of Administrative Law Judge Larry W. Price 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 found the newly submitted evidence insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b) and, therefore, he found that claimant failed to establish a change in an applicable condition of entitlement pursuant to C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that "the opinion of Dr. Baker and other evidence throughout the record, including claimant's testimony" establish that he is totally disabled. Claimant's Brief at 3. Claimant also generally contends that the adminis`trative law judge should have considered all of the evidence of record. *Id*. 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.

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.[2] 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 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

[1] Claimant filed a prior claim for benefits on February 12, 1993, which was finally denied on the ground that he failed to establish total disability. [*P. D.*] *v Hubb Corp.*, BRB No. 96-1621 BLA (June 26, 1997) (unpub.); Director's Exhibit 1. Claimant took no further action on the denial of his claim until he filed his current subsequent claim on June 14, 2006. Director's Exhibit 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

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 that he was totally disabled. Consequently, claimant had to submit new evidence establishing that he is totally disabled in order to satisfy the requirements of Section 725.309 and to have the administrative law judge consider all of the record evidence relevant to his entitlement to benefits. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

The administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i), (ii), as the newly submitted pulmonary function and arterial blood gas studies dated December 5, 2006 and July 14, 2006 were all non-qualifying for total disability.[3] Decision and Order at 4. Because the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge concluded that claimant failed to establish total disability at Section 718.204(b)(2)(iii). *Id*. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the newly submitted medical opinions of Drs. Baker and Dahhan failed to support claimant's burden of proof, as each doctor opined that claimant was not totally disabled by a respiratory or pulmonary impairment.[4] *Id*. Furthermore, since the administrative law judge found that the medical evidence was insufficient to establish total disability, lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant generally asserts that, based on Dr. Baker's opinion, "it is obvious" that the administrative law judge erred in failing to find total disability established, and that the administrative law judge should have considered the new evidence, as well as that in the previous claim. Claimant's Brief at 3. Claimant, however, has not specified how the administrative law judge erred in finding that he is not totally disabled from a respiratory or pulmonary impairment. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46

[3] 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., while a "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[4] Dr. Baker indicated that claimant's objective testing was normal and that he had no respiratory impairment, while Dr. Dahhan diagnosed that claimant had no significant respiratory impairment and specifically opined that claimant retained the respiratory capacity to work in his usual coal mine employment. Director's Exhibit 15; Employer's Exhibit 2.

(6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

The administrative law judge considered all of the new evidence, and claimant has not identified any specific evidence that the administrative law judge failed to consider on the issue of total disability. Because no physician has opined that claimant has a totally disabling respiratory or pulmonary impairment, there is no objective evidence to support a finding of total disability, and claimant may not establish total disability based on lay testimony alone, we affirm the administrative law judge's finding that the new evidence fails to establish total disability at Section 718.204(b). Since claimant has not satisfied his burden to establish total disability, we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309.

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