BRB No. 10-0171 BLA

DAVID LEE NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/27/2010
	)	
MANALAPAN MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

David Lee Napier, Evart, Kentucky, *pro se*.

Paul E. Jones and James W. Herald III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, without assistance of counsel, appeals the Decision and Order – Denial of Subsequent Claim (2008-BLA-5528) of Administrative Law Judge Larry S. Merck, with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant's Social Security Administration records corroborated the parties' stipulation to twenty-two years of coal mine employment. Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not submit a substantive response to claimant's appeal, unless requested to do so by the Board.[2]

By Order dated September 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010.[3] *Napier v.*

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[1] In a Proposed Decision and Order dated October 23, 2003, the district director denied claimant's prior claim, filed on February 27, 2003, on the ground that claimant failed to establish total disability. Director's Exhibit 1. Claimant took no further action until he filed a subsequent claim on June 4, 2007. Director's Exhibit 3. In a Proposed Decision and Order dated January 22, 2008, the district director denied benefits, as claimant did not establish total disability. Director's Exhibit 26. Upon claimant's request, the case was referred to the Office of Administrative Law Judges for a formal hearing that was held before the administrative law judge on May 13, 2009. Director's Exhibits 28, 32. After the hearing, the administrative law judge issued the Decision and Order – Denial of Subsequent Claim, which is the subject of this appeal.

[2] We affirm the administrative law judge's finding of twenty-two years of coal mine employment, as it is not adverse to claimant and it is not challenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Relevant to this living miner's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of

Manalapan Mining Co., BRB No. 10-0171 BLA (Sept. 10, 2010)(unpub. Order). Employer responds and argues that the denial of benefits should be upheld, that the recent amendments do not apply to this claim, as the evidence is insufficient to establish total disability. The Director asserts that, based on the filing date and the length of claimant's coal mine employment, the amended version of Section 411(c)(4) would apply if claimant established that he has a totally disabling respiratory impairment. The Director maintains, however, that Board need not remand the claim unless it determines that the denial of benefits must be vacated. In order to determine whether remand is necessary for consideration of the applicability of the amendments, we must first address the administrative law judge's consideration of the newly submitted evidence relevant to the issue of total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law.[4] 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).

Pursuant to Section 725.309(d), if 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., Inc.*, 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 by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

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the Act, 30 U.S.C. §921(c)(4). Pursuant to the amended version of Section 411(c)(4), the presumption is invoked when a miner is credited with at least fifteen years of qualifying coal mine employment and establishes that he or she is suffering from a totally disabling respiratory or pulmonary impairment.

[4] 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. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

Pursuant to 20 C.F.R. §718.204(b)(1), the administrative law judge correctly found that because there is no evidence of complicated pneumoconiosis, claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Decision and Order at 6. The administrative law judge rationally accorded greater weight to the more recent pulmonary function studies, "which are more indicative of claimant's current respiratory and pulmonary condition," and determined that the preponderance of the newly submitted pulmonary function studies was insufficient to establish total disability under Section 718.204(b)(2)(i).[5] Decision and Order at 8; *see Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*). The administrative law judge also properly found that all of the newly submitted blood gas studies yielded non-qualifying values for total disability pursuant to Section 718.204(b)(2)(ii).[6] Decision and Order at 8; Director's Exhibits 10, 13; Employer's Exhibit 1. Additionally, the administrative law judge determined correctly that the newly submitted evidence does not contain a diagnosis of cor pulmonale with right-sided congestive heart failure sufficient to establish total disability at Section 718.204(b)(2)(iii). We affirm, therefore, the administrative law judge's findings that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iii).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Alam, Broudy, and Rosenberg. Decision and Order at 9-13. The administrative law judge found that the opinion of Dr. Alam, that claimant is totally disabled, was entitled to little weight because Dr. Alam did not address claimant's disability in terms of his last coal mine job. Decision and Order at 10; Director's Exhibit 10. In contrast, the administrative law judge permissibly assigned full probative weight to the well-reasoned and well-documented opinions of Drs. Broudy and Rosenberg, that claimant is not totally disabled, since he determined that they based their medical conclusions on the underlying documentation, findings on examination, claimant's

[5] The record contains four newly submitted pulmonary function studies. The pulmonary function study administered by Dr. Alam on July 11, 2007, yielded qualifying pre-bronchodilator and post-bronchodilator values. Director's Exhibit 10. The August 27, 2007 pulmonary function study, administered by Dr. Alam, yielded qualifying values before and after the application of bronchodilators. *Id.* The pulmonary function studies administered by Dr. Broudy on November 13, 2007 and by Dr. Rosenberg on July 29, 2008, both included only pre-bronchodilator studies, which yielded non-qualifying values. Director's Exhibit 13; Employer's Exhibit 1.

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

medical history and the objective evidence of record.[7] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 11, 13; Director's Exhibit 13; Employer's Exhibit 1. Moreover, the administrative law judge acted with his discretion as fact finder in according greatest weight to Dr. Rosenberg's opinion, as he found that it is supported by the most current pulmonary function and blood gas study evidence. *See Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27; Decision and Order at 13. Accordingly, the administrative law judge rationally concluded that the preponderance of the newly submitted medical opinion evidence does not support a finding of total disability. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 13. We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability at Section 718.204(b)(2)(iv).

Based upon his findings under Section 718.204(b)(2)(i)-(iv), the administrative law judge also rationally determined that the newly submitted evidence of record, as a whole, did not demonstrate that claimant is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 13. Therefore, we affirm the administrative law judge's conclusion, that the newly submitted evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2).

Based upon our affirmance of the administrative law judge's determination that the newly submitted evidence is insufficient to establish total disability, we also affirm his finding that claimant has not demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d). Entitlement to benefits in this subsequent claim is, therefore, precluded. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3. In addition, because we have affirmed the administrative law judge's finding that claimant did not prove that he is totally disabled, a prerequisite to the invocation of the rebuttable presumption of total disability due to pneumoconiosis, we need not remand this case for

[7] The administrative law judge considered that Dr. Broudy relied on normal non-qualifying pulmonary function and blood gas studies and on his physical examination of claimant that revealed fair chest expansion, clear lungs on auscultation and percussion, and no cyanosis, clubbing, or edema of the extremities. Decision and Order at 10-11; Director's Exhibit 13. Similarly, the administrative law judge found that Dr. Rosenberg relied on non-qualifying pulmonary function and blood gas studies, a normal EKG and on claimant's physical examination that revealed equal expansion of the chest with decreased breath sounds with no rales, rhonchi or wheezes. Decision and Order at 11-12; Employer's Exhibit 1.

consideration of the applicability of the amended version of Section 411(c)(4), 30 U.S.C. §921(c).

Accordingly, the administrative law judge's Decision and Order – Denial of Subsequent Claim 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