BRB No. 04-0208 BLA

BILLY CONN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	DATE ISSUED: 09/30/2004
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-5499) of Administrative Law Judge Stuart A. Levin 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).[1] This case involves a subsequent claim filed on April 16, 2001. Administrative Law Judge Stuart A. Levin (the administrative law judge) initially noted that claimant's prior 1984 claim had not been included as part of the Director's Exhibits at the hearing.[2] However, the administrative law judge noted that employer had attached a copy of Administrative Law Judge Daniel J. Roketenetz's 1989 Decision and Order to its post-hearing brief. The administrative law judge noted that Judge Roketenetz denied benefits because he found that the evidence was insufficient to establish total disability. In his adjudication of the instant claim, the administrative law judge found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). Because this case was filed after January 19, 2001, all citations to the regulations refer to the amended regulations.

[2] The record does not include claimant first two claims. However, in submitting his response brief, the Director, Office of Workers' Compensation Programs, submitted copies of claimant's previous two claims, along with the evidence submitted in connection with those claims. From these documents, the following procedural history has been ascertained: Claimant initially filed a claim for benefits on May 30, 1984. By Decision and Order dated March 28, 1989, Administrative Law Judge Daniel J. Roketenetz found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). However, Judge Roketenetz found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge Roketenetz denied benefits. There is no indication that claimant took any further action in regard to his 1984 claim.

Claimant filed a second claim on February 5, 1993. The district director denied benefits on July 1, 1993 as she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. The district director also found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a third claim on April 16, 2001. Director's Exhibit 2.

the applicable condition of entitlement had not changed since the date upon which claimant's prior 1984 claim became final. In addition to finding that the evidence was insufficient to establish that an applicable condition of entitlement had changed pursuant to 20 C.F.R. §725.309, the administrative law judge also noted that claimant's 2001 claim "would also be denied on the merits since the evidence considered in total does not establish total disability due to pneumoconiosis." Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the administrative law judge's error, if any, in not considering the evidence submitted in connection with claimant's previous claims, is harmless.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant initially contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

Moreover, contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him

[3] Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 10. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 6.

Dr. Baker also opined that:

> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or other similar dusty occupations.

Director's Exhibit 10.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. Thus, the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *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).

Moreover, the administrative law judge's finding is supported by substantial evidence.[4] Consequently, this finding is affirmed.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that the applicable element of entitlement has changed since the date of the denial of the prior claim.[5] 20 C.F.R. §725.309.

Finally, we note that the arguments addressed by our dissenting colleague are not properly before the Board. The Board's procedural rules impose certain threshold requirements for alleging specific error before the Board will consider the merits of the appeal. Section 802.211(b) provides, in relevant part, that:

> Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b).[6]

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[4] The newly submitted medical opinion evidence also includes medical reports submitted by Drs. Hussain and Dahhan. Although Dr. Hussain opined that claimant suffered from a mild pulmonary impairment, he opined that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 8. Dr. Dahhan also opined that claimant retained the respiratory capacity to continue his previous coal mining work. Director's Exhibits 11, 12.

[5] Moreover, because claimant fails to challenge the administrative law judge's finding, on the merits, that the evidence is insufficient to establish total disability due to pneumoconiosis, this finding is also affirmed. *Skrack*, *supra*.

[6] Failure to comply with the requirements of Section 802.211(b) may, in the discretion of the Board, cause an appeal to be deemed abandoned. 20 C.F.R. §§802.211(d), 802.402. Although the Board has the discretion to waive formal compliance with the requirements of Section 802.211 when a claimant is not represented by counsel, *see* 20 C.F.R. §802.211(e), the claimant, in this case, has legal representation.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has noted that the Board "has repeatedly held that a party challenging an [administrative law judge's] decision must do more than recite evidence favorable to his case, but must demonstrate with some degree of specificity the manner in which substantial evidence precludes the denial of benefits or why the [administrative law judge's] decision is contrary to law." *Cox*, 791 F.2d at 446, 9 BLR at 2-47.

In this case, claimant does not raise, as error, the administrative law judge's failure to address whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis. Similarly, claimant does not contend that the administrative law judge erred in failing to make the evidence submitted in connection with claimant's prior claims a part of the record. Thus, these issues are not properly before the Board

Although claimant states that an administrative law judge "would be in error" in finding "a claimant" able to perform his usual coal mine work without considering the physical requirements of such work, *see* Claimant's Brief at 4-5, such a general statement does not comply with the requirements of 20 C.F.R. §802.211(b). Although claimant also notes that the administrative law judge "made no mention of the claimant's usual coal mine work in connection with Drs. Baker and Hussain's opinions of disability," *Id.* at 5, claimant fails to adequately explain why the administrative law judge's failure in this regard constitutes reversible error. Finally, although claimant notes that Dr. Hussain diagnosed a "mild pulmonary impairment," claimant merely states that it was "rational to conclude that [his] condition prevents him from engaging in such employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." *Id.* Again, because claimant fails to identify any specific error on the part of the administrative law judge, this statement does not provide an adequate basis for our review.

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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it holds that the administrative law judge properly found that Dr. Baker's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] I dissent from the majority's determination to affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). I also dissent from the majority's decision to affirm the administrative law judge's finding that claimant failed to establish that an applicable element of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1993 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the

[7] I also concur in the majority's affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), since these findings are unchallenged on appeal.

applicable conditions of entitlement[8] has changed since the date upon which the order denying the prior claim became final. *Id.*

The administrative law judge properly noted that Administrative Law Judge Daniel J. Roketenetz's denial of claimant's 1984 claim was based upon his finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). However, the administrative law judge was unaware of claimant's second claim filed in 1993. The district director denied benefits on claimant's 1993 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Consequently, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish either the existence of pneumoconiosis or total disability. The administrative law judge, however, only considered whether the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, I would vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309 and remand the case for further consideration.[9]

I also agree with claimant's contention that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Although the administrative law judge accurately noted that Drs. Hussain and Dahhan opined that claimant retained the respiratory capacity to perform his usual coal mine employment, Decision and Order at 5-6, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that

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[8] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

[9] The administrative law judge also erred in failing to make the evidence submitted in connection with claimant's prior claims a part of the record. Section 725.309 provides that:

> Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

20 C.F.R. §725.309(d)(1).

physician's opinion. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In this case, the administrative law judge did not address whether Drs. Hussain and Dahhan had any knowledge of the exertional requirements of the claimant's last coal mine employment. Moreover, the administrative law judge failed to make a finding regarding the exertional requirements of claimant's last coal mine employment.[10]

Claimant also argues that the administrative law judge erred in failing to address whether Dr. Hussain's diagnosis of a mild pulmonary impairment supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See* Director's Exhibit 8. The law is clear that even a mild impairment may be totally disabling, depending upon the exertional requirements of a miner's usual coal mine employment. *Cornett*, *supra*. In light of the above-referenced errors, I would vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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BETTY JEAN HALL
Administrative Appeals Judge

[10] It is claimant's burden of proof to establish the exertional requirements of his usual coal mine employment. *See Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). At the hearing, claimant testified that his last coal mine work involved building brattice curtains, a job that claimant characterized as a strenuous endeavor. Transcript at 17-18. Claimant testified that this work required him to lift solid blocks that weighed up to 25 to 30 pounds. *Id.* at 18.