BRB Nos. 05-0266 BLA

ROLAND COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 09/30/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. 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.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5470) of Administrative Law Judge Jeffrey Tureck on a subsequent claim[1] filed pursuant to the

[1]Claimant's original claim, filed on November 28, 1979, was denied by the district director on March 12, 1980. Director's Exhibits 21-1, 21-16. Claimant filed a second claim on January 20, 1982, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. by Decision and Order dated December 12, 1985. Director's Exhibit 21-2, 21-30. Judge Gilday noted that the Director, Office of Coal Workers' Compensation Programs (the Director), did not contest the existence of pneumoconiosis. *Id.* Judge

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).[2] The administrative law judge noted the parties' stipulation to eight years of coal mine employment. Decision and Order at 2 n.4. The administrative law judge found that while the Director, Office of Workers' Compensation Programs (the Director), contested the existence of pneumoconiosis, he had stipulated to this element of entitlement before Administrative Law Judge Bernard J. Gilday in connection with a prior claim filed in 1982 and was precluded from contesting it in connection with the instant claim. *Id.* at 3 n.6. The administrative law judge found that the newly submitted evidence is insufficient to establish, pursuant to 20 C.F.R. §718.203(c), that claimant's pneumoconiosis arose out of his coal mine employment. The administrative law judge further found that, even if the newly submitted evidence was sufficient to establish etiology at 20 C.F.R. §718.203, and thereby establish a change in one of the applicable conditions of entitlement at 20 C.F.R. §725.309 since the prior denial, the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge found the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and argues that the Director failed to provide claimant with a complete, credible pulmonary evaluation.[3]

Gilday found that the evidence failed to establish either that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(c), or total respiratory or pulmonary disability at 20 C.F.R. §718.204(c) (2000). *Id.* Claimant filed a third claim on June 22, 1999; subsequent to its denial by the district director, claimant requested a hearing. Director's Exhibits 9, 13, 18. However, by Order dated February 21, 2001, Administrative Law Judge Thomas F. Phalen, Jr. granted claimant's February 14, 2001 motion to withdraw the 1999 claim. Claimant filed the instant claim on June 15, 2001. Director's Exhibit 2.

[2]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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The administrative law judge found that the Director previously stipulated to the existence of pneumoconiosis, before Judge Gilday in connection with the 1982 claim, and was precluded from contesting this element of entitlement in the instant claim. Decision and Order at 3 n.6. The administrative law judge thus made no findings at 20 C.F.R. §718.202(a). Claimant mistakenly argues that the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. Claimant's Brief at 1, 2.

Claimant further alleges error in the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), relying on the opinion of Dr. Baker. The Director responds, and urges the Board to affirm the decision below.

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).

This case involves a subsequent claim. *See* 20 C.F.R. §725.309(d). The denial of benefits in the prior claim was based on claimant's failure to establish that his pneumoconiosis arose out of coal mine employment or that he is totally disabled due to a respiratory or pulmonary impairment, both essential elements of entitlement. *See* §§718.203(c), 718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). It is claimant's burden to initially demonstrate a change in one of these applicable conditions of entitlement in this subsequent claim. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant meets this burden, then the administrative law judge must consider whether the evidence of record, including the evidence submitted in connection with the prior claims, establishes entitlement to benefits. *Id.* In the instant case, the administrative law judge found that the newly submitted evidence is insufficient to establish a change in either of the two applicable conditions of entitlement under 20 C.F.R. §725.309(d) and that the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv) on the merits of the claim. He thus stated that "even if it was found that claimant established a change in conditions (sic) his claim would have to be denied." Decision and Order at 5.

We first address claimant's arguments with regard to the administrative law judge's finding, on the merits of the claim, that the record evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).[4] Claimant argues that Dr. Baker's September 5, 2001 report "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 5. Claimant's assertion lacks merit. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable to this claim. *See* 20 C.F.R. §727.203(a). Because the

[4]We affirm the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the claim, filed on June 15, 2001. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 2.

Claimant contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant asserts that Dr. Baker's report is reasoned and documented and, when compared to the exertional requirements of claimant's usual coal mine employment, establishes that claimant is totally disabled. By report dated September 5, 2001, Dr. Baker diagnosed coal workers' pneumoconiosis, category 1/0, based on abnormal x-ray evidence and claimant's "significant" history of coal dust exposure; mild to moderate resting arterial hypoxemia based on arterial blood gas analysis, and chronic bronchitis based on history. Director's Exhibit 12. Dr. Baker opined that claimant has a Class 1 impairment based on Table 5-12, Page 107, Chapter 5, Guides to the Evaluation of Permanent Impairment, Fifth Edition. *Id.* Dr. Baker also found a second impairment based on Section 5.8, Page 106, Chapter 5, Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Baker indicated that these Guides state "that persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id.* Dr. Baker added, "This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.* Dr. Baker further indicated, "It is felt that any pulmonary impairment is caused at least in part by [claimant's] coal dust exposure." *Id.*

Because Dr. Baker failed to explain the severity of a Class 1 impairment or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 1 impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Dr. Baker also indicated that persons who develop pneumoconiosis should limit further exposure to coal dust, and that it could be implied that claimant is "100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 12. Because a physician's recommendation against further exposure to coal dust is insufficient to establish a totally disabling respiratory or pulmonary impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion is insufficient to support a finding of total disability. Decision and Order at 5.

Claimant also contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 7. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant next asserts that "pneumoconiosis is proven to be a progressive and irreversible disease," and because a considerable amount of time has passed since he was first diagnosed with pneumoconiosis, it can be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 7. Claimant's assertion lacks merit. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant does not otherwise take issue with the administrative law judge's treatment of the medical opinions of record at 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm the administrative law judge's finding, on the merits of the claim, that the medical opinion evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Because claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. We, therefore, need not address claimant's arguments regarding the administrative law judge's finding that the newly submitted evidence is insufficient to establish the requisite etiology of claimant's pneumoconiosis at 20 C.F.R. §718.203(c) or total disability at 20 C.F.R. §718.204(b)(2), as any error therein could not change the outcome of the case.[5] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

---

[5]Claimant contends that, given the administrative law judge's finding at 20 C.F.R. §718.203(c) that Dr. Hussain's opinion regarding the cause of claimant's pneumoconiosis is not credible, the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b). The administrative law judge discredited Dr. Hussain's opinion at 20 C.F.R. §718.203(c) because Dr. Hussain did not consider that "claimant had a much longer occupational exposure to smoke and fumes from solder and perhaps other substances while employed manufacturing caskets (*see supra*) than he did to coal mine dust." Decision and Order at 3-4. The Director contends, however, that he has met his statutory obligation, and argues that it is not clear whether this deficiency in Dr. Hussain's opinion is due to "doctor error or because Claimant simply failed to inform the doctor of this information." Director's Brief at 2. The Director further asserts, however, that even if Dr. Hussain's opinion credibly established coal mine dust as the cause of claimant's pneumoconiosis, claimant would still not be entitled to benefits because the administrative law judge properly found the record evidence insufficient to establish total disability at 20 C.F.R. §718.204(b). The Director states, "As to this issue, the [administrative law judge] had no criticism of Dr. Hussain's opinion. Consequently, obtaining a more credible opinion from Dr. Hussain on the issue of disease-causation

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

---

would be of no help to Claimant." *Id.* Our affirmance of the administrative law judge's denial of benefits in this case is based upon his finding that the record evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). On this dispositive issue, the administrative law judge, at 20 C.F.R. §718.204(b)(2)(iv), relied, *inter alia*, on Dr. Hussain's opinion, which he determined did not support a finding of total disability. Decision and Order at 4-5. As the Director notes, claimant does not take issue with the administrative law judge's treatment of Dr. Hussain's opinion at 20 C.F.R. §718.204(b)(2)(iv). Because further development of Dr. Hussain's opinion on the issue of disease causation cannot affect the outcome, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), we decline to remand this case.