BRB No. 05-0358 BLA

GEORGE HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 09/19/2005
	)	
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 Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-BLA-5153) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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). The administrative law judge credited claimant with at least thirty-nine years of qualifying coal mine employment, and, based on the date of filing, adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied because the evidence was insufficient to establish total respiratory disability, and that the present claim, filed on September 20, 2001, was subject to the provisions at 20 C.F.R. §725.309(d).[1] The administrative law judge reviewed the new evidence submitted in support of this subsequent claim, and determined that it was insufficient to establish any element of entitlement, thus claimant failed to demonstrate a change in one of the applicable conditions of entitlement at Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the x-ray evidence and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), and his finding that total disability was not established at 20 C.F.R. §718.204(b).[2] Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the denial of benefits.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant's original claim for benefits, filed on August 14, 1981, was denied by Administrative Law Judge Joel R. Williams in a Decision and Order issued on November 4, 1987. Director's Exhibit 1. Claimant took no further action until the filing of the present claim for benefits on September 20, 2001. Director's Exhibit 3.

[2] Although claimant refers to the provisions at 20 C.F.R. §718.204(c), *see* Claimant's Brief at 5-6, under the amended regulations, total respiratory or pulmonary disability is established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that there was no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the

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 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); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*). The "applicable conditions of entitlement" are limited to "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As the administrative law judge determined that claimant's prior claim was denied because claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment, this subsequent claim could be approved only if new evidence submitted in connection therewith established that claimant is totally disabled. 20 C.F.R. §725.309(d)(2), (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. As claimant has not identified any specific legal or factual error in the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(b)(2)(i)-(iii) because the newly-submitted pulmonary function studies and blood gas studies of record produced non-qualifying values and there was no evidence of cor pulmonale with right-sided congestive heart failure, we affirm the administrative law judge's findings thereunder, as unchallenged on appeal. Decision and Order at 11-12; *see Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). At Section 718.204(b)(2)(iv), claimant maintains that the opinion of Dr. Simpao is reasoned, documented and sufficient to establish total respiratory disability, and that the administrative law judge should not have rejected the opinion for the reasons provided but instead should have compared the exertional requirements of claimant's usual coal mine employment as a dozer operator

---

Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

with Dr. Simpao's assessment of disability.[5] Claimant's Brief at 6-7. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR 1-111.

In evaluating Dr. Simpao's opinion, that claimant had a mild respiratory impairment and lacked the respiratory capacity to perform his usual coal mine employment or comparable work, the administrative law judge determined that the opinion was based upon the physician's "objective findings on the x-ray and pulmonary function test along with symptomatology and physical findings as noted in the report," Director's Exhibit 10. Decision and Order at 13. In view of the fact that all of claimant's objective tests were non-qualifying for total disability, and as Dr Simpao did not explain how the underlying documentation supported his conclusions, the administrative law judge acted within his discretion in finding that Dr. Simpao's opinion was not well reasoned and thus entitled to little weight. Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostsic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly accorded greater weight to the contrary opinions of Drs. Rosenberg and Repsher, that claimant had no respiratory impairment and could perform his usual coal mine employment or similar work, as the administrative law judge found that these opinions were well reasoned and supported by the objective evidence of record. Decision and Order at 13; Employer's Exhibits 1, 5, 7; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic*, 8 BLR 1-46.[6] The administrative law judge's findings pursuant to Section 718.204(b)(2)(iv) are supported by substantial evidence and thus are affirmed.

[5] We reject claimant's general contention that the inadvisability of claimant's return to work in dusty conditions is sufficient to establish a totally disabling respiratory impairment. Claimant's Brief at 7; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

[6] Claimant also asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 8. We reject claimant's argument, as 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). Further, contrary to claimant's assertion, the administrative law judge was not required to consider claimant's age, education and work experience. These issues are not relevant to the issue of the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

As the administrative law judge found that the new evidence submitted in support of this subsequent claim was insufficient to establish total disability, the applicable condition of entitlement upon which the prior denial was based, claimant is precluded from entitlement to benefits pursuant to Section 725.309(d). Consequently, we affirm the administrative law judge's denial of benefits.

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge