BRB No. 06-0416 BLA

EMMETT FOSTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 09/28/2006
	)	
	)	
Respondent	)	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.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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[1] appeals the Decision and Order – Denial of Benefits (04-BLA-6524) of Administrative Law Judge Daniel J. Roketenetz in a subsequent miner's 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 the miner with "eight years, nine months, and one and a half days" of coal mine

[1]Claimant filed this claim for benefits on August 13, 2003. Director's Exhibit 3. Claimant's first claim for benefits was filed on October 14, 1994. Director's Exhibit 1. On July 29, 2002, the Board affirmed Administrative Law Judge Rudolf L. Jansen's denial of benefits based on claimant's failure to establish total respiratory disability. *Id.*

employment. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 7-9. Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d). *Id.* at 9. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete pulmonary evaluation as required by the Act. The Director responds, urging affirmance of the administrative law judge's denial of benefits.[2]

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).

The instant claim, which is claimant's second claim, was filed on August 13, 2003. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) 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.*, 23 BLR 1-1 (2004). Claimant's first claim was denied because claimant failed to establish total respiratory disability.

Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Specifically, claimant contends that "it is error to reject a medical opinion solely because it is based on nonconforming pulmonary function studies." Claimant's Brief at 4.

[2]We affirm the administrative law judge's finding of "eight years, nine months, and one and a half days" of coal mine employment and his findings that the new evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant further contends that the administrative law judge erred in finding that claimant is able to perform his usual coal mine employment "without considering the physical requirements of such work." *Id*.

Claimant's assertions lack merit.[3] We affirm as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is non-supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). In an August 28, 2002 report, Dr. Baker opined that:

> Patient has a Class 1 impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 14. 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 1 impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant is "100% occupationally disabled for work in the coal mining industry." *Id.* The administrative law judge rationally determined that Dr. Baker's opinion merely advised claimant to avoid further coal dust exposure. Decision and Order at 8. The administrative law judge reasonably found that Dr. Baker's opinion is thus insufficient to establish total respiratory disability under Section 718.204(b)(2)(iv). *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). Furthermore, since the administrative law judge permissibly found that Dr. Baker's opinion is insufficient to establish total respiratory disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*,

[3]Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant 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 20 C.F.R. 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.

16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment, *see Budash*, 9 BLR at 1-51-52. As claimant has not raised any additional assertions of error by the administrative law judge with respect to his treatment of the medical opinions of Drs. Simpao, Burki, and Chaney, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).[4] *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on the new medical evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Lastly, claimant argues that, given the administrative law judge's finding at Section 718.204(b)(2)(iv) that Dr. Simpao diagnosed a mild respiratory impairment but failed to address the issue of claimant's level of disability, the Director failed to provide him with a complete pulmonary evaluation as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[5] The Director contends that claimant's assertion overlooks the fact that the Director corrected this deficiency in Dr. Simpao's evaluation by obtaining a consulting opinion from Dr. Burki, who reviewed Dr. Simpao's opinion as well as the other medical evidence associated with claimant's second claim, and found that claimant retains the respiratory capacity to perform his usual coal mine employment. Therefore, the Director maintains, citing *Oliver v. Director, OWCP*, 993 F.2d 1353, 17 BLR 2-88 (8th Cir. 1993), that he has provided claimant with a complete pulmonary examination. We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18

[4]We reject claimant's assertion that the administrative law judge erred in not finding him 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).

[5]Claimant selected Dr. Simpao to perform a pulmonary evaluation on him. Director's Exhibit 10.

BLR 1-84, 1-87 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case is not warranted based on the facts of this case. Therefore, we decline to remand this case for another pulmonary evaluation.

Based on the foregoing, we affirm the administrative law judge's finding that this claim must be denied as claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. *See* 20 C.F.R. §725.309.

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