BRB No. 07-0108 BLA

E.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/20/2007
	)	
LUTTRELL MINING, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURED FUND	)	
	)	
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

Rita Roppolo (Jonathan L. Snare, Acting 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6193) of Administrative Law Judge Alice M. Craft 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). This case involves a subsequent claim filed on May 14, 2001.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with twenty-three years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, she found that the new evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant did not establish that an applicable condition of entitlement had changed since the denial of claimant's 1990 claim. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding that the medical opinion evidence establishes total respiratory disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), because the administrative law judge found Dr. Hussain's opinion of total respiratory disability entitled to little weight. Claimant's Brief at 4. Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director

[1] Claimant filed his initial application for benefits on November 30, 1988, which was denied by the district director, because claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second claim on October 11, 1990, which was denied by the district director. Director's Exhibit 1. The case was then transferred to the Office of Administrative Law Judges. Following a formal hearing, Administrative Law Judge Thomas Schneider issued a Decision and Order on July 5, 1994, denying benefits. Judge Schneider found that, while the new evidence was sufficient to establish the existence of pneumoconiosis, claimant failed to establish a totally disabling respiratory impairment. Accordingly, benefits were denied. Director's Exhibit 1. The Board affirmed the administrative law judge's denial of benefits. *[E.W.] v. Luttrell Mining, Inc.*, BRB No. 94-2804 BLA (Mar. 29, 1995); Director's Exhibit 1. No further action was taken on this claim.

failed to provide him with a complete pulmonary evaluation.[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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 1990 claim was denied because he failed to establish a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the

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[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and her finding that the newly submitted evidence failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As claimant's last coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

opinions of Drs. Baker and Hussain, stating that claimant is disabled for coal mine employment, and the opinions of Drs. Broudy and Dahhan, stating that claimant retained the respiratory capacity to perform the work of a coal miner. The administrative law judge found that Dr. Baker's opinion was not a diagnosis of total disability, because Dr. Baker only found that claimant's pulmonary condition made a return to a dusty environment inadvisable. Decision and Order at 14-15; Director's Exhibit 12. Additionally, she accorded little weight to Dr. Hussain's opinion because the physician did not explain the basis for his diagnosis of total disability, particularly in light of the normal pulmonary function study and blood gas study evidence associated with his report. Decision and Order at 15; Director's Exhibit 5. Finding the opinions of Drs. Broudy and Dahhan well-reasoned and documented because these opinions are supported by the objective testing and they identify the evidence which supports their conclusions, the administrative law judge determined that the new medical evidence, like and unlike, did not establish that claimant is totally disabled. Decision and Order at 14, 15.

In challenging the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish total disability. Claimant argues that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 4-5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a hand loader and roof bolter. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability.[4]

[4] Moreover, with respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment with the FEV1 and vital capacity greater than 80% of predicted. This is based on Table 5-12,

Zimmerman v. Director, OWCP, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Because the administrative law judge rationally found that Dr. Baker did not diagnose a disabling respiratory or pulmonary impairment, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a dozer operator to Dr. Baker's medical opinion. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

In the middle of his argument regarding the administrative law judge's discrediting of Dr. Baker's disability opinion, claimant makes statements regarding the improper reliance upon non-conforming and non-qualifying studies to discredit medical opinions, but claimant does not assert that the administrative law judge cited either non-conforming or non-qualifying studies to discredit Dr. Baker's opinion. Claimant's Brief at 4. Moreover, the record does not support either contention. As discussed above, the administrative law judge accorded less weight to Dr. Baker's opinion because Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment, hence, his opinion was not supportive of claimant's burden. Director's Exhibit 12. Consequently, we affirm the administrative law judge's finding that Dr. Baker's opinion did not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Because an administrative law judge's findings must be based solely on the evidence of record, we also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and "a considerable amount of time has passed since the initial diagnosis…." Claimant's Brief at 5. *White*, 23 BLR at 1-7 n.8. Moreover, as claimant does not otherwise challenge the

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Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 12. Dr. Baker then stated that:

> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the 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 similar dusty occupations.

Director's Exhibit 12. However, the *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class I impairment as involving no impairment to the whole person.

administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm her finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 14-15; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *see also 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). Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under Section 725.309(d) with respect to total disability pursuant to Section 718.204(b)(2), the element of entitlement previously adjudicated against claimant.

Claimant lastly contends that 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, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). In this case, the administrative law judge rationally assigned greater probative weight to the opinions of Drs. Broudy and Dahhan, that claimant is not totally disabled, and thus lesser probative weight to Dr. Hussain's opinion, that claimant does not have the respiratory capacity to perform his usual coal mine employment. Decision and Order at 15. As the Director correctly argues, the administrative law judge did not find that Dr. Hussain's opinion was incomplete or incredible. The Director is not required to provide claimant with a dispositive medical evaluation but only one that is complete and credible. Thus, we reject claimant's argument that the Director failed to provide claimant with a full pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

In light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge