

BRB No. 07-0110 BLA

O.B.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 09/18/2007
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER
)	

Appeal of the Decision and Order - Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Barry Joyner (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5520) of Administrative Law Judge Pamela Lakes Wood rendered 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). Claimant filed a subsequent claim on November 27, 2003.¹ The administrative law judge determined that the newly

¹ The procedural history of this case is as follows. The Social Security Administration (SSA) denied claimant's first Part B claim, which is not contained in the

submitted evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore, found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that because he has already established the existence of pneumoconiosis in a prior claim, that the finding should have been binding on the administrative law judge with respect to the instant subsequent claim. Claimant argues that the report of Dr. Baker, the physician who performed the Department of Labor (DOL) examination, failed to adequately address the issue of his disability, and therefore he contends that the DOL failed to provide him with a complete pulmonary evaluation as required by 20 C.F.R. §725.406(a). In addition, claimant argues that the administrative law judge misapplied the preponderance of the evidence standard in allocating the parties' burden of proof. The Director, Office of Workers' Compensation Programs (the Director) responds, asserting that the DOL has satisfied its statutory obligation to provide claimant with a complete and credible pulmonary evaluation. The Director urges the Board to affirm the administrative law judge's denial of benefits.

record, on May 7, 1973. Director's Exhibit 1. Claimant elected review, and the claim was forwarded to the Department of Labor (DOL) for consideration. *Id.* In the interim, claimant filed a separate claim with the DOL on October 8, 1975. *Id.* Both of these claims were denied on May 19, 1980. Director's Exhibit 1. Claimant filed a third claim on December 17, 1982, which was denied on February 2, 1983. Claimant's fourth claim for benefits, filed on January 30, 1984, was treated as a request for modification and was also denied on February 2, 1983. *Id.* Claimant next filed a claim on October 24, 1986, which was denied by Administrative Law Judge Donald W. Mosser in a Decision and Order dated August 17, 1989. *Id.* Judge Mosser specifically found the new evidence was sufficient to establish the existence of pneumoconiosis and a material change in conditions pursuant to 20 C.F.R. §718.309(d) (2000). However, Judge Mosser also found that claimant was not totally disabled. *Id.* The denial of benefits was affirmed by the Board on appeal, *see [O.B.] v. Director, OWCP*, BRB No. 89-3114 BLA (89-3114 BLA) (Jan. 24, 1991) (unpub.). Director's Exhibit 1. Claimant subsequently filed a claim on January 27, 1993. *Id.* In a Decision and Order dated May 12, 1995, Administrative Law Judge Daniel J. Roketenetz denied benefits because he determined that claimant failed to establish total disability, and therefore, found that claimant was unable to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Claimant took no further action until filing the instant subsequent claim on November 27, 2003. Director's Exhibit 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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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); see *Tennessee Consolidated Coal Co., v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *White v. New White Coal Co.*, 23 BLR 1-1 (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 prior claim was denied because the newly submitted evidence failed to establish that he was totally disabled by a respiratory or pulmonary impairment, sufficient to demonstrate a material change in conditions pursuant to 20 C.F.R. §718.309 (2000). Director's Exhibit 1. With respect to the instant subsequent claim, claimant was required to submit new evidence proving that he was totally disabled in order for him to proceed with his claim on the merits. 20 C.F.R. §725.309(d); 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).

The administrative law judge found that the newly submitted evidence was insufficient to establish claimant's total disability. As noted by the administrative law judge, there is only one newly submitted pulmonary function study and one newly submitted arterial blood gas study, both of which were non-qualifying for total disability. Likewise, there is only one newly submitted medical opinion of record from, Dr. Baker, who specifically opined that claimant retained the respiratory capacity to return to his last coal mine employment. Decision and Order at 8; Director's Exhibit 10. Because claimant does not specifically challenge the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because the newly submitted evidence does not establish that claimant is totally disabled, we also affirm the administrative law judge's finding that

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.³ See *White*, 23 BLR at 1-3.

Claimant, however, asserts on appeal that he did not receive a complete pulmonary evaluation that “fairly” addresses his disability. Claimant’s Brief at 2. We construe claimant’s argument to be that he did not receive a complete pulmonary evaluation because Dr. Baker did not provide an opinion sufficient to establish that his entitlement to benefits. This argument is without merit. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); Claimant’s Brief at 2-3. The record reflects that Dr. Baker conducted a physical examination of claimant at the request of the DOL on January 11, 2003. Dr. Baker performed the full range of objective testing, as required by the regulations, and answered the questions posed on the Department of Labor examination form as to each element of entitlement. Director’s Exhibit 10. As noted by the Director, the “key issue in this case” was whether claimant suffered total respiratory disability. Director’s Brief at 2. Dr. Baker answered that question in his report. Director’s Exhibit 10. Dr. Baker specifically opined that claimant suffered from a respiratory condition due, in part, to coal dust exposure, but he also stated that claimant was not totally disabled.⁴ *Id.* Because Dr. Baker addressed all of the requisite elements of entitlement, we reject claimant’s suggestion that he is entitled to a new pulmonary examination simply because he disagrees with Dr. Baker’s conclusions. Thus, we reject claimant’s argument that was not provided with a complete and credible pulmonary evaluation. See *Hodges*, 18 BLR at 1-88 n.3.

Finally, there is no merit to claimant’s assertion that the administrative law judge erred in her application of the evidentiary standard in this case. Claimant has the burden

³ Claimant asserts that the administrative law judge failed to properly recognize that he has established the existence of pneumoconiosis. This assertion is without merit. The administrative law judge was unable to reach the merits of the claim, and address whether claimant suffered from pneumoconiosis, based on claimant’s failure to establish a change in an applicable condition of entitlement.

⁴ Although the administrative law judge indicated that Dr. Baker provided cursory responses to the questions posed by the Department of Labor questionnaire, this does not require a new pulmonary evaluation. We note that, even if Dr. Baker had been instructed to offer a more complete explanation of his findings, it would not change the outcome of this case as the doctor was of the opinion that claimant was not totally disabled. Furthermore, we agree with the Director that “[a]ny possible defect in Dr. Baker’s opinion with regard to disability causation [also] would not affect the result in this case.” Director’s Brief at 2 n.1.

of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR at 1-1 (1986) (*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant failed to satisfy his burden of proof pursuant to 20 C.F.R §§718.204(b)(2) and 725.309, 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

BETTY JEAN HALL
Administrative Appeals Judge