BRB No. 07-0131 BLA

R.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK	)	
	)	
and	)	DATE ISSUED: 09/25/2007
	)	
ARCH COAL CORPORATION, c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

R.G., Jackson, Kentucky, *pro se*.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (04-BLA-6092) of Administrative Law Judge Thomas F. Phalen, Jr., 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 first filed a claim for black lung benefits on February 25, 1991, which was denied by the district director on July 22, 1991. Director's Exhibit 1. Claimant took no further action with regard to the denial of his claim, until he filed the instant, subsequent claim on January 23, 2003. Decision and Order at 3; Director's Exhibit 3. The district

director issued a Proposed Decision and Order denying benefits on December 9, 2003. Director's Exhibit 29. Claimant requested a hearing, which was held on March 21, 2006. In his Decision and Order issued on September 20, 2006, the administrative law judge credited claimant with sixteen years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge considered all of the record evidence, including the evidence submitted in conjunction with the prior claim, and found that claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with law.[1] 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).

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); *White v. New White Coal Co.*, 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). In this case, claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment; therefore, he was required to submit new evidence to establish one of these elements. 20 C.F.R. §725.309(d)(2),(3). The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this claim arises, has held under the prior regulation at Section 725.309 (2000), that if a claimant proves one of the elements of entitlement previously denied, then the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with the prior claim, supports a finding of entitlement to benefits. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). In this case, the administrative

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

law judge did not strictly follow the guidelines of Section 725.309(d). Instead, he weighed all of the record evidence relevant to the issues of entitlement as though claimant had already satisfied his burden of establishing a change in an applicable condition of entitlement. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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 a finding of 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports his denial of benefits. The administrative law judge in the instant case reviewed all of the record evidence, including the evidence submitted with the prior claim, and correctly found that claimant is unable to establish his total respiratory disability, a requisite element of entitlement to benefits. *See Trent*, 11 BLR at 1-27 (1987).

In considering whether claimant was totally disabled, the administrative law judge first reviewed the pulmonary function study evidence. He properly noted that there were two pulmonary function studies, dated December 21, 1990 and January 3, 1999, submitted with claimant's prior claim, and two pulmonary function studies, dated June 7, 2003 and May 8, 2002, submitted with the subsequent claim. Director's Exhibits 15, 18; Claimant's Exhibits 2, 3. None of these four studies was qualifying for total disability under the regulations.[2] Similarly, the arterial blood study gas evidence, consisting of two studies dated January 3, 1991 and March 26, 1991, submitted with the prior claim, and two studies dated May 8, 2003 and June 7, 2003, submitted with the claimant's subsequent claim, was also non-qualifying for total disability. Claimant's Exhibit 3, Director's Exhibits 15, 18. Thus, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii). Furthermore, the administrative law judge properly found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) since there was no evidence in the record showing that he suffered from cor pulmonale with right-sided congestive heart failure. Decision and Order at 12.

[2] A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

Finally, Section 718.204(b)(2)(iv) provides for a finding of total disability "if a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge correctly determined that there was no medical opinion evidence from which to conclude that claimant was totally disabled. Decision and Order at 15.

The record contains five medical opinions. Dr. Myers examined claimant on December 21, 1990 and opined that he suffered a Class I respiratory impairment.[3] Claimant's Exhibit 1. Dr. Fritzhand examined claimant on March 26, 1991 and did not report any respiratory or pulmonary disability. Director's Exhibit 1. Claimant was examined by Dr. Anderson on January 3, 1991. Claimant's Exhibit 3. Dr. Anderson opined that claimant's pulmonary function and arterial blood gas studies were normal, and that claimant retained the respiratory capacity to perform his usual coal mine work as a heavy equipment operator. *Id*. Dr. Baker next examined claimant on June 7, 2003. Director's Exhibit 15. He indicated that claimant's objective testing was normal and diagnosed "minimal to no impairment." *Id*. Lastly, claimant was examined by Dr. Jarboe on May 8, 2003. Director's Exhibit 18. Dr. Jarboe opined that claimant had no respiratory impairment and that he retained the functional capacity to do his last coal mine job. *Id*.

As noted by the administrative law judge, Dr. Meyers' recommendation that claimant should limit further exposure to coal dust was not the equivalent of a reasoned opinion of total disability. Decision and Order at 12. Medical opinions that advise against further coal dust exposure, and fail to address the miner's physical capacity to do his usual coal mine employment, are not sufficient to satisfy claimant's burden of proof under Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). The remaining medical opinions by Drs. Fritzhand, Anderson, Baker and Jarboe likewise fail to satisfy claimant's burden of proof as they do not diagnose a disabling respiratory or pulmonary impairment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant failed to establish total disability based on the

[3] At the time of Dr. Myers' examination, a Class I respiratory impairment listed under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Chapter 5, p. 116, Table 8 (3rd. ed. 1989), corresponded to a rating of no impairment.

medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge properly determined that the evidence was insufficient to establish that claimant is totally disabled, a requisite element of entitlement, benefits are precluded.[4] *Trent*, 11 BLR at 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR at 1-2.

[4] As we affirm the administrative law judge's determination that claimant is not totally disabled, we decline to address his findings as to the existence of pneumoconiosis.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge