BRB No. 07-0143 BLA

R.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	DATE ISSUED: 09/24/2007
	)	
and	)	
	)	
EMPLOYERS' INSURANCE OF WAUSAU	)	
	)	
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.

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

Carl M. Brashear (Hoskins Law Offices, PLLC) Lexington, Kentucky, for employer.

Barry H. 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6792) 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).[1] Claimant filed his claim for benefits on August 13, 2003. Director's Exhibit 3. The administrative law judge credited claimant with at least nineteen years of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering the subsequent claim, the administrative law judge concluded that the newly submitted evidence did not establish any element of entitlement. The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.[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. 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant's previous claim, filed on October 7, 1993, was denied on April 4, 1994, because claimant did not establish total disability. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Because claimant does not challenge the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim.[4] 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered two new medical reports. Dr. Simpao examined and tested claimant and diagnosed a mild impairment. Director's Exhibit 11. Dr. Dahhan examined and tested claimant and diagnosed a mild, reversible obstructive impairment. Director's Exhibit 14 at 4. Based upon a "normal" blood gas study, "normal post bronchodilator spirometry," and "normal" examination results, Dr. Dahhan opined that claimant retains the respiratory capacity to continue his previous coal mining work. *Id*. The administrative law judge found that this evidence failed to establish total disability, because "no physician of record opines that [claimant] is totally disabled." Decision and Order at 10.

Claimant contends that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's

[4] Because the pneumoconiosis element was decided in claimant's favor in the prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2). Therefore, we need not address the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*). Accordingly, we do not reach claimant's arguments directed at those findings.

usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's specific argument, however, is that:

> It can be reasonably concluded that the claimant's coal mining 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, 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. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Additionally, claimant argues that, since pneumoconiosis is a progressive disease, it must have worsened, thus affecting his ability to perform his usual coal mine employment. Claimant's Brief at 6. An administrative law judge's findings regarding total disability must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n. 8. We therefore reject claimant's argument and affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant also contends that, because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's September 15, 2003 medical opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that there was no violation of his duty to provide claimant with a complete pulmonary evaluation.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the

Department of Labor examination form.[5] 20 C.F.R. §§718.101(a), 718.104, 725.406(a). As discussed above, claimant had to establish total disability based on the new evidence. Claimant does not assert any defect with respect to Dr. Simpao's opinion regarding total disability. On the issue of total disability, the administrative law judge found that Dr. Simpao's opinion diagnosing a mild impairment, even if well-reasoned and documented, would be, at best, in equipoise with Dr. Dahhan's "well-reasoned" opinion that claimant is not totally disabled. Decision and Order at 11, and n.10. Because the administrative law judge's finding that the new evidence did not establish total disability is sufficient to support his denial of benefits, we agree with the Director that any defect in Dr. Simpao's opinion with regard to the issue of pneumoconiosis is inconsequential. *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 (1994).

As the administrative law judge properly found that the new evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2), claimant has failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits.

[5] Substantial evidence does not support the administrative law judge's finding that Dr. Simpao did not address the total disability element, and therefore did not provide an evaluation sufficient to constitute an opportunity to substantiate the claim. Dr. Simpao addressed the total disability element by indicating that claimant has a mild impairment. *See Smith v. Martin County Coal Corp*., Nos. 06-3808, 06-3907, 2007 WL 1544154 at *5 (6th Cir. May 25, 2007).

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