

BRB No. 08-0182 BLA

F.C.)
)
 Claimant-Petitioner)
)
 v.)
)
 EASTERN MOUNTAIN CONTRACTORS,)
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-) DATE ISSUED: 09/18/2008
 INSURANCE 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 – 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.

David H. Neeley (Neeley Law Office, PSC), Prestonsburg, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (07-BLA-5156) of Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge) on a

subsequent claim¹ 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 found, as the parties stipulated, that the miner had at least sixteen years of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the newly submitted evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and that claimant failed, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge failed to compare the exertional requirements of claimant's usual coal mine employment with the new medical opinion evidence assessing claimant's respiratory disabilities. Employer responds, urging affirmance of the administrative law judge's Decision and Order – Denial of Benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,² they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed this subsequent claim for benefits on December 13, 2005. Director's Exhibit 4. Claimant filed his initial claim on April 15, 1996. Director's Exhibit 1. That claim was denied because, while the district director determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, he found that claimant failed to establish total respiratory disability. Claimant did not appeal the denial. Claimant filed his second claim for benefits on February 22, 2001. Director's Exhibit 2. Benefits were denied on January 6, 2004 by an administrative law judge, who found that claimant did not establish total respiratory disability and failed, therefore, to establish a change in an applicable condition of entitlement. On November 30, 2004, the Board affirmed that decision. *See [F.C.] v. Eastern Mountain Contractors, Inc.*, BRB No. 04-0392 BLA (Nov. 30, 2004) (unpub.).

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 most recent claim was denied because he failed to establish a totally disabling respiratory impairment. Consequently, claimant had to submit new evidence of a totally disabling respiratory impairment in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant argues that the administrative law judge erred in finding that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).³ Specifically, claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work as a loader operator with the physicians' assessment of disability. Claimant also contends that, considering the new opinion of Dr. Simpao advising against further dust exposure, claimant's condition precludes him from engaging in his usual employment in a dusty environment.

The newly submitted evidence relevant to the issue of total respiratory disability consists of two non-qualifying pulmonary function studies, two non-qualifying blood gas studies, and the medical opinions of Drs. Simpao, Dahhan and Westerfield. In finding that the new medical opinion evidence failed to establish total disability at Section 718.204(b)(2)(iv), the administrative law judge noted that Dr. Simpao diagnosed a mild respiratory impairment, but stated that claimant retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 18, 22. The administrative law judge further noted that Dr. Dahhan assessed claimant as having the respiratory capacity to continue his previous coal mine employment, Director's Exhibit 23, and that Dr. Westerfield found no evidence of any respiratory impairment due to coal mine

³ The administrative law judge's finding that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

employment. Employer's Exhibit 1. The administrative law judge noted that an administrative law judge is required to compare the exertional requirements of a claimant's usual coal mine employment with physicians' assessments of claimant's respiratory impairment. Decision and Order at 10. However, on considering all of the newly submitted medical opinions, the administrative law judge correctly found that none of them stated that claimant had a totally disabling respiratory impairment. The administrative law judge noted that all of the newly submitted opinions specifically found that claimant was able to perform his usual coal mine employment from a respiratory standpoint. The administrative law judge, therefore, properly concluded that there was no need to compare the exertional requirements of claimant's usual coal mine employment with the assessments of respiratory disability contained in the physicians' opinions. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Similarly, contrary to claimant's argument, Dr. Simpao's new opinion advising claimant against further dust exposure is not sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence failed to establish total respiratory disability at Section 718.204(b)(2)(iv). In conclusion, we affirm the administrative law judge's finding that the new evidence failed to establish total respiratory disability at Section 718.204(b)(2), and therefore, a change in an applicable condition of entitlement at Section 725.309(d).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge