BRB No. 09-0160 BLA

D.A.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKEY MOUNTAIN TRUCKING	)	DATE ISSUED: 09/11/2009
	)	
and	)	
	)	
NATIONAL SURETY CORPORATION	)	
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (2006-BLA-5844) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) rendered on a subsequent claim filed on May 10, 2005, 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] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the parties stipulated to fourteen years of coal mine employment, but found that the new evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and thereby, failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that there is new x-ray and medical opinion evidence that establishes pneumoconiosis at Section 718.202(a)(1) and (4). Claimant also asserts that he is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), that there is new evidence establishing a total respiratory disability at Section 718.204(b)(2)(i), (ii) and (iv), and that his total respiratory disability arises out of coal mine employment at 20 C.F.R. §718.204(c). In addition, claimant asserts that the administrative law judge erred in failing to properly weigh the opinion of claimant's treating physicians and to consider claimant's treatment records. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[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.[3] 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).

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[1] Claimant's prior claim, filed on October 10, 1994, was denied by the district director on March 2, 1995, for failure to establish any element of entitlement. Director's Exhibit 1 at 11-12. Because claimant did not take any action within sixty days of the denial, his claim was deemed abandoned and was administratively closed.

[2] The administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3) and that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(iii) are affirmed, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Because claimant's last coal mine employment was in Kentucky, we will apply the law 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*).

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).

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). 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 he failed to establish any element of entitlement. Consequently, claimant had to submit new evidence establishing one of the elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

At the outset, we must affirm the administrative law judge's denial of benefits, as claimant has failed to allege a specific error made by the administrative law judge in his consideration of the new evidence on the issues of pneumoconiosis and total disability. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Claimant's mere citation to evidence supportive of his claim is insufficient to provide a basis upon which to review the administrative law judge's findings. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Further, contrary to claimant's general assertion that the administrative law judge did not consider claimant's treatment records, the administrative law judge did consider them. Decision and Order at 11. However, the administrative law judge properly found that they did not establish clinical or legal pneumoconiosis, as their references to coal workers' pneumoconiosis were "unsupported by any data or reasoning" and they did not relate claimant's chronic obstructive pulmonary disease to coal mine employment. *See Clark*, 12 BLR 1-155; 20 C.F.R. §718.204. Claimant has not challenged these credibility determinations. Additionally, contrary to claimant's contention, the administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone, where he finds, as he did here, that the opinion of the treating physician is unreasoned. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

As claimant has failed to sufficiently challenge the administrative law judge's findings that the new evidence does not establish pneumoconiosis or total disability, essential elements of entitlement, *Anderson*, 12 BLR at 1-112, we must affirm the administrative law judge's findings that pneumoconiosis and total disability were not established at Sections 718.202(a)(1) and (4) and 718.204(b)(2)(i), (ii) and (iv). Thus, we

further affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement at Section 725.309.

Accordingly, we affirm the administrative law judge's Decision and Order – Rejection of Claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge