BRB No. 97-1763 BLA

DAVID ROBINETTE Claimant-Petitioner v. STURGEON COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Stephen E. Crist (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1446) of Administrative

Law Judge Richard D. Mills denying benefits on a 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's initial application for benefits filed on November 3, 1983 was finally denied on October 31, 1985. Director's Exhibit 25. His second application filed on April 20, 1993 was finally denied on November 5, 1993. Director's Exhibit 24. On November 29, 1994, claimant filed the present application which, like his second claim, is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The administrative law judge accepted the parties' stipulation to at least eighteen years and eleven months of coal mine employment, found that the newly-submitted evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and concluded therefore that a material change in conditions was not established as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the new medical evidence pursuant to Section 718.204(c)(1) and (4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §718.204(c)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Where a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

The administrative law judge noted that claimant was previously denied benefits because he failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Decision and Order at 2, 4; Director's Exhibit 24. The administrative law judge then considered the new evidence to determine whether it established a material change in conditions. *See Rutter, supra*.

The new medical evidence relating to disability consisted of a non-qualifying[2] blood gas study, a pulmonary function study which was qualifying pre-bronchodilator and non-qualifying post-bronchodilator, and two medical reports. Director's Exhibits 9-11; Employer's Exhibit 5. Dr. Vasudevan, whose qualifications are not in the record, examined and tested claimant and, based in part on the pulmonary function study results, diagnosed bronchial asthma resulting in a mild impairment. Director's Exhibit 11. Dr. Fino, who the record indicates is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the new medical evidence and concluded that claimant's pulmonary system is normal. Employer's Exhibit 5. In so doing, Dr. Fino opined that although the new pulmonary function study administered on January 13, 1995 was invalid due to insufficient effort, the post-bronchodilator values were normal.

After finding that the new blood gas study failed to establish total respiratory disability pursuant to Section 718.204(c)(2), the administrative law judge summarized the pulmonary function study results and the medical opinions. Decision and Order at 5-6. The administrative law judge weighed these items of evidence together and concluded that, because the pulmonary function study was non-qualifying post-bronchodilator, because Dr. Vasudevan diagnosed only a mild

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

impairment, and because Dr. Fino believed that the pulmonary function values were low due to poor effort, "neither the pulmonary function study nor the medical opinions establish[ed] that the claimant is totally disabled." Decision and Order at 7.

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge erred by accepting Dr. Fino's "speculation that the claimant did not actually perform a valid pulmonary function test." Claimant's Brief at 4. Review of the record indicates that Dr. Fino explained his conclusion by identifying specific deviations from the pulmonary function study quality standards listed at Part 718 Appendix B. Employer's Exhibit 5 at 2; *see* 20 C.F.R. §718.103(c); Part 718 App. B 2(ii)(C), (F). In discussing Dr. Fino's comments, the administrative law judge considered Dr. Fino's documented credentials in Pulmonary Disease. Decision and Order at 7. In addition, the administrative law judge properly considered that the pulmonary function study was partially non-qualifying and that the physician who administered the test diagnosed only a mild impairment. *See Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11, 1-14 (1991)(administrative law judge must weigh evidence supportive of a finding of total disability against the contrary probative evidence); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Although the administrative law judge should also have weighed Dr. Fino's comments against the validation form submitted by Dr. Ranavaya,[3] substantial evidence nevertheless supports the administrative law judge's finding at Section 718.204(c)(1) because he provided additional, valid reasons for the weight accorded to the January 13, 1995 pulmonary function study. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(4), claimant asserts that Dr. Fino's opinion is unexplained and therefore the administrative law judge should not have accorded it any weight. Claimant's Brief at 4. Contrary to claimant's contention, Dr. Fino explained that his conclusion that claimant's pulmonary system is normal was based on his opinion that claimant's blood gas study, pulmonary function study, and physical examination were all normal. Employer's Exhibit 5. Therefore, we reject claimant's contention. In addition, because the record indicates that Dr. Fino based his opinion on a review of the examination results and objective testing, we also reject claimant's assertion that Dr. Fino's opinion was based solely upon his belief that claimant does not have pneumoconiosis. Claimant's Brief at 4. Substantial evidence supports the administrative law judge's finding that the two new medical

[3] Dr. Ranavaya, who is Board-Certified in Occupational Medicine, submitted a form on which he checked a box indicating that he believed that the pulmonary function study was acceptable. Director's Exhibit 9.

opinions do not establish total respiratory disability. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Based on the foregoing, we affirm the administrative law judge's finding that the newly-submitted evidence failed to establish total respiratory disability, the element of entitlement previously adjudicated against claimant, and therefore, failed to establish a material change in conditions pursuant to Section 725.309(d). *See Rutter, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge