

BRB No. 04-0673 BLA

DANIEL B. CALDWELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 05/26/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	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.

Phillip Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5749) 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). The administrative law judge found, and the parties stipulated to, twenty-six years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R.

Part 718.¹ Decision and Order at 3. In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), elements of entitlement previously adjudicated against claimant. The administrative law judge, therefore, determined that claimant failed to establish a change in one of the applicable conditions of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204(b), (c). The Director, Office of Workers' Compensation Programs (the Director), responds, and urges affirmance of the administrative law judge's denial of benefits.

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 applicable law, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

The instant claim, filed November 16, 2001, Director's Exhibit 3, constitutes a subsequent claim under the revised regulation at 20 C.F.R. §725.309(d). As such, this claim must be denied unless claimant demonstrates that one of the applicable conditions

¹ Claimant filed his first claim for benefits on May 7, 1996. Director's Exhibit 1. That claim was denied by Administrative Law Judge Donald W. Mosser on May 27, 1998, because claimant failed to establish any element of entitlement. *Id.* The Benefits Review Board affirmed the denial on June 8, 1999. *Id.* Claimant filed this subsequent claim on November 16, 2001, which was denied by the district director by Proposed Decision and Order dated February 25, 2003. Director's Exhibits 3, 13. Claimant requested a formal hearing on February 27, 2003, and the case was transferred to the Office of the Administrative Law Judges on April 18, 2003. Director's Exhibits 14, 16. A hearing was held on November 18, 2003.

of entitlement has changed since Administrative Law Judge Donald W. Mosser's May 27, 1998 denial of benefits became final. 20 C.F.R. §725.309(d). Judge Mosser denied benefits based on claimant's failure to establish any element of entitlement. Director's Exhibit 1. Claimant, therefore, must establish one of the elements of entitlement in the instant subsequent claim to meet the requirements of 20 C.F.R. §725.309(d).

Claimant contends that Dr. Baker's opinion, the only newly submitted medical opinion, establishes that he is totally disabled due to pneumoconiosis, and should have been afforded greater weight by the administrative law judge. By report dated May 11, 2002, Dr. Baker diagnosed chronic bronchitis and hypoxemia, both due to coal dust exposure, and chest pain by history, the etiology of which he indicated he could not determine. Director's Exhibit 9. Dr. Baker stated that claimant's degree of impairment was "minimal with decreased PO₂, and chronic bronchitis." *Id.* In a separate report, also dated May 11, 2002, Dr. Baker indicated, however, that claimant had no occupational lung disease caused by coal mine employment, had no pulmonary impairment, and had the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* Claimant asserts general error on the part of the administrative law judge, stating, "When considering the total evidence of record, including the claimant's testimony, his history of exposure, and the medical evidence, it is obvious the administrative law judge erred in his decision." Claimant's Brief at 3.²

Claimant's contention lacks merit. Considering Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4), the administrative law judge noted, "Dr. Baker's findings regarding the presence or absence of medical or legal pneumoconiosis are contradictory," and permissibly determined that Dr. Baker's opinion was thus insufficient to establish the existence of pneumoconiosis. *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). The administrative law judge likewise permissibly found, when he considered Dr. Baker's opinion on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv), that it was not a reasoned medical opinion. Decision and Order at 9; *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); see *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Based on the foregoing, we affirm the administrative law judge's weighing of Dr. Baker's opinion, and reject claimant's challenge thereto.

Claimant identifies no further error, general or specific, in the administrative law judge's findings. See 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 44, 9 BLR 2-46 (6th Cir.); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore,

² Claimant identifies no error in the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iii). We thus affirm these findings as they are unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

affirm the administrative law judge's denial of benefits in the instant subsequent claim based on claimant's failure to establish that one of the applicable conditions of entitlement has changed since the prior denial of benefits. 20 C.F.R. §725.309(d).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge