

BRB No. 06-0856 BLA

HARMON OSBORNE)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 08/30/2007
)
 BON TRUCKING COMPANY,)
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS)
 SELF-INSURED 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-Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for
employer/carrier.

Michelle S. Gerdano (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
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order—Denying Benefits (04-BLA-5300) of Administrative Law Judge Joseph E. Kane 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 The administrative law judge credited claimant with at least ten years of coal mine employment.² The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge determined that the new evidence did not 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 his state black lung award precluded relitigation of whether the x-ray evidence established the existence of pneumoconiosis in this claim. Claimant also argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director responds, urging the Board to reject the argument that the principle of collateral estoppel applies in this claim, and asserting that he provided claimant with a complete pulmonary evaluation.³

¹ Claimant's first claim for benefits, filed on July 20, 1988, was denied by an administrative law judge because the evidence did not establish the existence of pneumoconiosis or that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed the denial of benefits on June 14, 1993. *Id.* Claimant filed his current claim for benefits on January 9, 2002. Director's Exhibit 3.

² The record indicates that claimant's last 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, 1-203 (1989)(*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(4), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 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" 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 the existence of pneumoconiosis and total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either element to obtain review of the merits of his claim.⁴ 20 C.F.R. §725.309(d)(2),(3).

We first address claimant's challenge to the administrative law judge's finding that the uniformly negative x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 5, 9. Claimant argues that collateral estoppel precluded that issue from being relitigated, because claimant established the existence of coal workers' pneumoconiosis by x-ray in his state workers' compensation award. Claimant's Brief at 1-2.

We disagree. The administrative law judge was not bound to find the existence of pneumoconiosis established by x-ray, based on claimant's Kentucky workers' compensation award. See *Schegan v. Waste Mgmt. & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994); *Wenanski v. Director, OWCP*, 8 BLR 1-487, 1-489 (1986). Moreover, claimant's state workers' compensation award was not contained in the record, and thus, the administrative law judge could not review it or rely on it. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the new

⁴ As noted, claimant does not challenge the finding that the new evidence did not establish total disability. See n.3, *supra*.

x-ray evidence, we affirm the finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Because claimant did not establish the existence of pneumoconiosis or total disability based on the new evidence, we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement. We therefore affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

Claimant contends that he is entitled to a remand of the case for the Director to provide him with a complete and credible pulmonary evaluation because the Department of Labor physician, Dr. Baker, "fail[ed] to credibly address the issue of [p]ulmonary [i]mpairment" Claimant's Brief at 2. The Director asserts that he met his duty to provide claimant with a complete pulmonary evaluation. Director's Brief at 2.

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The record reflects that Dr. Baker 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. Director's Exhibits 11, 29; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge fully credited Dr. Baker's opinion that claimant has minimal or no pulmonary impairment, and should be able to perform his usual coal mine employment. Director's Exhibits 11, 29. Therefore, we agree with the Director that he met his statutory obligation to claimant in this case. *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 (1994).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge