BRB No. 05-0866 BLA

EDWIN WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/20/2006
SHAMROCK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6267) 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). Claimant's initial claim for benefits filed on

August 4, 1994 was denied on January 28, 1997 because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed this claim for benefits on July 16, 2001. Director's Exhibit 3.

The administrative law judge credited claimant with "at least" thirteen years of coal mine employment.[1] Decision and Order at 13. The administrative law judge found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore concluded that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence. Claimant alleges further that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.[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. 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 a finding of 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).

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[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 4, 20. 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 (1989)(*en banc*).

[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered new medical reports from Drs. Baker, Hussain, Dahhan, and Rosenberg, and medical treatment records from claimant's family physician, Dr. Chaney. Based on a blood gas study, Dr. Baker diagnosed claimant with "[m]ild resting arterial hypoxemia." Director's Exhibit 14 at 2. The administrative law judge noted that although Dr. Baker diagnosed mild hypoxemia, he did not assess claimant's ability to perform his coal mine work as a welder and repairman. The administrative law judge further noted that Dr. Chaney's treatment notes "did not report on [claimant's] level of pulmonary impairment . . . ." Decision and Order at 13; Director's Exhibits 12, 13. Finally, Drs. Hussain, Dahhan, and Rosenberg concluded, based on objective tests, that claimant has no respiratory or pulmonary impairment at all. Director's Exhibits 15, 16; Employer's Exhibits 3, 5, 6. According greater weight to the "reasoned and well-documented" reports from Drs. Dahhan and Rosenberg, the administrative law judge found that the new medical reports did not establish that claimant is totally disabled. Decision and Order at 11, 13.

Claimant contends that the administrative law judge erred because he "made no findings regarding Dr. Baker's assessment of a pulmonary impairment . . . ." Claimant's Brief at 7. This contention lacks merit. As discussed, the administrative law judge considered Dr. Baker's diagnosis of mild hypoxemia, but permissibly chose to accord greater weight to better reasoned and documented opinions that claimant has no respiratory or pulmonary impairment.[3] *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21

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[3] The record reflects that Dr. Baker did not assess any other respiratory impairments. Specifically, his statement that claimant is "100% occupationally disabled" because of the need to "limit further exposure," is merely a recommendation against further exposure to coal mine dust, not a diagnosis of a respiratory disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Director's Exhibit 14 at 2. Additionally, Dr. Baker's assessment of a Class I

BLR 2-615, 2-626 (6th Cir. 1999). Claimant's argument that Dr. Baker's report was well reasoned essentially asks the Board to reweigh the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Additionally, because the administrative law judge credited the medical reports concluding that claimant has no impairment, it was unnecessary for him to compare the exertional requirements of claimant's job duties with the medical reports. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We therefore reject claimant's contention that the administrative law judge erred in his analysis of Dr. Baker's report.

Further, claimant's allegation that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that because the administrative law judge did not fully credit Dr. Hussain's October 24, 2001 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 6. The Director responds that there was no violation of his duty to provide claimant with a complete pulmonary evaluation.

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 issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

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impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, corresponds to a rating of no impairment. *See Gamble v. Penn Allegheny Coal Co.*, 5 BLR 1-457, 1-459-60 (1983).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations. Director's Exhibit 15 at 3; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Based on that evaluation, Dr. Hussain concluded that claimant has no cardiopulmonary diagnosis, no occupational lung disease, and no impairment. Director's Exhibit 15 at 3-5. On the issue of total disability, the administrative law judge gave "less" weight to Dr. Hussain's opinion because Dr. Hussain did not indicate that he knew the length of claimant's coal mine employment or the specific job duties that claimant had to perform. Decision and Order at 11, 13. We agree with the Director, however, that those considerations were not critical here because Dr. Hussain opined that claimant has no impairment at all. *See Lane*, 105 F.3d at 172-73, 21 BLR at 2-45-46; *Wetzel*, 8 BLR at 1-142. Consequently, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Hussain's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish that claimant is totally disabled.[4] Consequently, we affirm the administrative law judge's finding that claimant did not establish that the applicable condition of entitlement changed since the denial of his prior claim, and we 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.

[4] Because the pneumoconiosis element was decided in claimant's favor in the prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2). Therefore, we need not address the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*). Accordingly, we do not reach claimant's arguments directed at those findings.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge