BRB No. 06-0439 BLA

BOBBY W. ELDRIDGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/18/2006
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (04-BLA-5389) of

[1]Claimant filed this claim for benefits on August 16, 2002. Director's Exhibit 6. Claimant's first claim, filed on October 29, 1973, was finally denied by a Department of Labor (DOL) claims examiner on April 7, 1980. Director's Exhibit 1. Claimant's second

Administrative Law Judge Rudolf L. Jansen in a subsequent miner's 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 credited the miner with eleven years of coal mine employment pursuant to the parties' stipulation, 2005 Hearing Transcript at 8. Decision and Order at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 13-15. Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial, pursuant to 20 C.F.R. §725.309(d). *Id.* at 15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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. 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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claim for benefits, filed on December 10, 1985, was finally denied by a DOL claims examiner on February 29, 1988. Director's Exhibit 2. Claimant filed another claim on June 10, 1988, which was treated as a request for modification, but was ultimately deemed abandoned on October 12, 1988 because claimant failed to submit evidence to support his modification request. *Id.* Claimant's third claim for benefits, filed on May 20, 1993, was finally denied by Administrative Law Judge Richard E. Huddleston on September 6, 1996. Director's Exhibit 3. Claimant's fourth claim for benefits, filed on March 8, 1999, was finally denied by Administrative Law Judge Donald W. Mosser on January 26, 2001 because claimant failed to establish total respiratory disability. Director's Exhibit 4.

[2]We affirm the administrative law judge's finding of eleven years of coal mine employment and his findings that the new evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The instant claim, which is claimant's fifth claim, was filed on August 16, 2002. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) 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 (2004). Claimant's fourth claim was denied because claimant failed to establish total respiratory disability.

Claimant argues that the administrative law judge erred in failing to find the opinion of claimant's treating physician, Dr. Moore, sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge first considered the opinions of Drs. Dahhan, Baker, and Branscomb.[3] The administrative law judge noted that Drs. Dahhan, Baker, and Branscomb all found that claimant did not have a respiratory impairment and that he retained the respiratory capacity to perform his previous coal mine employment. The administrative law judge found the opinions of Drs. Dahhan, Baker, and Branscomb "to be well-reasoned and documented." Decision and Order at 14. Specifically, the administrative law judge stated that Drs. Dahhan and Baker "based their opinions on a complete pulmonary examination and non-qualifying pulmonary function and arterial blood gas studies" and that "Dr. Branscomb based his opinion on a thorough review of [claimant's] medical records." *Id.* Moreover, the administrative law judge stated that the opinions of Drs. Dahhan, Baker, and Branscomb "are better supported by the objective medical data of record." *Id.*

The administrative law judge next considered the opinion of Dr. Moore, who found that claimant is totally disabled due to a respiratory impairment. The administrative law judge concluded that Dr. Moore's "opinion is unreasoned and entitled to less probative weight" because he failed to explain his disability finding in light of claimant's non-qualifying objective test results. *Id.* Because Dr. Moore is claimant's treating physician, the administrative law judge considered this physician's report pursuant to 20 C.F.R. §718.104(d). The administrative law judge found that "Dr. Moore's opinion is entitled to no additional weight as [claimant's] treating physician" because claimant "failed to provide any evidence that could be used to establish the

[3]The administrative law judge properly noted that claimant's treatment records are not probative pursuant to Section 718.204(b)(2)(iv) because these records are silent as to whether claimant suffers from a totally disabling respiratory impairment. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365 (1983).

frequency or extent of treatment"[4] that claimant received from Dr. Moore. *Id.* at 15. Furthermore, the administrative law judge found that he could not give controlling weight to Dr. Moore's opinion because of its poor reasoning and documentation.

Contrary to claimant's contention, an administrative law judge may not automatically accord greater weight to the medical opinion of a treating physician. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims). Rather, an administrative law judge must properly examine all of the physicians' opinions on their merits and make a reasoned judgment about their credibility, with proper deference given to the treating physicians' opinions only when warranted. *See* 20 C.F.R. §718.104(d). In the instant case, the administrative law judge performed such an inquiry in determining the weight to be accorded to the opinion of claimant's treating physician, Dr. Moore. Moreover, the administrative law judge found, within his discretion as trier-of-fact, that the opinions of Drs. Baker, Dahhan, and Branscomb are entitled to greater weight because he rationally found these physicians' opinions to be better reasoned and documented than the opinion of Dr. Moore. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on the new medical evidence. *See Fields*, 10 BLR at 1-21; *Rafferty v. Jones &*

[4]In fact, claimant testified that he sees Dr. Moore every three months for his diverticulitis. 2005 Hearing Transcript at 22. Because the administrative law judge stated that "[e]ven assuming Claimant [had] presented evidence to establish a doctor/patient relationship, Dr. Moore's opinion would still not be entitled to any controlling weight because I found his opinion to be poorly reasoned and documented," we deem harmless any error the administrative law judge may have made in failing to consider claimant's testimony regarding the frequency of his visits to Dr. Moore. Decision and Order at 15; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Laughlin Steel Corp., 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Based on the foregoing, we affirm the administrative law judge's finding that this claim must be denied as claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. *See* 20 C.F.R. §725.309.

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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REGINA C. McGRANERY
Administrative Appeals Judge