BRB No. 05-0834 BLA

NEEDHAM F. WHITFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 04/19/2006
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Frances Poole (Lay Representative), Madisonville, Kentucky, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, appearing without the assistance of counsel, appeals the Decision and Order (04-BLA-5484) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found that employer was the proper responsible operator and accepted the parties' stipulation to twenty-two years of qualifying coal mine employment.[1] Decision and Order at 4; Hearing Transcript at 16-17. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 8. After determining that the claim before him was a subsequent claim,[2] the administrative law judge found that although the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, it was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement adjudicated against claimant in the prior denial. Decision and Order at 2-3, 9-15. The administrative law judge concluded, therefore, that claimant failed to establish the requisite change in an applicable condition of entitlement and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 15.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not filed a response brief in the instant appeal. The Director, Office of Workers' Compensation Programs, responds asserting that the

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

[2] Claimant filed his initial claim for benefits on March 10, 1992, which was finally denied by the Department of Labor on September 4, 1992, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on May 26, 1998, which was denied by the district director on September 24, 1998, as claimant failed to establish that he was totally disabled. Director's Exhibit 2. Claimant took no further action until he filed the instant claim on September 10, 2001, which was denied by the district director on September 13, 2003. Director's Exhibits 3, 22. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 23.

administrative law judge's denial of benefits must be vacated and the case remanded for further consideration.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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., Inc.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The administrative law judge correctly noted that the previous claim was finally denied as claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 2-3, 9; Director's Exhibit 2. Consequently, claimant was required to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 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

[3] As the administrative law judge's length of coal mine employment well as his findings pursuant to 20 C.F.R. §§718.202 and 718.203, are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the former provision that claimant must establish at least one element of entitlement previously adjudicated against him).[4]

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge denying benefits must be vacated and the case remanded to the administrative law judge for further consideration.

In considering the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge properly determined that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. *See* 20 C.F.R. §718.204(b)(1); Decision and Order at 10, 13, 15. The administrative law judge acted within his discretion in concluding that the more recent newly submitted pulmonary function studies produced qualifying values and were sufficient to establish total disability pursuant to Section 718.204(b)(2)(i). *See* 20 C.F.R. §718.204(b)(2)(i); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibit 15; Claimant's Exhibits 3, 6; Employer's Exhibit 1; Decision and Order at 14. The administrative law judge, with respect to Section 718.204(b)(2)(ii), correctly noted that the June 10, 2004 blood gas study produced a non-qualifying result at rest and a qualifying result with exercise and that all of the remaining newly submitted blood gas studies of record were non-qualifying.[5] Decision and Order at 14. The administrative law judge therefore permissibly found that the totality of the newly submitted blood gas study evidence was insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibit 7; Claimant's Exhibit 6; Employer's Exhibit 1; Decision and Order at 14. The administrative law judge properly concluded that total disability can not be established pursuant to Section 718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii);

[4] The United States Court of Appeals for the Sixth Circuit has further held under the former regulation that the administrative law judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

Newell v. Freeman United Coal Mining Co., 13 BLR 1-37 (1989); Decision and Order at 15.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the five newly submitted medical opinions of record and determined correctly that Drs. Pruitt, Farmer, Selby and Chavda did not address whether claimant was totally disabled. Decision and Order at 15; Director's Exhibit 7; Claimant's Exhibit 7; Employer's Exhibit 1. The administrative law judge accorded little weight to the opinion in which Dr. Simpao stated that the miner no longer retains the respiratory capacity to perform the work of a miner, as the physician did not sufficiently identify the objective testing upon which he relied in making his diagnosis. Decision and Order at 15; Claimant's Exhibit 6.

When considering Dr. Simpao's opinion, however, the administrative law judge did not address the post-hearing evidence that claimant submitted with the express purpose of curing the deficiencies in Dr. Simpao's opinion and in accordance with the instructions set forth by the administrative law judge at the hearing. *See* Hearing Transcript at 9; Claimant's Letter dated February 7, 2005. Under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge is required to render findings based upon a consideration of all relevant evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge did not comply with the APA in determining the probative weight to which Dr. Simpao's opinion is entitled, we must vacate the administrative law judge's finding that Dr. Simpao's diagnosis is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). On remand, the administrative law judge must reconsider Dr. Simpao's opinion in light of all of the relevant evidence of record.

Upon weighing the newly submitted evidence relevant to Sections 718.204(b)(2)(i)-(iv) together, the administrative law judge found that the newly submitted evidence as a whole fails to establish total disability. *See Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 15. In light of our determination that the administrative law judge did not act properly consider in Dr. Simpao's opinion pursuant to Section 718.204(b)(2)(iv), we must also vacate the administrative law judge's finding with respect to whether the newly submitted evidence of record as a whole is sufficient to establish total disability.

In addition, contrary to the administrative law judge's analysis, the opinions of Drs. Pruitt, Farmer, Selby and Chavda, which do not address whether claimant was totally disabled and the opinion of Dr. Simpao, which supports claimant's burden, are not

contrary probative evidence under Section 718.204(b)(2). Decision and Order at 15; Director's Exhibits 7, 15; Claimant's Exhibits 3, 6, 7; Employer's Exhibit 1; *Fields*, 10 BLR 1-19; *Shedlock*, 9 BLR 1-195. Moreover, non-qualifying blood gas study results do not directly offset to qualifying pulmonary function study results, as blood gas studies and pulmonary function studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). We vacate, therefore, the administrative law judge's finding that the newly submitted evidence of record, when weighed together, does not establish total respiratory or pulmonary disability under Section 718.204(b)(2). The administrative must reconsider this evidence on remand. If the administrative law judge determines that claimant has satisfied his burden of proof regarding the element of total disability, then the administrative law judge must review the record *de novo* and determine if claimant has established entitlement to benefits pursuant to 20 C.F.R. Part 718 by a preponderance of the evidence of record as a whole. *See White*, 23 BLR 1-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge