

BRB Nos. 05-0956 BLA
and 05-0956 BLA-A

CLIFFORD COLLETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 04/19/2006
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
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 Pamela Lakes Wood, 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 A. 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2003-BLA-6373) of Administrative Law Judge Pamela Lakes Wood 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 credited claimant with fourteen years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and noted that the claim before her, filed on February 21, 2001, was a subsequent claim subject to the provisions at 20 C.F.R. §725.309(d). After finding that the present claim was timely filed pursuant to 20 C.F.R. §725.308, the administrative law judge determined that the prior claim was denied for failure to establish either the existence of pneumoconiosis or total respiratory disability. The administrative law judge found that the weight of the newly-submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv); upon consideration of the evidence of record in the prior claim, the administrative law judge determined that it was insufficient to establish entitlement, and that, taking all of the evidence into consideration, claimant cannot establish the existence of pneumoconiosis or total disability. Accordingly, the administrative law judge denied the subsequent claim pursuant to 20 C.F.R. §725.309(d), as claimant had failed to demonstrate that one of the applicable conditions of entitlement previously adjudicated against him had changed since the prior denial.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), or total respiratory disability pursuant to Section 718.204(b)(2)(iv). Claimant alternatively asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required pursuant to 30 U.S.C. §923(b), 20 C.F.R. §725.406(a), because the administrative law judge discounted the opinion of Dr. Hussain on the issue of the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, challenging the administrative law judge's finding that this claim was timely filed pursuant to Section 725.308, and her exclusion of evidence under 20 C.F.R. §725.414. The Director has filed a limited response, urging the Board to reject claimant's argument that the Director failed to provide claimant with a pulmonary examination that complies with the requirements of Section 413(b) of the Act, and to reject employer's arguments on cross-appeal.¹

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, her finding that the newly-submitted evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and her finding that the earlier evidence of record was insufficient to establish the existence of pneumoconiosis or total disability. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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.² 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, we reject claimant's argument that the Director violated his statutory duty to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The record reflects that Dr. Hussain's pulmonary evaluation of claimant addressed all elements of entitlement and was based upon a physical examination, x-ray, pulmonary function study, arterial blood gas study, EKG, claimant's symptoms, and employment, medical and smoking histories. Director's Exhibit 11, Decision and Order at 14. While the administrative law judge determined that Dr. Hussain's diagnosis of pneumoconiosis was outweighed by the contrary x-ray and medical opinion evidence of record, the administrative law judge accorded Dr. Hussain's opinion full weight on the issue of total respiratory disability. Decision and Order at 16, 18, 20, 21. As discussed *infra*, substantial evidence supports the administrative law judge's finding that the weight of the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In these circumstances, we agree with the Director's assertion that his statutory obligation to provide claimant with a complete pulmonary evaluation has been satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Turning to the issue of total disability at Section 718.204(b)(2)(iv), claimant maintains that the newly-submitted opinion of Dr. Baker is reasoned, documented, and sufficient to establish total respiratory disability, and that the administrative law judge should not have rejected the opinion for the reasons provided but instead should have

² 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*).

compared the exertional requirements of claimant's usual coal mine employment with Dr. Baker's assessment of disability. Claimant's Brief at 6-8. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR 1-111.

The administrative law judge acknowledged that claimant's usual coal mine employment as a laborer and equipment operator involved heavy manual labor. Decision and Order at 6. The administrative law judge accurately reviewed the conflicting medical opinions of record, *see* Decision and Order at 14-16, and declined to give Dr. Baker's opinion controlling weight based on his status as a treating physician due to the limited period of time that the physician treated claimant before rendering his opinion. Decision and Order at 17, 21; *see* 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge determined that Dr. Baker was the only physician who opined that claimant was "100% occupationally disabled," Director's Exhibit 12, based on his diagnosis of a Class I impairment and a second impairment pursuant to the *Guides to the Evaluation of Permanent Impairment*, which states that persons who develop pneumoconiosis should limit further exposure to dust.³ Decision and Order at 20-21. The administrative law judge properly found that Dr. Baker's opinion was not the equivalent of a finding of total respiratory disability, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988), and permissibly credited the contrary opinions of Drs. Hussain, Dahhan and Broudy, that claimant had the respiratory capacity to perform his usual coal mine employment or comparable work, which were consistent with the objective clinical findings. Decision and Order at 20-21; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Contrary to claimant's assertion, the administrative law judge was not required to consider claimant's age, education and work experience. These issues are not relevant to the issue of the existence of a respiratory impairment pursuant to Section 718.204(b)(2)(iv).⁴ *See White v. New White Coal Co.*, 23 BLR 1-1 (2004). The

³ Dr. Baker diagnosed a Class I impairment based on FEV₁ and vital capacity values that were greater than 80% of the predicted value, which is equivalent to a 0% impairment as listed in Table 5-12 of the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Director's Exhibit 12.

⁴ Claimant further asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 8. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

administrative law judge also acted within her discretion in according greater weight to the opinions of employer's experts, Drs. Dahhan and Broudy, based on their thorough analysis and supporting documentation. Decision and Order at 21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings that the newly-submitted medical opinions of record are insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv) are supported by substantial evidence and thus are affirmed.

Claimant's failure to establish total disability, an essential element of entitlement, by both the earlier and the newly-submitted evidence of record pursuant to Section 718.204(b)(2)(i)-(iv) precludes an award of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR 1-111. Consequently, we affirm the administrative law judge's denial of benefits and need not reach claimant's arguments on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), or employer's arguments on cross-appeal.

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

JUDITH S. BOGGS
Administrative Appeals Judge