

BRB No. 07-0698 BLA

C. N.)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 04/29/2008
)
 MOUNTAIN RIDGE MINING COMPANY)
)
 and)
)
 EMPLOYERS INSURANCE OF WAUSAU)
)
 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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

C. N., Evarts, Kentucky, *pro se*.

Carl M. Brashear (Hoskins Law Offices), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2005-BLA-05787) of Administrative Law Judge Adele Higgins Odegard 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 found that the claim was timely filed pursuant to 20 C.F.R. §725.308 and, based on the parties' stipulation, credited claimant with ten years of coal mine employment.² Decision and Order at 2 n.3. The administrative law judge acknowledged that claimant's 1999 claim was denied because the district director determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, but did not prove he was totally disabled due to pneumoconiosis. Decision and Order at 4; Director's Exhibit 1. The administrative law judge then considered the newly submitted evidence and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) or invoke the irrebuttable presumption of total disability pursuant to 20 C.F.R. §718.304. The administrative law judge therefore found that claimant failed to establish 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 generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director,

¹ Claimant filed his first claim on April 12, 1999. Director's Exhibit 1. On July 30, 1999, the district director issued a letter denying benefits because claimant did not establish that he was totally disabled by pneumoconiosis. *Id.* Claimant took no further action until filing a second application for benefits on November 4, 2002. Director's Exhibit 2. On August 1, 2003, the district director issued a proposed Decision and Order denying benefits, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but did not establish total disability due to pneumoconiosis. Director's Exhibit 23. Claimant requested a hearing and the district director transferred the case to the Office of Administrative Law Judges. On June 8, 2004, Administrative Law Judge Thomas F. Phalen remanded the case to the district director to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. Decision and Order at 3; Director's Exhibit 33. Upon receipt of Dr. Dahhan's November 1, 2004 report, the district director forwarded the case to the Office of Administrative Law Judges for adjudication. Director's Exhibit 34. Administrative Law Judge Adele Higgins Odegard held a hearing on August 23, 2006.

² Because claimant's coal mine employment was in Kentucky, 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 (1989)(*en banc*); Director's Exhibit 3.

Office of Workers' Compensation Programs, has indicated that he will not submit a response brief unless requested to do so by the Board.³

In an appeal by a claimant filed 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *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.*, 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). As noted by the administrative law judge, because claimant's prior claim was denied for failure to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, claimant was required to submit new evidence establishing that he is totally disabled in order to proceed to the merits of his claim. 20 C.F.R. §725.309(d).

Regarding the issue of total disability, the administrative law judge first considered whether the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, thus entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Decision and Order at 12. The administrative law judge noted that Dr. Alexander observed a Category A large opacity on claimant's June 19, 2006 x-ray. *Id.*; Claimant's

³ We affirm the administrative law judge's findings that the claim was timely filed and that claimant established ten years of coal mine employment, as they are not adverse to claimant and are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Exhibit 1. The administrative law judge further found, however, that Dr. Alexander's interpretation was equivocal, as he stated that the Category A large opacities "could be" coal workers' pneumoconiosis or lung cancer, and recommended a CT scan. The administrative law judge rationally concluded, therefore, that Dr. Alexander's x-ray reading was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a).⁴ See *Island Creek Coal Co. v. Holdman*, 202 F.3d, 22 BLR 2-25 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 12-13; Claimant's Exhibit 1. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. 20 C.F.R. §718.204(b)(1).

In considering whether claimant established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i) or (ii), the administrative law judge correctly determined that the newly submitted pulmonary function studies dated January 2, 2003 and July 11, 2003, and the three newly submitted arterial blood gas studies dated January 23, 2002, January 2, 2003, and July 11, 2003, produced non-qualifying values.⁵ Decision and Order at 18-20; Director's Exhibits 11, 33. The administrative law judge also considered a qualifying blood gas study conducted on January 21, 2002, during claimant's hospital admission for treatment of breathing problems. Director's Exhibit 33. The administrative law judge noted, however, that two days later, on January 23, 2002, claimant's blood gas study was non-qualifying, and that the two subsequent blood gas studies were non-qualifying. Decision and Order at 20. The administrative law judge reasonably concluded, therefore, that the evidence supported a finding that the impairment revealed on the qualifying blood gas study was temporary, and properly found that claimant was unable to establish total disability pursuant to Section 718.204(b)(2)(i) or (ii). See *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 20. In addition, the administrative law judge correctly found that there was no newly submitted evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii). Decision and Order at 20.

⁴ The administrative law judge determined correctly that the record contains no CT scan evidence or any other evidence relevant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 13.

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

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that none of the newly submitted medical opinions contained a diagnosis of a totally disabling respiratory or pulmonary impairment. Decision and Order at 21. Dr. Dahhan opined that claimant had a mild obstructive airway disease, but stated that there is “no evidence of total or permanent pulmonary disability based on the clinical findings on examination of the chest, pulmonary function studies and arterial blood gases.” Director’s Exhibit 33. Similarly, Dr. Broudy and Dr. Castle opined that there is no evidence that claimant suffers from a disabling respiratory or pulmonary impairment, and stated specifically that claimant retained the respiratory capacity to perform the work of an underground coal miner or similarly arduous manual labor. Employer’s Exhibits 1, 2. Thus, the administrative law judge rationally determined that the newly submitted medical opinions were insufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff’d on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); Decision and Order at 20.

The administrative law judge also properly concluded, therefore, that the newly submitted evidence, when considered as a whole, does not establish total disability at Section 718.204(b)(2). *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.*, 9 BLR 1-236 (1987)(*en banc*); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Decision and Order at 21. Thus, we affirm the administrative law judge’s finding, pursuant to Section 725.309(d), that claimant failed to demonstrate a change in an applicable condition of entitlement since the prior denial of claimant’s 1999 claim. *See White*, 23 BLR at 1-7.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge