

BRB No. 05-0141 BLA

FRED EUGENE HERALD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/17/2005
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 Living Miner's Benefits of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 Living Miner's Benefits (03-BLA-6368) of Administrative Law Judge Thomas M. Burke 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).<sup>1</sup> The administrative law judge credited claimant with twenty-two years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found 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 consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds only to employer's assertion that the administrative law judge erred in excluding certain medical evidence submitted by employer because it exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414.<sup>3</sup>

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,

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<sup>1</sup> Claimant's initial application for black lung benefits, filed on June 30, 1986, was finally denied on September 4, 1986, because claimant did not establish total disability due to pneumoconiosis. Decision and Order at 2; Director's Exhibit 1. Claimant's second claim for benefits, filed on July 19, 1991, was finally denied on December 18, 1991, because claimant failed to establish total disability due to pneumoconiosis. Decision and Order at 2; Director's Exhibit 2. Claimant filed his current application for benefits on July 18, 2001. Decision and Order at 3; Director's Exhibit 4.

<sup>2</sup> The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> We affirm as unchallenged on appeal the administrative law judge's findings that claimant has twenty-two years of coal mine employment and did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 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).

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). Claimant’s prior claims were denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibits 1-2. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Forehand, Robinette, McSharry, and Castle in light of the physicians’ respective qualifications. Decision and Order at 7-16; Director’s Exhibit 12; Claimant’s Exhibits 1-2; Employer’s Exhibits 1-2, 5, 9-11. Drs. Forehand and Robinette opined that claimant is totally disabled by a respiratory impairment, whereas Drs. McSharry and Castle concluded that he is not disabled by a respiratory or pulmonary impairment, but rather, suffers from a total cardiac disability. The administrative law judge found that Dr.Castle and Dr. McSharry’s opinions were better supported by all of the objective evidence of record, and were further supported by Dr. Castle and Dr. McSharry’s credentials in internal medicine and pulmonary disease. The administrative law judge therefore found that the medical opinion evidence, when considered along with all the contrary probative evidence, did not establish that claimant has a total respiratory disability.

Claimant contends that the administrative law judge did not provide his reasons for crediting the opinions of Drs. Castle and McSharry over those of Drs. Forehand and Robinette. As just discussed, however, the administrative law judge explained that he credited the opinions of Drs. Castle and McSharry because he found them “better

supported” by “the totality of the objective evidence of record,” and because the opinions were supported by the doctors’ credentials.<sup>4</sup> Decision and Order at 14, 15, 16. Therefore, the administrative law judge adequately set forth the basis for his finding. See 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); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-198 (6th Cir. 1997).

Additionally, claimant contends that the administrative law judge did not consider all of the relevant evidence when he weighed the competing medical opinions concerning the significance of an October 8, 2001 exercise blood gas study that reflected hypoxemia, in light of subsequent, normal resting blood gas studies. Specifically, claimant alleges that the administrative law judge did not consider Dr. Robinette’s testimony that “it is possible to have normal resting blood gas studies and have a patient then show significant desaturation with exercise.” Claimant’s Brief at 10, citing Claimant’s Exhibit 2 at 14.

We reject claimant’s allegation of error. The administrative law judge set forth the physicians’ reports and testimony in great detail, and recognized that “[m]uch of the disagreement among the physicians in this case centers on the [October 8, 2001] arterial blood gas test by Dr. Forehand.” Decision and Order at 15. As summarized by the administrative law judge, Drs. Forehand and Robinette viewed the October 8, 2001 blood gas study reflecting hypoxemia as evidence of a disabling lung impairment, while Drs. Castle and McSharry viewed those test results as a manifestation of cardiac disease. The administrative law judge found that the opinions of Drs. Castle and McSharry were better supported by the objective evidence that they referenced, including: subsequent, normal blood gas studies, non-qualifying pulmonary function studies, normal diffusing capacity tests, and examination and test findings confirming cardiomegaly and cardiac disease. The administrative law judge was within his discretion to find the opinions of Drs. Castle and McSharry better supported by “the totality of the objective evidence of record,” Decision and Order at 15, and substantial evidence supports his finding. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). We therefore affirm the administrative law judge’s finding that the medical opinion evidence, viewed in context

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<sup>4</sup> Claimant does not challenge the administrative law judge’s decision to credit the opinions of Drs. Castle and McSharry based on their qualifications in internal medicine and pulmonary disease. Review of the record reflects that Dr. Forehand lacks certification in those medical fields. Director’s Exhibits 22 at 5, 28 at 11. Although the record indicates that Dr. Robinette is Board-certified in internal medicine and pulmonary disease, Claimant’s Exhibit 2 at 4, the administrative law judge also found that Dr. Robinette’s opinion was not as well supported by the totality of the objective evidence of record as were the contrary opinions of Drs. Castle and McSharry.

of the record, did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish total respiratory disability, the element of entitlement that was previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3. We therefore need not address employer's argument concerning the administrative law judge's application of 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's 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