

BRB No. 07-1009 BLA

T.M.)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 08/29/2008
 WAGON FORK COAL COMPANY)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 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 John M Vittone,
Chief Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp (Kenneth S. Stepp, P.S.C.), Manchester, Kentucky, for
claimant.

David H. Neeley (David H. Neeley, Law Office, P.S.C.), Prestonsburg,
Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05269) of Chief Administrative Law Judge John M. Vittone with respect to 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 claim at issue in this case was filed on January 14, 2005.¹ Director's Exhibit 5. The administrative law judge determined that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that claimant did not prove that he is totally disabled under 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

¹The miner filed his first claim for benefits on November 18, 1976, which was denied by the district director on July 31, 1979, because claimant had not established the presence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1 at 600, 631. On June 10, 1985, claimant filed a second claim, which was denied by the district director on September 12, 1985, by reason of abandonment. Director's Exhibit 1 at 1-454, 1-596. Claimant filed a third claim for benefits on September 22, 1986. Director's Exhibit 1 at 459. That claim was denied by Administrative Law Judge Robert Cox on October 12, 1990, on the ground that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1 at 221. Claimant filed a fourth application for benefits on January 28, 1991, which was treated as a request for modification. Director's Exhibit 1 at 217. Administrative Law Judge Charles W. Campbell denied claimant's request, finding that the prior denial did not contain a mistake in a determination of fact nor was the evidence sufficient to establish the existence of pneumoconiosis and a change in conditions. Director's Exhibit 1 at 45. Claimant appealed to the Board, which vacated the denial of benefits and remanded the case for reconsideration of the issue of mistake in a determination of fact based upon a weighing of all of the evidence of record. *[T.M.] v. Wagon Fork Coal Co.*, BRB No. 94-0728 BLA (Aug. 31, 1995) (unpub.); Director's Exhibit 1 at 15. In a Decision and Order issued on May 29, 1996, Administrative Law Judge Richard E. Huddleston found that claimant did not establish a change in conditions or a mistake in a determination of fact and denied benefits. Director's Exhibit 1 at 2. Claimant filed a fifth claim on October 9, 1998, which was denied by the district director because claimant did not establish a material change in conditions since the prior denial. Director's Exhibit 2 at 4. Claimant filed a sixth application for benefits on May 31, 2001. Director's Exhibit 3 at 163. The district director denied the claim by reason of abandonment on September 27, 2002 and denied claimant's subsequent request for modification in a Proposed Decision and Order dated October 15, 2003. Claimant filed the present subsequent claim on January 14, 2005. Director's Exhibit 5.

Claimant argues on appeal that the administrative law judge's finding at Section 718.204(b)(2) must be vacated, as the administrative law judge failed to weigh all of the evidence of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant's sole argument on appeal is that the administrative law judge erred by failing to weigh all of the evidence of record on the issue of total disability after he determined that claimant established a change in an applicable condition of entitlement. Upon review of claimant's allegation of error, the administrative law judge's Decision and Order, and applicable law, we hold that remand is required in this case.

Pursuant to Section 725.309, when 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

² The administrative law judge's determination that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and, therefore, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) is not challenged on appeal. Accordingly, it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 5; see *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

(2004); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Once the administrative law judge determines that a change in an applicable condition of entitlement has been established, the administrative law judge must consider whether claimant has established entitlement on the merits based upon a *de novo* review of all of the evidence of record. 20 C.F.R. §725.309(d)(4); *see Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480, 23 BLR 2-44, 2-66 (6th Cir. 2003).

In this case, the administrative law judge determined that claimant established a change in an applicable condition of entitlement under Section 725.309(d) by demonstrating, pursuant to Section 718.202(a)(4), that he is now suffering from legal pneumoconiosis. Decision and Order at 9. With respect to the issue of total disability, the administrative law judge found that the newly submitted evidence was insufficient to prove that claimant has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). Decision and Order at 10-12. The administrative law judge determined that the newly submitted pulmonary function studies were invalidated by the administering physicians; the newly submitted blood gas studies produced nonqualifying results; the new evidence contained no diagnoses of cor pulmonale with right-sided congestive heart failure; and the physicians stated in the newly submitted medical reports that they could not offer a definitive opinion as to claimant’s pulmonary function due to the effects of the two strokes that he has suffered since 1998. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 11-12. Because claimant has not alleged any error with respect to the administrative law judge’s findings, we affirm the administrative law judge’s determination that the newly submitted evidence is insufficient to establish total disability under Section 718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

When rendering a finding regarding the previously submitted evidence, which contains evidence supportive of a finding of total disability, the administrative law judge referred to “total disability due to pneumoconiosis” and stated:

A review of the previous decisions and the records upon which the decisions were based reveal [sic] that they contain an accurate analysis and discussion of the evidence submitted in the first five claims. Therefore, the findings of fact are incorporated by reference. Given the lapse in time, greatest weight is accorded to the most recent evidence of record since it contains a more accurate evaluation of Claimant’s current condition. *See Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); *Bates v. Director, OWCP*, 7 BLR 1-113 (1984). As a result, on review of all of the evidence, I find Claimant has established the presence of legal pneumoconiosis which

arose out of coal mine employment. However, I further find Claimant has not established total disability due to pneumoconiosis. Therefore, this claim shall be denied.

Decision and Order at 12 (footnote omitted). However, the previous decisions to which the administrative law judge referred, including those issued by administrative law judges, did not contain specific findings regarding the evidence relevant to total disability. The administrative law judge could not, therefore, base his conclusion that claimant did not establish total disability on the merits pursuant to Sections 718.204(b)(2) on his agreement with the prior findings, as they do not exist. In addition, the administrative law judge's reliance upon the principle that the most recent evidence of record is entitled to greater weight is inapposite in the present case. Claimant's inability to perform a valid pulmonary function study since he had a stroke in 1999 - a fact that the administrative law judge has acknowledged - belies the notion that the evidence developed subsequently is the best indicator of claimant's current pulmonary condition. *See* Decision and Order at 11. We vacate, therefore, the administrative law judge's findings on the issue of total disability, and remand the case to the administrative law judge. On remand, the administrative law judge must determine whether claimant has established total disability on the merits pursuant to Section 718.204(b)(2), based upon a *de novo* consideration of all of the evidence of record. If the administrative law judge finds that claimant has established total disability on the merits under Section 718.204(b)(2), he must determine whether claimant has proven that his legal pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge