BRB No. 06-0468 BLA

PATRICK KINSER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/09/2007
ELKAY MINING COMPANY	)	
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Patrick Kinser, White Sulphur Springs, West Virginia, *pro se*.

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-5379) of Administrative Law Judge William S. Colwell 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] Claimant

[1] Claimant's initial claim for benefits, filed in 1973, was denied on February 19, 1981, because claimant did not establish any element of entitlement. Director's Exhibit 1. His second claim, filed in 1993, was denied on July 20, 1993, because he did not

filed this claim for benefits on June 3, 2002. Director's Exhibit 4. The administrative law judge credited claimant with twenty-five years of coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's prior claim did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). He 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 generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits, and the Director, Office of Workers' Compensation Programs, has not submitted a brief.

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).

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. 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 claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 2. Consequently,

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establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibits 2, 11. 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*).

claimant had to submit new evidence establishing that he is totally disabled, to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three new pulmonary function studies dated July 11, 2002, September 3, 2003, and February 2, 2004. The administrative law judge correctly found that the July 11, 2002 pulmonary function study was qualifying,[3] and that the September 3, 2003 pulmonary function study was non-qualifying. The administrative law judge accurately determined that the February 2, 2004 pulmonary function study was qualifying on the pre-bronchodilator portion of the test, but was non-qualifying on the post-bronchodilator portion of the test. Employer's Exhibit 4. Taking all of these results into account, the administrative law judge reasonably found that the non-qualifying results obtained in the 2003 and 2004 pulmonary function studies weighed against a finding of total disability. *See Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Coffey v. Director, OWCP,* 5 BLR 1-404 (1982). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), which we therefore affirm.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge correctly found that none of the three new blood gas studies was qualifying for total disability. Director's Exhibit 17; Employer's Exhibits 1, 4. Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately noted that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, that method of establishing total disability is inapplicable to this claim.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered three new medical opinions. Dr. Porterfield opined that claimant has a 55% impairment that disables him from performing his previous job as a roof bolter. Director's Exhibit 17 at 4. Dr. Zaldivar stated that claimant suffers from a pulmonary impairment, the exact degree of which would need to be determined by an exercise test, but he opined that from a pulmonary standpoint, claimant "is capable of performing his usual coal mining work or work requiring similar exertion."[4] Employer's Exhibit 1. Dr. Crisalli stated that

[3] A "qualifying" objective study yields values equal to or less than those listed 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).

[4] In rendering this opinion, Dr. Zaldivar discussed claimant's job duties as a roof bolter. Employer's Exhibit 1 at 1, 6; Employer's Exhibit 8 at 20-21. He considered that claimant was required to stand for eight to ten hours a day, lift fifty to ninety pounds per

claimant has a mild impairment and "may well retain the pulmonary functional capacity to perform his previous job in the coal mines with adequate anti-asthma therapy although it must be realized that asthma is a disease of variable obstruction and that there might be days when [claimant] would be unable to perform his regular coal mine job . . . ." Employer's Exhibit 4 at 6.

The administrative law judge permissibly found that Dr. Porterfield's opinion was not as well-reasoned or documented as Dr. Zaldivar's opinion, because Dr. Porterfield "provide[d] insufficient reasoning" for his conclusion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);Decision and Order at 15. The administrative law judge further determined, within his discretion, that Dr. Crisalli's statement that there may be days when claimant would be unable to work was too equivocal to support claimant's burden of proof. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). It is therefore affirmed.

Therefore, we affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish that claimant is totally disabled.[5] Consequently, we affirm the finding that claimant did not establish that the applicable condition of entitlement has changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7.

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day for four to six hours, and carry ten to ninety pounds from ten to four hundred feet, thirty times per day. *Id*.

[5] Because the pneumoconiosis element was not decided against claimant in his prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2); Director's Exhibit 2. Therefore, we need not address the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*).

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

BETTY JEAN HALL
Administrative Appeals Judge