BRB No. 06-0638 BLA

BRUCE ALLEN MILES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/15/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 Benefits (03-BLA-6602) of Administrative Law Judge Joseph E. Kane 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). Claimant filed his first claim for benefits on February 11, 1997, which was denied by the district director on June 11, 1997 because the evidence did not establish any element of entitlement. Director's Exhibit 1. Claimant filed this claim for benefits on March 26, 2001. Director's Exhibit 3.

The administrative law judge initially found the evidence sufficient to establish 6.19 years of coal mine employment.[1] The administrative law judge also found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[2] Consequently, the administrative law judge determined that the newly submitted evidence did not establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final, pursuant to 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 finding that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation. The Director responds, asserting that the Board should reject claimant's argument.

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. 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).

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 6 at 7. Accordingly, 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 (1989)(*en banc*).

[2] The administrative law judge found that the issue of whether claimant's pneumoconiosis arose out of his coal mine employment is moot since claimant failed to establish pneumoconiosis. Decision and Order at 10. Likewise, the administrative law judge found that the issue of whether claimant is totally disabled due to pneumoconiosis is moot since claimant failed to establish total disability. *Id*. at 12.

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 the existence of pneumoconiosis, that it arose out of his coal mine employment, and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing any of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[3] the administrative law judge found that Dr. Baker's opinion that claimant has no pulmonary impairment and is able to perform his usual coal mine employment was well-reasoned and well-documented, because it was supported by the objective medical testing, which Dr. Baker found normal, and because it was consistent with the other evidence of record. Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 4-5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a belt machine operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v.*

[3] The administrative law judge's findings that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 10-11.

Director, OWCP, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment as a belt machine operator to Dr. Baker's opinion that claimant does not have any impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); Decision and Order at 12; Director's Exhibit 12.

We also reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the newly submitted medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) based on that new evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *White*, 23 BLR at 1-6-7.

Claimant also contends that he is entitled to a remand of the case for the Director to provide him with a complete and credible pulmonary evaluation because the administrative law judge found that Dr. Baker's May 19, 2001 opinion regarding the existence of pneumoconiosis, provided by the Department of Labor, was entitled to little weight and was unreasoned. Claimant's Brief at 3-4; *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406. The administrative law judge found that Dr. Baker's opinion was entitled to little weight and was unreasoned because Dr. Baker inconsistently related claimant's chronic bronchitis in part, to coal mine employment, but then indicated that claimant did not have an occupational lung disease caused by his coal mine employment. The Director responds that any error in the administrative law judge's discrediting of Dr. Baker's opinion with respect to the issue of pneumoconiosis is harmless, because the administrative law judge fully credited Dr. Baker's opinion that claimant has no pulmonary impairment, with respect to the issue of total disability.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete" or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 1-

102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Dr. Baker examined claimant and performed the full range of testing required by the regulations. Director's Exhibit 12 at 3; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Based on that evaluation, Dr. Baker categorized the extent of claimant's pulmonary impairment as "no impairment." Director's Exhibit 12. The administrative law judge fully credited this opinion. Claimant does not assert that Dr. Baker's opinion on the issue of total disability is deficient, warranting a remand for another pulmonary evaluation. Since we have affirmed the administrative law judge's finding that claimant is not totally disabled based on the newly submitted evidence, a finding of total disability pursuant to 20 C.F.R. §718.204(b) on the merits is precluded. Therefore, the administrative law judge properly denied the claim pursuant to 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent*, 11 BLR at 1-27. Consequently, we agree with the Director that there is no need to remand this case for Dr. Baker to clarify his opinion on the existence of pneumoconiosis.

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