

BRB No. 07-0470 BLA

E. M. )  
(on behalf of the estate of B. M.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
CUMBERLAND MOUNTAIN SERVICE )  
C/O AEI RESOURCES, INCORPORATED )  
 )  
and ) DATE ISSUED: 02/29/2008  
 )  
RAG AMERICAN COAL COMPANY )  
C/O ACORDIA EMPLOYERS SERVICE )  
 )  
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

E. M., Middlesboro, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order – Denial of Benefits (2005-BLA-5144) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim, filed by the deceased miner prior to his death,<sup>2</sup> 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>3</sup> After crediting the miner with at least eleven years of coal mine employment<sup>4</sup>, the administrative law judge found that the

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<sup>1</sup> Jerry Murphree, Benefits Counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>2</sup> The miner filed his first claim for black lung benefits on June 9, 1986. Director's Exhibit 1. On April 2, 1991, Administrative Law Judge E. Earl Thomas issued a Decision and Order Denying Benefits. Judge Thomas found that the miner established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but that he failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* On February 21, 1995, the miner filed a duplicate claim that was denied by the district director on August 1, 1995. Director's Exhibit 2. On August 13, 1996, the miner filed a third application for benefits, his second duplicate claim, which was denied on May 24, 1999 by Administrative Law Judge Rudolf L. Jansen, on the ground that the newly submitted evidence failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 3. The miner filed his current subsequent claim on April 12, 2001. Director's Exhibit 4. The district director denied benefits and the case was forwarded to the Office of Administrative Law Judges for a formal hearing, scheduled for June 22, 2004. Prior to the hearing, the miner died and the case was remanded to the district director, at which time claimant, the miner's widow, was appointed to appear on behalf of the estate. The parties then agreed to a decision on the record without a formal hearing. Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) denied benefits on January 19, 2007.

<sup>3</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The provision pertaining to total disability, previously set out at 20 C.F.R. 718.204(c)(2000), is now found at 20 C.F.R. §718.204(b).

<sup>4</sup> 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.

newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and, therefore, he 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, 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'Keefe 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). The miner's initial claim was denied because the evidence failed to establish that he had a totally disabling respiratory or pulmonary impairment, and his prior duplicate claim was denied for failure to establish a material change in conditions pursuant to Section 725.309 (2000); Director's Exhibit 1. Consequently, with respect to the instant subsequent claim, it was necessary for claimant first to submit new evidence establishing the miner was totally disabled, before the administrative law judge could proceed to the merits of whether claimant is entitled to benefits.<sup>5</sup> 20 C.F.R. §725.309(d).

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<sup>5</sup> Contrary to the administrative law judge's analysis, because the miner established the existence of pneumoconiosis in his initial claim, pursuant to the April 2, 1991 Decision and Order issued by Administrative Law Judge E. Earl Thomas, the only available basis for claimant to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309, was to establish, by way of the new medical

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 one pulmonary function study of record dated September 6, 2001 was non-qualifying for total disability, and that the three arterial blood gas studies dated September 6, 2001, November 19, 2001, and February 8, 2002 also were non-qualifying for total disability.<sup>6</sup> Decision and Order at 8-10, 18-19; Director's Exhibits 10, 11, 25. The administrative law judge also properly found that claimant was unable to establish that the miner was totally disabled pursuant to Section 718.204(b)(2)(iii), as the record contained no evidence to establish that the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 19.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge also considered whether claimant had established total disability based on the medical opinion evidence. The administrative law judge properly found that while Dr. Dorin, the miner's treating physician, diagnosed significant coal workers' pneumoconiosis, the doctor failed to provide an opinion as to whether the miner was totally disabled. The administrative law judge also properly found that of the three remaining physicians' opinions, there was no evidence that the miner had a totally disabling respiratory or pulmonary impairment. Drs. Baker, Hippensteel and Castle specifically opined that the miner was not totally disabled. Decision and Order at 19, 20; Director's Exhibits 9, 27; Claimant's Exhibit 2; Employer's Exhibit 2. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the newly submitted medical opinion evidence at Section 718.204(b)(2)(iv).

Consequently, we affirm the administrative law judge's finding, pursuant to Section 725.309(d), that claimant has failed to demonstrate a change in an applicable condition of entitlement since the prior denial of the miner's claim. *See White*, 23 BLR at 1-7. Thus, we affirm the administrative law judge's denial of benefits.

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evidence, that the miner was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §725.309.

<sup>6</sup> 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).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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BETTY JEAN HALL  
Administrative Appeals Judge