

BRB No. 13-0295 BLA

KENNETH CALHOUN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STURGEON MINING COMPANY, INCORPORATED)	DATE ISSUED: 02/20/2014
)	
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 Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Kenneth Calhoun, Irvine, Kentucky, *pro se*.

Paul E. Jones and James W. Herald (Jones, Walter, Turner & Shelton
PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2010-BLA-5044) of Administrative Law Judge Joseph E. Kane on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as

¹ Claimant, Kenneth Calhoun, filed his first application for benefits on January 30, 2001, which was denied by the district director on November 1, 2001, based on claimant's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Director's

amended, 30 U.S.C. §§901-944 (2012)(the Act).² The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725, and credited claimant with 28.25 years of coal mine employment. The administrative law judge found that new evidence submitted in support of this subsequent claim was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), or total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013). Thus, the administrative law judge concluded that claimant failed to establish that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309(d) (2013).³ Because total respiratory disability was not established, the administrative law judge also found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.

Exhibit 1. Claimant's second application, filed on January 21, 2009, is pending herein on appeal. Director's Exhibit 3.

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if the claimant establishes that he suffers from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718. And 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

³ The applicable language set forth in 20 C.F.R. §725.309(d) (2013) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (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 law.⁴ 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 (2013), 718.204 (2013); *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 one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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(c). The applicable conditions of entitlement "are limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

After consideration of the administrative law judge's Decision and Order Denying Benefits and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and must be affirmed. In determining that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) (2013), the administrative law judge accurately found that all of the newly submitted pulmonary function studies and blood gas studies of record produced non-qualifying values;⁵ that the

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

⁵ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii) (2013).

record contains no evidence of cor pulmonale with right-sided congestive heart failure; and that the newly submitted medical opinions of Drs. Mettu, Broudy, and Vuskovich all concluded that, from a respiratory standpoint, claimant retains the physiological capacity to perform his previous coal mine work. Decision and Order at 10-11; Director's Exhibits 12, 17, 32-34; Employer's Exhibits 2, 3; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). As substantial evidence supports the administrative law judge's findings, we affirm his determination that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv) (2013). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). Consequently, we affirm his finding that claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). Decision and Order at 14.

Next, the administrative law judge correctly determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2013), because the newly submitted x-ray evidence was uniformly interpreted as negative for pneumoconiosis, *see* Director's Exhibits 12, 13, 33; Employer's Exhibits 1, 2; the record contains no biopsy evidence; and claimant is not entitled to any of the presumptions set forth in 20 C.F.R. §§718.304 (2013), 718.305, and 718.306 (2013), as there is no evidence of complicated pneumoconiosis, claimant failed to establish total respiratory disability, and this is a living miner's claim. Decision and Order at 13-14. As substantial evidence supports the administrative law judge's findings thereunder, they are affirmed. Turning to the newly submitted medical opinions pursuant to Section 718.202(a)(4) (2013), the administrative law judge accurately determined that no doctor diagnosed clinical pneumoconiosis, but that Dr. Mettu⁶ diagnosed legal pneumoconiosis, whereas Drs. Broudy⁷ and Vuskovich⁸ concluded that claimant does not

⁶ After conducting a complete pulmonary evaluation of claimant on February 10, 2009, Dr. Mettu diagnosed chronic bronchitis attributable to cigarette smoking and coal dust exposure, and stated that "coal dust exposure significantly aggravated [claimant's] pulmonary impairment, giving [sic] legal pneumoconiosis." Director's Exhibit 12. Dr. Mettu reiterated his conclusions during his deposition held on March 3, 2009. Director's Exhibit 34.

⁷ In a report dated March 12, 2009, a supplemental report dated May 1, 2009, and in a deposition held on August 31, 2009, Dr. Broudy opined that, although claimant suffers from mild chronic obstructive pulmonary disease due to cigarette smoking, there is no evidence of either clinical or legal pneumoconiosis. Director's Exhibits 17, 32, 33; Employer's Exhibit 2.

have legal pneumoconiosis. Although the administrative law judge discounted the opinions of Drs. Broudy and Vuskovich as insufficiently reasoned,⁹ he also permissibly found that Dr. Mettu's diagnosis of legal pneumoconiosis was entitled to little weight because Dr. Mettu failed to provide any rationale or explanation for the diagnosis in his February, 2009 narrative report. Decision and Order at 15; Director's Exhibit 12; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Noting that Dr. Mettu testified at his deposition that he found no abnormalities in claimant's chest during his physical examination, and that claimant's subjective complaints of shortness of breath were not substantiated by the examination, the administrative law judge acted within his discretion in finding that Dr. Mettu's opinion was not well-reasoned, as the physician failed to explain how the underlying documentation supported his diagnosis. Decision and Order at 15; Director's Exhibit 34 at 8-9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law

⁸ After conducting a review of the medical records on August 21, 2010, Dr. Vuskovich opined that claimant has mild chronic obstructive pulmonary disease caused by cigarette smoking, but does not have coal workers' pneumoconiosis or any other coal mine dust-induced disease process. Employer's Exhibit 3.

⁹ The administrative law judge found that Dr. Broudy's elimination of coal dust exposure as a cause of claimant's chronic bronchitis was entitled to diminished weight because Dr. Broudy believed that "chronic bronchitis associated with coal dust exposure ceases with cessation of further exposure," contrary to the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in Section 718.201(c), recognizing pneumoconiosis as a latent and progressive disease. Decision and Order at 15; Director's Exhibit 32; *see Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The administrative law judge also found Dr. Broudy's belief, that "obstructive airways disease is far more likely to be due to cigarette smoking than the inhalation of coal mine dust," Director's Exhibit 32, was contrary to DOL's position that "non-smoking miners develop moderate and severe obstruction at the same rate as smoking miners." Decision and Order at 15, *citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000). The administrative law judge reasonably determined that the opinion of Dr. Vuskovich, that claimant "didn't receive enough cumulative internal dose of respirable coal dust to cause.... legal pneumoconiosis," was speculative, as the amount of coal dust exposure that claimant experienced during his coal mine employment was not evident in the medical records that Dr. Vuskovich reviewed. Decision and Order at 15-16; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

judge's findings, we affirm his determination that the newly submitted medical opinions did not include a well-reasoned and documented diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4) (2013). Decision and Order at 14-16; *see King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-48.

Since the administrative law judge properly found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) (2013) or total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv) (2013), we affirm his finding that claimant failed to demonstrate a change in an applicable condition of entitlement since the denial of the prior claim pursuant to Section 725.309 (2013). Decision and Order at 16; *see White v. New White Coal Co.*, 23 BLR 1-1 (2004). Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge