

BRB No. 07-0364 BLA

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| E.H. |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| EASTERN ASSOCIATED COAL |) | DATE ISSUED: 01/31/2008 |
| CORPORATION |) | |
| |) | |
| 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

E.H., Gordon, West Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (06-BLA-5330) of Administrative Law Judge Michael P. Lesniak denying benefits on a 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's prior application for benefits, filed on August 20, 1997, was finally denied on February 11, 1998 because claimant failed to establish the existence of a totally disabling respiratory impairment.¹

¹ The current claim is claimant's fourth. Claimant's first claim, filed on February 26, 1976, was finally denied on May 1, 1986, because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit

Director's Exhibits 2, 3. On February 16, 2005, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

The administrative law judge credited claimant with eight years of coal mine employment,² based on Social Security Administration earnings records and claimant's testimony in support of his prior claim,³ and found that the medical evidence developed since the prior denial of benefits did not establish either 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). The administrative law judge therefore concluded 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.

1. Claimant's second and third claims, filed on January 23, 1990 and August 20, 1997, were finally denied on August 13, 1993 and February 11, 1998, respectively, because the evidence developed since the prior denials of benefits did not establish that claimant was totally disabled. *See* 20 C.F.R. §725.309(d) (2000); Director's Exhibits 2, 3.

² The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 6. 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*).

³ In addition to the Social Security Administration (SSA) earnings records and claimant's testimony in his prior claim, the administrative law judge properly considered written statements and affidavits submitted by claimant, his fellow co-workers, and a former boss's daughter, as well as claimant's testimony in the current claim. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-92 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9-10 (1985). The administrative law judge acted within his discretion in concluding that the SSA earnings records and claimant's prior testimony, which was twenty years closer in time to his dates of employment than was his current testimony, were the most reliable sources of employment information, and, taken together, established eight years of coal mine employment. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988)(*en banc*); *Henderson v. Director, OWCP*, 7 BLR 1-866, 1-868-869 (1985); Decision and Order at 2-3. Accordingly, the administrative law judge's finding of eight years of coal mine employment is affirmed.

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

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'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. Failure to establish any one of these elements precludes a finding of 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).

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 3. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Evaluating the evidence relevant to the issue of total disability, the administrative law judge properly found that, as all of the new pulmonary function and blood gas studies are non-qualifying,⁴ claimant failed to establish total disability pursuant to 20 C.F.R.

⁴ 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).

§718.204(b)(2)(i), (ii). *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); Decision and Order at 4-5, 8; Director's Exhibits 15, 16. In addition, the record contains no medical evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8. Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Evaluating the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Gaziano opined that claimant is totally disabled from performing his usual coal mine work, while, by contrast, Dr. Zaldivar opined that claimant has no pulmonary impairment and could perform his usual coal mine work from a pulmonary standpoint. Decision and Order at 5-6, 8; Director's Exhibits 15, 16. The administrative law judge permissibly accorded less weight to Dr. Gaziano's opinion because the physician failed to point to any underlying documentation, other than claimant's subjective complaints, to support his conclusions.⁵ *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 8; Director's Exhibit 15. Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113. As they are supported by substantial evidence, we affirm the administrative law judge's findings that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 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.⁶ Consequently, we affirm the administrative

⁵ Dr. Gaziano reported that the results of claimant's pulmonary function, blood gas, and diffusing capacity studies were normal. Director's Exhibit 15.

⁶ Because the pneumoconiosis element was not addressed in claimant's 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 3. Therefore, we need not address the administrative

law judge's 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.

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

JUDITH S. BOGGS
Administrative Appeals Judge

law judge's findings that the new evidence did not establish the existence of pneumoconiosis. 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*).