BRB No. 10-0292 BLA

KENNETH CHILDERS	)
	)
Claimant-Petitioner	)
	)
v.	)
	)
NAVISTAR C/O NAVISTAR INTERNATIONAL	)
	) DATE ISSUED: 01/11/2011
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

H. Kent Hendrickson (Rice, Hendrickson & Williams), Harlan, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 (04-BLA-6636) of Administrative Law Judge Richard K. Malamphy rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This is the third time this case is before the Board.[1] Initially, pursuant to employer's appeal, the Board vacated the administrative law judge's findings that the miner's current claim was timely filed, and that the new medical opinion evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2)(iv); 725.309(d).[2] *K.C.* [*Childers*] *v. Navistar*, BRB No. 07-0136 BLA, slip op. at 5-9 (Oct. 30, 2007)(unpub.). Accordingly, the Board remanded the case for further consideration of those issues.

On August 22, 2008, the administrative law judge reissued, unaltered, the same decision that the Board had vacated. Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits for the same reasons that the Board previously provided, and remanded this case for the administrative law judge's consideration, consistent with the Board's remand instructions. *K.C.* [*Childers*] *v. Navistar*, BRB No. 08-0859 BLA, slip op. at 2 (July 23, 2009)(unpub.).

On remand, the administrative law judge addressed the Board's remand instructions. In so doing, the administrative law judge credited claimant with eleven years of coal mine employment,[3] and found that the claim was timely filed. The administrative law judge further found, however, that the new medical opinion evidence did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and thus, did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the new medical opinion evidence established total disability and, therefore, established a change in an applicable condition of entitlement. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief.

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[1] The Board set forth previously this claim's full procedural history. *K.C.* [*Childers*] *v. Navistar*, BRB No. 07-0136 BLA, slip op. at 2 (Oct. 30, 2007)(unpub.). Our prior discussion of the procedural history is incorporated by reference.

[2] The Board affirmed the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Childers*, BRB No. 07-0136 BLA, slip op. at 3.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 1 at 224, 344. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

By Order dated September 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for claims that were filed after January 1, 2005, and which were pending on March 23, 2010. The Director responded, stating, correctly, that the recent amendments to the Act do not apply to this claim, because it was filed before January 1, 2005.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 suffering from a totally disabling respiratory impairment. Director's Exhibit 1 at 31; *Childers v. Navistar*, BRB No. 95-1585 BLA (Jan. 16, 1996)(unpub.). 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).

As noted above, the Board has affirmed the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Childers*, BRB No. 07-0136 BLA, slip op. at 3. The remaining method by which claimant may establish total disability is with medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The record contains the new medical opinions of Drs. Baker and Dahhan. Dr. Baker examined claimant on December 9, 2003 and indicated that claimant was last employed as a mine inspector. Director's Exhibit 19. Dr. Baker diagnosed a mild obstructive impairment. *Id.* He did not indicate the extent, if any, to which this impairment affected claimant's ability to perform his usual coal mine employment. *Id.* Dr. Dahhan examined claimant on March 23, 2004 and noted that claimant told him that he last worked as a mine inspector. Director's Exhibit 21. Dr. Dahhan diagnosed a moderately severe, partially reversible obstructive impairment, based upon claimant's pulmonary function study. *Id.* In the section of his report in

which he set forth his conclusions, Dr. Dahhan indicated that claimant "does not retain the physiological capacity to continue his previous coal mining work or [a] job of comparable physical demand." *Id*.

Considering the new medical opinion evidence, the administrative law judge found that the opinions of Drs. Baker and Dahhan were not sufficiently reasoned to establish total disability. Specifically, he found that Drs. Baker and Dahhan did not address the exertional requirements of claimant's last job as a coal mine inspector, or compare claimant's physical limitations with those requirements.[4] Decision and Order at 7.

On appeal, claimant summarizes the opinions of Drs. Baker and Dahhan, states that "the evidence weighs in favor of [claimant's] being totally disabled," and asserts that the administrative law judge "erred in finding otherwise." Claimant's Brief at 2-3 (unpaginated).

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board's circumscribed scope of review requires that the party challenging the Decision and Order below address that Decision and Order with specificity, and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf*, 10 BLR at 1-120; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

In this case, claimant recites evidence favorable to his claim, but has not identified any errors made by the administrative law judge in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that claimant, therefore, failed to establish a change in the applicable condition of

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[4] In making this finding, the administrative law judge set forth the Board's specific instruction that he was to determine whether "each physician has provided a reasoned and documented opinion regarding claimant's ability, from a respiratory or pulmonary standpoint, to perform his usual coal mine employment," or "has described claimant's physical limitations such that the administrative law judge can compare them to the exertional requirements of claimant's usual coal mine job." Decision and Order at 7, *quoting Childers*, BRB No. 07-0136 BLA, slip op. at 9.

entitlement under 20 C.F.R. §725.309(d). Because claimant has failed to identify any error made by the administrative law judge, the Board has no basis upon which to review the administrative law judge's findings and must, therefore, affirm them.[5] 20 C.F.R. §§802.211(b), 802.301(a); *see Cox,* 791 F.2d at 446-47, 9 BLR at 2-47-48. In light of our affirmance of the administrative law judge's determination that claimant failed to establish a change in the applicable condition of entitlement, we affirm the denial of benefits. *White*, 23 BLR at 1-3.

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

[5] Moreover, even if we concluded that claimant specifically challenged the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), substantial evidence supports the administrative law judge's determination that neither Dr. Baker, nor Dr. Dahhan, addressed claimant's job duties as a mine inspector, and that thus, they did not render well-reasoned opinions that claimant is totally disabled. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); Director's Exhibits 19, 21.