

BRB No. 11-0398 BLA

ELMER GEORGE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/27/2012
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Frank R. Cori, Saint Clair, Pennsylvania, for claimant.

Michelle Gerdano (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5519) of Administrative Law Judge Janice K. Bullard denying benefits on a 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 case involves a subsequent claim filed on May 4, 2009.¹ After crediting

¹ Claimant's previous claim, filed on December 29, 2000, was finally denied because claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment. *George v. Director, OWCP*, BRB No. 06-0100 BLA (July 27, 2006) (unpub.); Director's Exhibit 1.

claimant with fourteen years of coal mine employment,² the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant had not established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, claimant had to submit new evidence establishing a totally disabling respiratory or pulmonary condition in order to obtain review of the merits of his 2000 claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence, consisting of the opinions of Drs. Rothfleisch, Talati, and

² The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Shane, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ Claimant, however, alleges no error in regard to the administrative law judge's consideration of the opinions of Drs. Rothfleisch, Talati, and Shane.⁴ See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. See 20 C.F.R. §§802.211, 802.301. Consequently, the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.⁵

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that the applicable condition of entitlement changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309.

³ Because claimant does not challenge the administrative law judge's findings that the new evidence fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The administrative law judge found that Dr. Rothfleisch's opinion, that claimant is totally disabled due to a combination of coronary artery disease, asthma, and coal workers' pneumoconiosis, was not well-reasoned, noting that the "doctor did not explain how he reached his conclusions." Decision and Order at 10; Director's Exhibit 9. The administrative law judge also noted that Dr. Rothfleisch's opinion was inconsistent with the non-qualifying pulmonary function study that he administered. *Id.* The administrative law judge found that Dr. Talati's opinion, that claimant suffers from a "possible mild restrictive ventilatory defect," was too equivocal to support a finding of total disability. Decision and Order at 11; Director's Exhibit 25. The administrative law judge found that Dr. Shane's opinion, that claimant suffers from disabling obstructive/restrictive lung disease, was not well-reasoned, noting that there was no support for the doctor's opinion that claimant had "dangerously low resting oxygen saturations" and "profound abnormalities" on pulmonary function testing. Decision and Order at 11; Claimant's Exhibit 2.

⁵ The administrative law judge correctly determined that the rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), a provision contained within the recent amendments to the Act, does not apply to this claim because claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

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

BETTY JEAN HALL
Administrative Appeals Judge