

BRB No. 06-0930 BLA

R.R.)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 07/27/2007
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Denying Benefits (05-BLA-5484) of Administrative Law Judge Adele Higgins Odegard on a subsequent 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 filed his prior claim for benefits on August 19, 1985, which was finally denied by the Board on December 20, 1994 because the evidence did not establish total disability. Director's Exhibit 1. Claimant filed his current application, which is considered a "subsequent claim for benefits," on May 23, 2001. Director's Exhibit 3.

The administrative law judge initially found the evidence sufficient to establish twelve years of coal mine employment, as stipulated by the parties.¹ The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge determined that the newly submitted evidence was insufficient to establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F. R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), moves to remand the case to the district director so that claimant may obtain a complete pulmonary evaluation.²

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'Keeffe v. Smith, Hinchman and 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 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

¹ The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, 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*).

² The administrative law judge's findings that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

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 total disability. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant challenges the administrative law judge’s finding that total disability was not established by medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), initially asserting that the administrative law judge should have considered the exertional requirements of claimant’s usual coal mine employment in conjunction with Dr. Baker’s opinion. We disagree.

The administrative law judge found that Dr. Baker did not diagnose the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 9. Substantial evidence supports this finding. First, Dr. Baker’s assessment of a Class I impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, corresponds to a rating of no impairment. American Medical Association *Guides to the Evaluation of Permanent Impairment*, Table 5-12 (5th ed. 2000); see *Gamble v. Penn Allegheny Coal Co.*, 5 BLR 1-457, 1-459-60 (1983). Additionally, Dr. Baker’s statement that claimant is “100% occupationally disabled” because of the need to “limit further exposure,” is merely a recommendation against further exposure to coal mine dust, not a diagnosis of a respiratory disability. See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Director’s Exhibit 15. Thus, there is no merit to claimant’s contention that the administrative law judge erred in his evaluation of Dr. Baker’s opinion.³

Claimant next asserts, and the Director agrees, that the administrative law judge mischaracterized Dr. Simpao’s opinion when he found that the physician did not diagnose a totally disabling respiratory impairment. Decision and Order at 9; Claimant’s Brief at 4; Director’s Brief at 5. In his report dated April 30, 2002, Dr. Simpao diagnosed a mild respiratory impairment and indicated that claimant does not have the respiratory

³ We also reject claimant’s argument that he must be totally disabled because he was diagnosed with pneumoconiosis a “considerable amount of time” ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant’s Brief at 5. An administrative law judge’s findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

capacity to perform his usual coal mine work. Director's Exhibit 10. Further, Dr. Simpao reiterated this opinion in a supplemental letter dated October 19, 2004. Director's Exhibit 25. In light of the administrative law judge's mischaracterization of Dr. Simpao's opinion, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). *Barnes v. Director, OWCP*, 19 BLR 1-71, 1-77 (1995); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Furthermore, the Director concedes that because Dr. Simpao could not offer a clear opinion as to whether pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory impairment, a necessary element of entitlement, the Department of Labor has not fulfilled its statutory obligation to provide claimant with a complete pulmonary evaluation.⁴ 30 U.S.C. §923(b); 20 C.F.R. §725.406. Thus, the Director requests that the case be remanded to the district director to schedule another pulmonary evaluation of claimant addressing all elements of entitlement. In light of the Director's concession, we grant the Director's Motion to Remand. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994)(granting Director's Motion to Remand for a complete pulmonary evaluation); *Petry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

⁴ As the Director asserts, contrary to the administrative law judge's conclusion, Dr. Simpao specifically stated that claimant's coal dust exposure, smoking history, and heart disease each contributed to the impairment, although he could not quantify the degree to which each contributed. Decision and Order at 8; Director's Exhibit 25. The Director explains, however, that is unclear whether Dr. Simpao could not determine the degree to which coal workers' pneumoconiosis contributed to the pulmonary impairment (*i.e.*, whether the contribution was material as required by the regulations) or whether he believed that the contribution was material and simply could not determine the precise extent to which each of the three components contributed. Director's Motion to Remand at 7 n.3.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part. The Director's Motion to Remand is granted, and the case is remanded to the district director for a complete pulmonary evaluation of claimant, and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge