

BRB No. 07-0950 BLA

H.V.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/28/2008
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Denial of Benefits (06-BLA-5254) of Administrative Law Judge Joseph E. Kane on a subsequent claim¹ filed on November 30,

¹ Claimant's initial claim for benefits, filed on February 23, 1987, was denied by an administrative law judge on December 5, 1989, because claimant did not establish any element of entitlement. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on August 28, 1991. Director's Exhibit 1 at 381, 406. Claimant's second claim, filed on December 4, 1995, was denied by an administrative law judge on October 9, 1997, because claimant failed to prove that he was totally disabled. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on November 6, 1998, and denied claimant's motion for reconsideration on March 19, 1999. Director's Exhibit 1 at

2004, 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). The administrative law judge accepted the parties' stipulation that claimant worked for nineteen years in coal mine employment,² and found that the medical evidence developed since the denial of claimant's previous claim failed to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the medical opinion evidence in finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.³

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. If a miner files an application for benefits more than one year after the final

96, 102, 148. Claimant's third claim, filed on December 8, 2000, was denied by an administrative law judge on August 29, 2002, because claimant failed to establish total disability. Director's Exhibit 1 at 3. The record does not indicate that claimant took any further action on his third claim. Claimant filed his current claim on November 30, 2004. Director's Exhibit 3.

² The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant asserts that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at Section 718.204(b)(2)(iv). Claimant’s Brief at 3. The administrative law judge considered one new medical opinion. Dr. Alam examined and tested claimant and concluded that, based on “normal” FEV1 values obtained on pulmonary function testing, and “normal” PO2 values obtained on a blood gas study, claimant has a “very mild” impairment and “is not disabled from [a] pulmonary aspect.” Director’s Exhibit 10 at 14. Based on this opinion, the administrative law judge found that claimant did not establish that he is totally disabled. Claimant contends that, in finding that Dr. Alam’s opinion did not establish total disability, the administrative law judge did not consider the exertional requirements of claimant’s usual coal mine work. We disagree.

Contrary to claimant’s contention, the administrative law judge found that Dr. Alam’s opinion was based in part on Dr. Alam’s “considering [claimant’s] previous employment” as a continuous miner operator.⁴ Decision and Order at 5. Substantial evidence supports this finding, as Dr. Alam, in opining that claimant’s “very mild” impairment was not totally disabling, specifically discussed the fact that claimant “worked 21 years in coal mining . . . running [a] continuous miner.” Director’s Exhibit 10 at 14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552, (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 124, (6th Cir. 2000). Further, substantial evidence supports the administrative law judge’s determination that Dr. Alam’s opinion was uncontradicted. Decision and Order at 8. Therefore, in light of the absence of contrary probative evidence, and because the administrative law judge rationally concluded that Dr. Alam understood the demands of claimant’s coal mine work, we hold that the administrative law judge permissibly

⁴ The record reflects that this was claimant’s last coal mine employment. Hearing Transcript at 12.

determined that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).⁵ The administrative law judge's finding is therefore affirmed.

Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement that was previously adjudicated against him, we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3. Therefore, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of 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 Claimant further asserts that, because “pneumoconiosis has been proven to be a progressive and irreversible disease,” it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 3. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).