

BRB No. 08-0757 BLA

H.K.F.)
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 Claimant-Petitioner)
)
 v.)
)
 LEECO, INCORPORATED)
)
 and)
)
 JAMES RIVER COAL COMPANY) DATE ISSUED: 07/21/2009
)
 Employer/Carrier-)
 Respondents)
)
 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 Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for
employer.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank
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 (2006-BLA-5375) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim¹ 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). The administrative law judge credited the parties' stipulation to nineteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was insufficient to establish that claimant was totally disabled. The administrative law judge found that the new evidence submitted in support of the 2005 subsequent claim was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he is not totally disabled pursuant to Section 718.204(b)(2)(iv).² In addition, claimant

¹ Claimant filed a claim for benefits on August 26, 1996, which was denied by Administrative Law Judge Daniel J. Roketenetz on January 14, 1999, because claimant failed to establish any element of entitlement. Director's Exhibit 1. The Board affirmed the denial of benefits. [*H.K.F.*] *v. Leeco, Inc.*, BRB No. 99-0452 BLA (Jan. 24, 2000) (unpub.). Claimant took no further action until he filed a second claim for benefits on January 24, 2001. Director's Exhibit 1. On November 27, 2002, Administrative Law Judge Joseph E. Kane (the administrative law judge) issued a Decision and Order – Denying Benefits, finding that claimant established the existence of legal pneumoconiosis and demonstrated a material change in conditions, but that he was not able to establish a totally disabling respiratory impairment. *Id.* The Board affirmed the denial of benefits. [*H.K.F.*] *v. Leeco, Inc.*, BRB No. 03-0241 BLA (Sept. 29, 2003) (unpub.). Claimant took no further action until he filed the current claim for benefits on January 21, 2005. Director's Exhibit 5. The district director issued a Proposed Decision and Order denying benefits, finding that claimant failed to establish that he was totally disabled. Director's Exhibit 33. Claimant requested a hearing before the administrative law judge, which was held on July 6, 2007.

² Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. We note that the Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now

contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible, pulmonary evaluation on the issue of respiratory disability pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, in a limited response, asserts that there has been no violation of the Director's duty to provide claimant with a credible evaluation.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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.⁴ See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If 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., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions

found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his finding that the newly submitted evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1.

of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s last claim was denied because he failed to establish a totally disabling respiratory impairment. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing a totally disabling respiratory impairment pursuant to Section 718.204(b)(2) to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant challenges the administrative law judge’s finding under Section 718.204(b)(2)(iv), asserting that the administrative law judge is required to consider the exertional requirements of claimant’s usual coal mine work in conjunction with the medical reports assessing disability. Claimant’s Brief at 5, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument that claimant sets forth, however, is that:

It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant’s condition against such duties, it is rational to conclude that the claimant’s condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant’s Brief at 5. Because a miner’s inability to withstand further exposure to coal dust does not establish the presence of a totally disabling respiratory or pulmonary impairment, claimant’s argument is without merit. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, because claimant has failed to brief with specificity the significance of its assertion on this point, we decline to address it further. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

We also reject claimant’s argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and a “considerable amount of time ... has passed since the initial diagnosis...” Claimant’s Brief at 3. A finding of total respiratory disability must be based on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. As claimant does not otherwise challenge the administrative law judge’s weighing of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), we affirm his finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment by the newly submitted medical opinion evidence thereunder. Further, we affirm the administrative law judge’s finding that the newly submitted evidence does not establish that claimant suffers from a totally disabling respiratory impairment at Section 718.204(b)(2), overall. Decision and Order at 9; *see Fields v.*

Island Creek Coal Co., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant next contends that because the administrative law judge concluded that Dr. Simpao's opinion was "vague," the Director failed to fulfill his statutory obligation of providing claimant with "a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required by the Act." Claimant's Brief at 4. In response, the Director contends that Dr. Simpao, examined claimant, obtained a positive x-ray, a pulmonary function study that showed mild obstructive airway disease and a normal blood gas study. The Director contends that there is no violation of the Director's duty under Section 413(b) because the administrative law judge reasonably found that Dr. Simpao's opinion did not support a finding of total disability, but merely recommends that claimant avoid additional exposure to coal dust. The Director further argues that, to the extent that Dr. Simpao's opinion could be construed as a finding of functional disability, the administrative law judge found the opinions of Drs. Broudy and Rosenberg, that claimant retains the ability to perform his work as a beltman, to be more persuasive.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination at the request of the Department of Labor, performed the full range of testing required by the regulations, and addressed each element of entitlement on the examination form. *See* 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 8. On the issue of whether claimant is totally disabled, the administrative law judge found that Dr. Simpao is the only physician finding claimant totally disabled from a respiratory standpoint. Decision and Order at 9. The administrative law judge specifically found that Dr. Simpao diagnosed a "mild" impairment and stated that claimant is "totally disabled and is unable to perform his last coal mining job as a beltman." Decision and Order at 2, 9. The administrative law judge acknowledged that a mild impairment may establish total disability if it precludes a miner from performing his previous coal mine employment. *Id.* The administrative law judge, however, reasonably found that Dr. Simpao's additional statement that claimant is capable of "work[ing] in a totally dust free environment," suggests that Dr. Simpao is recommending that claimant avoid additional exposure to

coal dust, rather than stating that claimant lacks the respiratory capacity to perform the work of a beltman. *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258; Decision and Order at 9; Director's Exhibit 8.

In contrast, the administrative law judge found that the opinions of Drs. Broudy and Rosenberg, who possess superior qualifications as Board-certified pulmonologists, who examined claimant, and who unequivocally concluded that claimant is not totally disabled, do not assist claimant in satisfying his burden of proof under Section 718.204(b)(2)(iv). *See Taylor*, 12 BLR at 1-88; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); Decision and Order at 6-7, 9; Director's Exhibit 11; Employer's Exhibits 1, 3. Because Dr. Simpao addressed all of the requisite elements of claimant's entitlement in his report, and the administrative law judge reasonably found that his opinion was outweighed by the contrary opinions of better qualified physicians, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *See Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.); *cf. Hodges*, 18 BLR at 1-93. Thus, we reject claimant's request that the Board remand this case to the district director for further proceedings.

Because we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish that claimant is totally disabled by a respiratory impairment pursuant to Section 718.204(b), claimant has failed to demonstrate a change in an applicable condition of entitlement since the denial of his prior claim pursuant to Section 725.309(d). Entitlement to benefits in this subsequent claim, therefore, is precluded. 20 C.F.R. §725.309(d).

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