

BRB Nos. 05-0186 BLA
and 05-0186 BLA-A

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| JESSE J. EVERSOLE |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| PERRY COUNTY COAL CORPORATION |) | |
| |) | |
| Employer-Respondent |) | DATE ISSUED: 06/27/2005 |
| Cross-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | |
| Cross-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for
employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
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
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5818) of Administrative Law Judge Rudolf L. Jansen rendered on a 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 has filed four applications for benefits. His first, filed on May 23, 1970, was denied by the Department of Labor on May 15, 1979. Director's Exhibit 26. Claimant's second application, filed on July 12, 1984, was treated as a duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000) and denied on October 16, 1986 because, although claimant established the existence of pneumoconiosis, he did not prove that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 27. On March 6, 1997, claimant filed his third application, also a duplicate claim. Director's Exhibit 1. Administrative Law Judge Joseph E. Kane held a hearing and, in a Decision and Order issued on March 9, 1999, found that claimant demonstrated a material change in conditions under Section 725.309(d) by demonstrating that he had become totally disabled by a respiratory or pulmonary impairment since the prior claim denial. Judge Kane denied benefits, however, because claimant did not establish that his total disability was due to pneumoconiosis. Upon review of claimant's appeal, the Board affirmed Judge Kane's denial of benefits. *Eversole v. Perry County Coal Corp.*, BRB No. 99-0643 BLA (Sep. 19, 2000)(unpub.). On April 19, 2001, claimant filed his fourth and current application, which was treated as a request for modification pursuant to 20 C.F.R. §725.310 (2000).¹ Director's Exhibit 2.

After holding a hearing on claimant's modification request, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order - Denying Benefits on October 7, 2004. The administrative law judge credited claimant with 35.5 years of coal mine employment and found that he established the existence of pneumoconiosis arising out of

¹ Initially, the district director permitted claimant to withdraw his 1997 claim and treated his April 19, 2001 application as a new claim. Director's Exhibit 1 (Proposed Decision and Order, Withdrawal of Claim, Feb. 23, 2001); Director's Exhibit 26. Employer timely objected to the withdrawal, and upon the district director's review of the file, the district director found that he was without authority to grant claimant's withdrawal request because the request was untimely. Director's Exhibit 1 (Employer's Letter, Mar. 16, 2001); Director's Exhibit 33; *see Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-200 (2002)(*en banc*). Because claimant's April 19, 2001 application for benefits was submitted within one year of the denial of his prior claim, the district director considered the new application as a request for modification of the prior denial. Director's Exhibit 33.

coal mine employment and that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b)(2). However, the administrative law judge found that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred when he found that claimant did not prove that his total disability is due to pneumoconiosis. Claimant argues further that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation. Employer has filed a cross-appeal, alleging that the administrative law judge erred by failing to consider whether claimant's 1997 duplicate claim was timely filed. Employer alleges further that the administrative law judge erred in determining the length of claimant's coal mine employment and erred in his analysis of certain medical opinions on the issue of total disability. The Director responds that claimant's 1997 claim was timely filed and that the administrative law judge properly reconsidered Judge Kane's prior finding as to the length of claimant's coal mine employment. Employer has filed a reply brief reiterating its contentions.

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. Failure to establish any one of these elements precludes a finding of 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).

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge erred in finding that he did not establish that his total disability is due to pneumoconiosis because "pneumoconiosis is proven to be a progressive and irreversible disease," and it can thus be concluded that "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 3. With this allegation, claimant specifies no error in the administrative law judge's finding that claimant did not establish that his totally

disabling respiratory impairment is due to pneumoconiosis. Decision and Order - Denying Benefits at 30-32; *see* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, we reject claimant's argument because an administrative law judge's findings must be based solely on the medical evidence in the record. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(1).

Claimant contends that because the administrative law judge did not credit Dr. Hussain's June 6, 2001 medical opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 3. The Director responds that he is required to "provid[e] a miner with a complete and credible pulmonary evaluation once per claim," and argues that he "fulfilled his obligation to claimant when Dr. Mitchell Wicker provided his reasoned and documented opinion of his March 18, 1997 examination of claimant." Director's Brief at 2.

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 (2000), 725.406 (2000). 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 Director states that Section 923(b) requires him to provide a complete pulmonary evaluation once per claim filed by a miner, but not a new pulmonary evaluation with each modification request, because a modification request is merely a continuation of the miner's original claim. Director's Brief at 2, citing 64 Fed. Reg. 54965, 54990 (Oct. 8, 1999). The Director's reasonable interpretations of the Act and regulations are entitled to deference. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994).

The record reflects that on March 18, 1997, Dr. Wicker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form.² Director's Exhibit 1 (report

² Dr. Wicker reported that he saw no evidence of pneumoconiosis and concluded that claimant's respiratory capacity appeared sufficient for claimant to perform his

labeled Director's Exhibit 8); 20 C.F.R. §§718.101 (2000), 718.104 (2000), 725.406 (2000). The administrative law judge did not find nor does claimant allege that Dr. Wicker's report was incomplete. In the original adjudication of claimant's 1997 claim, Judge Kane accepted Dr. Wicker's report as credible but found it outweighed by more probative evidence. [1999] Decision and Order - Denying Benefits at 13, 15. On modification, Judge Jansen assigned Dr. Wicker's opinion "less weight," but did not find that it lacked any credibility. Decision and Order - Denying Benefits at 23, 28. Because Dr. Wicker's report was complete and neither administrative law judge found that it lacked credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.³ *Cf. Hodges*, 18 BLR at 1-93.

Because claimant failed to establish that he is totally disabled due to pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). In view of our disposition of this case, we need not address employer's cross-appeal.

previous coal mine employment. Director's Exhibit 1 (report labeled Director's Exhibit 8, at 3-4).

³ Consequently, we need not address whether Dr. Hussain's 2001 report, provided before the Director realized that claimant's April, 2001 application was not a new claim, fulfilled the Director's obligation under Section 923(b) of the Act.

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