

BRB No. 07-0835 BLA

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| D.B. |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| WESTMORELAND COAL COMPANY |) | |
| |) | DATE ISSUED: 06/30/2008 |
| Employer-Respondent |) | |
| |) | |
| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

D.B., Harts, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order Denying Benefits (2004-BLA-6439) of Administrative Law Judge Richard A. Morgan rendered 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). The administrative law judge credited claimant with at least ten years of coal mine employment and adjudicated this subsequent claim, filed on February 13, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found

¹ Claimant was represented by counsel before the administrative law judge.

the newly submitted evidence insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & 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).

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). 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 by a respiratory or pulmonary impairment.³ Director's Exhibit 3. Consequently, claimant had to submit

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

³ Claimant's prior claim, filed on November 24, 1995, was finally denied by the district director on March 22, 1996. Director's Exhibit 3. Earlier claims, filed on

new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Allen v. Mead Corp.*, 22 BLR 1-61, 1-66 (2000); *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51, 1-53 (1997), *modifying on recon.*, 20 BLR 1-8 (1996).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In his consideration of the newly submitted evidence at Section 718.204(b), the administrative law judge accurately determined that the two pulmonary function studies and the two blood gas studies of record produced non-qualifying values,⁴ and concluded that claimant could not establish total disability at Section 718.204(b)(2)(i), (ii). Decision and Order at 5, 6, 15; Director's Exhibits 17, 18; Employer's Exhibit 2. Additionally, the administrative law judge found that there was no evidence of cor pulmonale with right-sided congestive heart failure, and concluded that claimant could not establish total disability at Section 718.204(b)(2)(iii). Decision and Order at 15. Lastly, the administrative law judge found that the weight of the evidence was insufficient to establish total disability at Section 718.204(b)(2)(iv) because Drs. Ranavaya, Zaldivar and Castle all opined that claimant did not suffer from any pulmonary or respiratory impairment, and Dr. Kessinger's opinion, that the miner was "no longer physically capable of doing his previous job," Director's Exhibit 30, was conclusory and lacked objective support. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 16; Director's Exhibits 16, 30; Employer's Exhibits 2, 4, 5, 6. The administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iv) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish total disability and a change in an applicable condition of entitlement pursuant to Section 725.309(d), *see White*, 23 BLR at 1-3, and affirm the denial of benefits.

January 24, 1989 and January 15, 1993, had also been finally denied and administratively closed. Director's Exhibits 1, 2.

⁴ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

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