

BRB No. 07-0860 BLA

M.C.W., Jr.)
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 Claimant-Petitioner)
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 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 06/19/2008
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

M.C.W., Jr., Pennington Gap, Virginia, *pro se*.

Michelle S. Gerdano (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (06-BLA-5131) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) on a subsequent miner's claim filed on December 27, 2004. In the prior claim, filed on June 10, 1980, Administrative Law Judge Giles J. McCarthy found that the parties stipulated to 11.5 years of coal mine employment and that claimant established the existence of pneumoconiosis. The administrative law judge found, however, that claimant failed to establish total disability due to a pulmonary impairment. Benefits were finally denied on December 21, 1990. Director's Exhibit 1. In this subsequent claim, the administrative law judge 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, 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 generally challenges the administrative law judge's denial of benefits.¹ The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's decision denying benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence and is in accordance with law.² *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 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 rational, supported by substantial evidence, and in accordance with 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).

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). In this case, claimant's prior claim was denied because he failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total respiratory disability in order to have his subsequent claim

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² The record indicates that claimant was employed in the coal mine industry in Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

reviewed on the merits. 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)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-64 (2004)(*en banc*); *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 and consistent with applicable law. It must, therefore, be affirmed. In his consideration of the newly submitted evidence at 20 C.F.R. § 718.204(b)(2)(i)-(iv), the administrative law judge found that the newly submitted pulmonary function test and blood gas study of record produced non-qualifying values, and, therefore, concluded that claimant could not establish total disability at Section 718.204(b)(2)(i), (ii). Decision and Order at 5; Director's Exhibit 12. Additionally, the administrative law judge found that the record contained no evidence of cor pulmonale with right-sided heart failure, and that claimant could not, therefore, establish total disability at Section 718.204(b)(2)(iii). Decision and Order at 4.

Lastly, the administrative law judge found that claimant could not establish total disability at Section 718.203(b)(2)(iv) based on the newly submitted medical opinion evidence. The administrative law judge properly noted that, although Dr. Almatari, claimant's treating physician, concluded that claimant was no longer able to return to coal mining, his opinion was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv) because it was also based on non-respiratory factors, including age and hypertension.³ Decision and Order at 8-9; Director's Exhibit 14; Claimant's Exhibits 2, 4; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). The administrative law judge also properly accorded less weight to the opinion of Dr. Almatari because "neither [his] treatment notes nor his total disability comments

³ The administrative law judge also found that the report by Kellie Brooks, MSN, RNCS, FNP, of Stone Mountain Health Services, Claimant's Exhibit 3, Director's Exhibit 14, that claimant was disabled from his coal mine employment, was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) because Ms. Brooks was a nurse, not a doctor. The regulation provides that the opinion of "*a physician* exercising reasoned medical judgment..." may support a finding of total disability. *See* 20 C.F.R. §718.204(b)(2)(iv). Additionally, the administrative law judge noted that, even if considered, Ms. Brooks's report did not sufficiently reconcile her pulmonary disability assessment with the objective medical evidence and that Ms. Brooks's opinion also considered claimant's "age," a non-respiratory factor, in reaching her opinion on total disability. Decision and Order at 7 n.20; Claimant's Exhibit 3; Director's Exhibit 14.

reference any objective test results showing a significant pulmonary deficiency.” Decision and Order at 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Instead, the administrative law judge properly credited the reasoned and documented opinion of Dr. Rasmussen, who found “no significant loss of lung function” and concluded that claimant retained the pulmonary capacity to return to his regular coal mine employment, as it was better supported by the objective evidence. Decision and Order at 9; Director’s Exhibit 12; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). 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 new submitted evidence failed to establish a change in an applicable condition of entitlement since the prior denial of benefits pursuant to Section 725.309(d). *See Dempsey*, 23 BLR at 1-64.

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

BETTY JEAN HALL
Administrative Appeals Judge