BRB No. 12-0583 BLA

RONNIE F. Mc DONALD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	
	)	DATE ISSUED: 06/14/2013
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-05103) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on November 4, 2008.[1]

[1] Claimant's previous claims, filed on July 12, 1993 and November 17, 2005, were finally denied because claimant failed to establish that he suffered from a totally disabling pulmonary impairment. Director's Exhibits 1, 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

After crediting claimant with eighteen years of coal mine employment, the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant failed to invoke the Section 411(c)(4) presumption. The administrative law judge further found that claimant failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates his previous 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement 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. 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); *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 by a respiratory or pulmonary impairment. Director's Exhibits 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d).

Claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Claimant specifically argues that the administrative law judge erred in finding that Dr. Baker's opinion did not establish the existence of a totally disabling pulmonary impairment. We disagree. Dr. Baker, who performed the Department of Labor's pulmonary evaluation of claimant on February 9, 2009, initially diagnosed a mild to moderate impairment, but opined that claimant is not totally disabled, and would have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 14. However, in a supplemental report dated June 4, 2009, Dr. Baker explained that he had overlooked the post-bronchodilator values from claimant's pulmonary function study. Based on those results, Dr. Baker opined that claimant would not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 17. Dr. Baker, however, again changed his opinion after reviewing additional evidence. During a May 24, 2010 deposition, Dr. Baker testified that, based upon the results of a more-recent pulmonary function study conducted on October 27, 2009, claimant would be able to perform his most recent coal mine employment.[3] Employer's Exhibit 2 at 10-12. Given Dr. Baker's conflicting opinions, as to whether claimant is totally disabled from a pulmonary standpoint, the administrative law judge permissibly discredited his opinion as equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 9. The administrative law judge correctly stated that all of the remaining physicians who submitted new medical opinions, namely Drs. Fino and Repsher, opined that claimant retains the pulmonary capacity to perform his previous coal mine employment.[4] Decision and Order at 8. Because it is based upon substantial evidence,

[2] Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Claimant contends that the administrative law judge misclassified claimant's coal mine employment as requiring only medium labor, rather than heavy labor. Contrary to claimant's contention, the administrative law judge found that claimant's coal mine employment required heavy labor. Decision and Order at 9.

[4] Dr. Fino opined that claimant's respiratory impairment, which he characterized as mild to moderate, would not prevent claimant from returning to his previous coal mine employment. Employer's Exhibit 7. Although Dr. Repsher opined that claimant suffers from a mild airways obstruction, he opined that claimant "has sufficient lung function to carry out his previous job in the coal mines." Employer's Exhibit 1.

we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of the our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(d). We, therefore, affirm the denial of benefits.[5]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[5] In light of our affirmance of the administrative law judge's finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), we also affirm his finding that claimant is unable to invoke the Section 411(c)(4) rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 9-10.