BRB No. 12-0433 BLA

DAVID GIBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/16/2013
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Asher, Kentucky, for claimant.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05606) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge

[1] Claimant filed his first claim for benefits on June 4, 1991. Director's Exhibit 1 at 681. On April 28, 1999, Administrative Law Judge Joseph E. Kane denied benefits, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total respiratory disability. Director's Exhibit 1 at 82. On February 18, 2000, Judge Kane denied claimant's motion for reconsideration, and claimant took no further action on his first claim. Director's Exhibit 1 at 53.

credited claimant with 11.11 years of coal mine employment, and adjudicated this subsequent claim, filed on January 21, 2005, pursuant to the provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was insufficient to establish that claimant suffers from a totally disabling respiratory impairment, the element of entitlement previously adjudicated against claimant. Thus, claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2).[2] Specifically, claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment with the assessments of respiratory impairment contained in the newly submitted medical opinions of Drs. Baker and Mettu at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. The Department of Labor, however, amended the regulations implementing the Black Lung Benefits Act, as amended, and the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment, and her finding that the new evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 14.

Additionally, because claimant has not established at least fifteen years of underground coal mine employment, we affirm the administrative law judge's finding that claimant is not eligible for consideration under the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 7 n. 13.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See*

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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Claimant's prior claim was denied because he failed to establish total respiratory disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant contends that it was error for the administrative law judge to find that total disability was not established at Section 718.204(b)(2)(iv) without comparing the exertional requirements of claimant's usual coal mine employment with a physician's assessment of claimant's respiratory impairment. Claimant further contends that, since pneumoconiosis has been proven to be a progressive and irreversible disease, and considerable time has passed since claimant's initial diagnosis of pneumoconiosis, it can be assumed that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's arguments lack merit.

The administrative law judge determined that the record contains the medical reports of Drs. Mettu and Baker,[5] and that the record supports the understanding by Drs.

Shupe v. Director, OWCP, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 1 at 675, 4 at 1.

[5] The record also contains treatment records from Stone Mountain Health Services, including pulmonary function testing and a physical examination by Dr. Augustine in May, 2009. Director's Exhibit 42. The administrative law judge found that "Dr. Augustine did not render any opinion regarding whether claimant was totally disabled, from a respiratory perspective." As no party challenges the administrative law judge's findings with regard to the treatment records, those findings are affirmed. *See Skrack*, 6 BLR at 1-710; Decision and Order at 13.

Mettu and Baker that claimant's usual coal mine work was as a roof bolter.[6] Decision and Order at 11 & n.25, 12 & n.27, 13 n.28; Director's Exhibits 37 at 4, 33-36, 63- 66, 42 at 25-29. Dr. Mettu stated that claimant has no pulmonary impairment, based on normal results from the April 30, 2009 pulmonary function studies he administered, as well as normal arterial blood gas study results, and a normal physical examination. He concluded that claimant "is not totally disabled from the pulmonary point of view." Decision and Order at 11-12; Director's Exhibit 37 at 4, 33-36. Dr. Baker assessed a "mild impairment" on pulmonary function testing, and stated that claimant would have the respiratory capacity for his usual coal mine work or comparable work, in a dust-free environment, based on his pulmonary function. Decision and Order at 12-13; Director's Exhibit 42 at 25-29. Hence, because neither Dr. Mettu, nor Dr. Baker, opined that claimant is totally disabled from a respiratory perspective, the administrative law judge properly found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc); Decision and Order at 11-12. As both physicians acknowledged claimant's usual coal mine work in rendering their opinions, the administrative law judge was not required to make an independent comparison of the physicians' opinions with the exertional requirements of claimant's usual coal mine employment.

We reject claimant's assertion that total disability is established because, while Drs. Mettu and Baker indicated that claimant could perform his usual coal mine work in a dust-free environment, "it can be reasonably concluded that [claimant's] regular coal

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[6] In a Description of Coal Mine Work form, and accompanying filing documents, claimant described the duties of his job for South East Coal Company from 1977 until 1982 as "roof belt machine," and "bolt machine – drill holes. Put bolts in the top." Director's Exhibits 1 at 673, 669, 4 at 2, 5 at 1; *see* Decision and Order at 11 n.25; *see also* Director's Exhibit 1 at 628. At the hearings on April 4, 2007 and June 2, 2011, claimant testified, with respect to his 1977-1982 coal mine employment, that "about all of it was roof bolting." *See* June 2, 2011 Hearing Transcript at 23; Director's Exhibit 37 at 147. He described his duties as "I drilled holes," and stated that "sometimes it was heavy" manual–type labor. Director's Exhibit 37 at 148.

Describing claimant's [usual] coal mine employment, the administrative law judge reviewed claimant's testimony that "he worked underground, primarily as a roof bolter…from 1977 to 1982." Decision and Order at 3.

Dr. Mettu, in considering claimant's coal mine employment from 1973 until 1985, noted that claimant "ran roof bolter." Director's Exhibit 37 at 33-36, 63-66.

Dr. Baker recorded claimant's coal mine employment from 1973 until 1982, as "bolt machine [&] scoop operator, various other jobs." Director's Exhibit 42 at 25.

mining duties involved [exposure] to heavy concentrations of dust on a daily basis." *See* Claimant's Brief at 3. Since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, the administrative law judge rationally determined that the references of Drs. Baker and Mettu to a dust-free work environment "do not constitute opinions that [claimant] is totally disabled from a respiratory perspective." Decision and Order at 13-14; *see Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989). We also reject claimant's argument that he must be assumed to be totally disabled in light of the progressive and irreversible nature of pneumoconiosis, as an administrative law judge's finding of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8.

As the administrative law judge's findings with regard to the opinions of Drs. Mettu and Baker at Section 718.204(b)(2)(iv) are supported by substantial evidence, and as claimant has not challenged her determination that the evidence at Section 718.204(b)(2)(i)-(iii) also did not establish total disability, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Consequently, we affirm the administrative law judge's finding that this subsequent claim must be denied because claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d)(2), (3). *See White*, 23 BLR at 1-7.

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge