

BRB No. 09-0285 BLA

J.K.)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 10/07/2009
 UNICORN MINING, INCORPORATED)
)
 and)
)
 AMERICAN INTERNATIONAL SOUTH)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (04-BLA-5896) of Administrative Law Judge William S. Colwell 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).¹ This case is before the Board for the second time. Initially, the administrative law judge credited claimant with thirty-two years of coal mine employment² and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the denial of claimant’s prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant’s appeal, the Board affirmed the administrative law judge’s finding that the new medical evidence did not establish the existence of pneumoconiosis, but vacated the finding that the new medical opinion evidence did not establish total disability pursuant to §718.204(b)(2)(iv).³ *J.K. v. Unicorn Mining, Inc.*, BRB No. 06-0952 BLA (July 26, 2007)(unpub.). Specifically, the Board held that the administrative law judge erred in finding that Dr. Simpao’s opinion diagnosing a mild respiratory impairment was insufficient to establish total disability because Dr. Simpao did not state whether the mild impairment was disabling. *J.K.*, slip op. at 5. The Board remanded the case for the administrative law judge to determine whether Dr. Simpao’s diagnosis of a mild impairment was credible, and, if so, to compare Dr. Simpao’s impairment rating with the exertional requirements of claimant’s usual coal mine employment, and

¹ Claimant’s first claim for benefits, filed on October 12, 1999, was denied by the district director on January 28, 2000, because the evidence did not establish the existence of pneumoconiosis or that claimant was totally disabled. Director’s Exhibit 1. Claimant took no further action on his 1999 claim. Claimant filed this claim for benefits on October 22, 2002. Director’s Exhibit 3.

² The record indicates that claimant’s coal mine employment was in Kentucky. Director’s Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ The Board affirmed, as unchallenged, the administrative law judge’s findings that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *J.K. v. Unicorn Mining, Inc.*, BRB No. 06-0952 BLA slip op. at 2 n.2 (July 26, 2007)(unpub.).

determine whether the mild impairment precludes claimant from performing that employment. *Id.* The Board further instructed the administrative law judge that if, on remand, he found that the new evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), he was to consider all of the relevant evidence of record to determine whether claimant is entitled to benefits. *J.K.*, slip op. at 6. Finally, the Board rejected claimant's contention that Dr. Simpao's medical opinion did not fulfill the obligation of the Director, Office of Workers' Compensation Programs (the Director), to provide claimant with a complete pulmonary evaluation. *J.K.*, slip op. at 6-7.

On remand, the administrative law judge found that Dr. Simpao's diagnosis of a mild impairment was credible. Comparing Dr. Simpao's impairment rating with claimant's job duties as a repairman and electrician, the administrative law judge found that Dr. Simpao's opinion did not establish that claimant is totally disabled pursuant 20 C.F.R. §718.204(b)(2)(iv), and therefore, did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that, assuming Dr. Simpao's opinion established total disability, the record did not establish the existence of pneumoconiosis or that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Simpao's medical opinion did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Further, claimant generally contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director filed a limited response, urging the Board to reject claimant's contention that he failed to provide claimant with a complete pulmonary evaluation.

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. 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 the existence of pneumoconiosis and that he was totally disabled. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

We have affirmed the administrative law judge’s finding that the new medical evidence did not establish the existence of pneumoconiosis. *J.K.*, slip op. at 2 n.2, 3-4. We now turn to his finding, on remand, that the new medical report from Dr. Simpao did not establish total disability.⁴

Claimant first contends that “the report and opinion of Dr. Simpao is both well reasoned and well documented and should not have been rejected” by the administrative law judge. Claimant’s Brief at 3. Contrary to claimant’s characterization, the administrative law judge did not reject Dr. Simpao’s opinion. The administrative law judge specifically found that Dr. Simpao’s diagnosis of a mild impairment was “credible,” noting that it was based upon a pulmonary function study that Dr. Simpao interpreted as revealing small airway disease. Director’s Exhibit 9 at 3-4. Since claimant mischaracterizes the administrative law judge’s credibility determination with respect to Dr. Simpao, we reject claimant’s contention.

Claimant further argues that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant’s usual coal mine work in conjunction with a physician’s findings regarding the extent of any respiratory impairment. Claimant’s Brief at 4, *citing Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant’s specific argument is that:

It can be reasonably concluded that [claimant’s coal mining] duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant’s condition against such duties, as well as the medical opinion of Dr. Simpao, it is rational to conclude that the claimant’s condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant’s Brief at 4. Claimant’s argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability.

⁴ Dr. Simpao’s medical report is the only medical report of record in claimant’s current claim for benefits.

Zimmerman v. Director, OWCP, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, to the extent claimant means to contend that the administrative law judge did not consider claimant's job duties in conjunction with Dr. Simpao's rating of a mild impairment, the contention lacks merit. As instructed by the Board, the administrative law judge, on remand, compared the exertional requirements of claimant's usual coal mine work as a repairman and electrician with Dr. Simpao's assessment of a mild impairment.⁵ Decision and Order on Remand at 3. Finding that, overall, claimant's job duties were relatively "less strenuous," the administrative law judge determined that Dr. Simpao's impairment assessment did not establish that claimant could not perform his usual coal mine employment.⁶ Decision and Order on Remand at 5. Since the administrative law judge considered claimant's job duties, and claimant does not allege error in the administrative law judge's finding regarding the exertional level of those

⁵ The administrative law judge set forth and discussed claimant's hearing testimony concerning his work as a repairman electrician, as well as the Description of Coal Mine Work form describing the physical activity of that job. Decision and Order on Remand at 3, 5; Hearing Transcript at 13-17; Director's Exhibits 1, 5.

⁶ The administrative law judge's finding was as follows:

That [claimant] suffers from a mild impairment does not lead to the conclusion that he could not perform the physical requirements of his last coal mine job, as those requirements have been described in the documentary evidence and by his testimony. I specifically focus on the fact that [claimant's] duties are less strenuous than those normally found in coal mining. A majority of his work, as discussed in more detail above, is serving as a repair electrician "doing repairs and electrical work underground." When he submitted a list of his work duties . . . he listed "repairman, electrician, ran a ramcar, ran a scoop, helped on a miner, helped run a bolt machine, bossed," On the same form he stated he lifted 50 pounds several times a day, 30 pounds several times a day, and 20 pounds several times a day. This more strenuous labor of lifting objects is required infrequently and is a minor part of his duties. When considering Dr. Simpao's finding of a mild pulmonary impairment, and [claimant's] normal blood gas and EKG test results, I do not find that the evidence establishes a totally disabling pulmonary impairment when considering [claimant's] lighter physical duties.

Decision and Order on Remand at 5 (citations omitted).

duties, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv).⁷ See *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; see also *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Therefore, we affirm the administrative law judge's finding that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and thus, did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, we affirm the denial of benefits.

In the closing section of his brief, claimant generally asserts that "the Director failed to provide him with a credible pulmonary evaluation as required by the Act."⁸ Claimant's Brief at 5. In response, the Director notes that in the prior appeal, the Board rejected claimant's contention that he did not receive a complete pulmonary evaluation, and he argues that the Board should not revisit that holding.

Previously, we held that Dr. Simpao conducted all of the medical tests required by the regulations and addressed each element of entitlement in a manner that satisfied the Director's statutory obligation to provide claimant with a complete pulmonary evaluation. *J.K.*, slip op. at 6-7. This holding constitutes the law of the case with regard to this issue. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Claimant has not shown a basis for an exception to this doctrine, and therefore, we decline to revisit the issue.⁹ See *Williams*, 22 BRBS at 237.

⁷ Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 4-5. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge's findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

⁸ 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), as implemented by 20 C.F.R. §§718.101(a), 725.406.

⁹ Recent case law from the Sixth Circuit, setting forth the standard for determining whether a pulmonary evaluation is complete, supports the Board's holding that claimant received a complete pulmonary evaluation. See *Greene v. King James Coal Mining, Inc.*,

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

575 F.3d 628, 642, --- BLR --- (6th Cir. 2009) (“[T]he DOL meets its statutory obligation to provide a ‘complete pulmonary evaluation’ . . . when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests.”).