BRB No. 07-0596 BLA

A. G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/28/2008
	)	
EASTOVER MINING COMPANY c/o DUKE POWER COMPANY	)	
	)	
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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-06678) of Administrative Law Judge Larry S. Merck on a 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 found this case to be a

subsequent claim filed on July 30, 2002.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with 9.5 years of coal mine employment, based on a stipulation of the parties, and found that this subsequent claim was timely filed. Weighing the medical evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his weighing of the pulmonary function study evidence and medical opinion evidence pursuant to Section 718.204(b)(2)(i) and (iv). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant filed his initial claim for benefits on June 20, 1985, which was denied by Administrative Law Judge Bernard Gilday, Jr. in a Decision and Order issued on July 1, 1988. Director's Exhibit 1. The Board affirmed the denial of benefits. [*A.G.*] *v. Eastover Mining Co.*, BRB No. 88-2690 BLA (Aug. 28, 1990)(unpub.); Director's Exhibit 1. Claimant's request for modification of the denial of his 1985 claim was denied by Administrative Law Judge Robert Glennon in a Decision and Order issued on August 25, 1993. Director's Exhibit 1. The Board affirmed Judge Glennon's finding that the evidence was insufficient to establish total respiratory disability and, thus, affirmed his denial of benefits. [*A.G.*] *v. Eastover Mining Co.*, BRB No. 93-2334 BLA (Jun. 17, 1994)(unpub.); Director's Exhibit 1.

[2] We affirm the administrative law judge's decision to credit claimant with 9.5 years of coal mine employment, and his finding that the newly submitted evidence was insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

If 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., Inc.*, 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 last claim was denied because he failed to establish that he had a totally disabling respiratory or pulmonary impairment.[4] Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Weighing the newly submitted evidence of record, the administrative law judge found that claimant did not prove total respiratory or pulmonary disability pursuant to Section 718.204(b)(2) and, therefore, failed to establish a change in an applicable condition of entitlement at Section 725.309(d). Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the four newly submitted pulmonary function studies dated October 1, 2002, February 5, 2003, August 1, 2003 and June 14, 2006. Director's Exhibits 15, 20; Employer's Exhibits 3, 9. Of these studies, only the February 5, 2003 study yielded qualifying values.[5] However, Dr. Vuskovich submitted a report finding

[4] The administrative law judge also found that the newly submitted evidence was insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). However, because this element of entitlement was not a condition upon which the prior denial was based, the administrative law judge was not required to adjudicate this issue. 20 C.F.R. §725.309(d); Director's Exhibit 1.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

that the February 5, 2003 study was invalid because claimant did not exert sufficient effort. Employer's Exhibit 7.

Weighing this evidence, the administrative law judge stated, "even assuming [the qualifying February 5, 2003 study] had not been invalidated by Dr. Vuskovich, the preponderance of the evidence does not support a finding of total disability." Decision and Order at 8. Consequently, the administrative law judge found that the newly submitted pulmonary function study evidence was insufficient to establish total disability at Section 718.204(b)(2)(i). *Id*.

On appeal, claimant contends that the administrative law judge erred in failing to "afford Dr. Narayanan's findings, particularly the qualifying pulmonary function studies, proper weight." Claimant's Brief at 7. Claimant further contends that the administrative law judge erred in accepting Dr. Vuskovich's invalidation of the qualifying study obtained by Dr. Narayanan, arguing that Dr. Vuskovich's conclusions are poorly reasoned and unsupported by adequate documentation. Claimant's Brief at 8. Specifically, claimant contends that there "is no explanation as to how the eight 'yes/no' answers in the matrix demonstrate that the study was invalid." *Id*. These contentions lack merit.

The administrative law judge, within a reasonable exercise of his discretion as fact-finder, concluded that the February 5, 2003 pulmonary function study by Dr. Narayanan was invalid based on Dr. Vuskovich's statement that the study:

> Did not yield values that accurately measured the parameters that spirometry was designed and standardized to measure. [As] demonstrated by time-volume and flow-volume tracings, maximum effort, the essential requirement for valid spirometry results, [was] not satisfied.

Employer's Exhibit 7; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Therefore, contrary to claimant's contention, the administrative law judge permissibly found that Dr. Vuskovich provided a sufficient rationale for his opinion. Moreover, error, if any, in the administrative law judge's crediting of Dr. Vuskovich's invalidation report is harmless because the administrative law judge rationally determined that the qualifying pulmonary function study, even if valid, was outweighed by the preponderance of the pulmonary function study evidence, which yielded non-qualifying values. Decision and Order at 8; 20 C.F.R. §718.204(b)(2)(i); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We affirm, therefore, the administrative law judge's finding that the newly submitted pulmonary function study evidence does not establish total disability pursuant to Section 718.204(b)(2)(i).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Dahhan and Rosenberg, as well as claimant's treatment records. Decision and Order at 9-10. Dr. Baker opined that claimant had a "mild [impairment] with decreased FEV1, chronic bronchitis, and Coal Workers' Pneumoconiosis, 1/0." Director's Exhibit 13. Dr. Baker further opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id*. Dr. Dahhan opined that claimant was capable of performing his previous coal mine employment. Employer's Exhibits 1, 11. Dr. Rosenberg stated that, from a pulmonary perspective, claimant was capable of performing his previous coal mining job. Employer's Exhibits 8, 12. Claimant's treatment records are comprised of a hospital discharge summary by Dr. Galileo Molina, dated November 14, 2005, in which Dr. Molina summarized claimant's treatment for pneumonia; x-ray reports associated with this hospitalization; and CT scans dated November 4, 2005 and January 5, 2006. Claimant's Exhibits 1-3. These records detail the course of treatment for claimant's pneumonia, but do not address the extent of any pulmonary impairment.

Claimant contends that the administrative law judge erred in the weight he accorded the opinions of Drs. Dahhan and Rosenberg under Section 718.204(b)(2)(iv). Specifically, claimant contends that the administrative law judge erred in crediting Dr. Rosenberg's opinion, because Dr. Rosenberg's assumption that chronic obstructive pulmonary disease is not latent and progressive is hostile to the Act. Claimant's Brief at 5-6. Claimant further contends that the administrative law judge erred in crediting the medical opinion of Dr. Dahhan because Dr. Dahhan failed to provide a reasoned basis for his conclusions, as they are based on non-conforming and non-qualifying objective tests. Claimant's Brief at 6-7. Claimant also alleges that the administrative law judge erred in not affording claimant's treatment records enough weight on the issue of total disability, arguing that the treatment records are entitled to greater weight because they show the progression and severity of claimant's condition. Claimant's Brief at 8. These contentions lack merit.

The administrative law judge rationally determined that the opinions of Drs. Baker, Dahhan and Rosenberg do not support a finding of total disability at Section 718.204(b)(2)(iv), as each physician stated that claimant is capable of performing his usual coal mine employment. Decision and Order at 9-10; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Thus, even if, as claimant alleges, the administrative law judge erred in crediting the opinions of Drs. Dahhan and Rosenberg, this error would be harmless because claimant, who bears the burden of establishing each of the requisite elements of entitlement, has not submitted a medical opinion supportive of his burden of proof under Section 718.204(b)(2)(iv). *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Moreover, contrary to claimant's contention that the administrative law judge erred in failing to accord greater weight to claimant's treatment records, the administrative law judge properly found that they do not address the issue of total respiratory disability. Decision and Order at 9; Claimant's Exhibits 1-3. Consequently, the administrative law judge reasonably accorded this evidence no weight at Section 718.204(b)(2)(iv), as it is not relevant to the issue of total respiratory disability. 20 C.F.R. §718.204(a), (b)(2)(iv); *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Because the administrative law judge properly found that none of the newly submitted medical opinions of record included a diagnosis of total disability, we affirm his finding that claimant has not proven total disability pursuant to Section 718.204(b)(2)(iv).

Accordingly, we also affirm the administrative law judge's finding that the newly submitted evidence, when weighed together, was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). Decision and Order at 23; 20 C.F.R. §718.204(b)(2); *see Fields*, 10 BLR at 1-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Because we affirm the administrative law judge's determination that the new evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2), claimant has failed to establish a change in the applicable condition of entitlement pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

Accordingly, the administrative law judge's Decision and Order – Denial of 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