

BRB No. 09-0531 BLA

BILLY J. ELKINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
YOUNGSTOWN MINES CORPORATION)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	DATE ISSUED: 03/18/2010
PNEUMOCONIOSIS FUND)	
)	
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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05079) of Administrative Law Judge Adele Higgins Odegard 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 Based on a stipulation by the parties and a review of the record, the administrative law judge credited claimant with at least ten years of qualifying coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718. Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against him. Therefore, 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. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that the blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declines to 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed his initial claim for black lung benefits on April 30, 1991, which was denied by the district director on October 22, 1991, as claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Claimant's second claim, filed on December 6, 1993, was denied by the district director on June 6, 1994 as claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 2. Claimant's third claim, filed on November 9, 2001, was denied by the district director on December 17, 2002, because, although claimant established the existence of pneumoconiosis, claimant failed to establish total disability. Director's Exhibit 3. Claimant's current claim was filed on August 21, 2006. Director's Exhibit 5.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that the miner had at least ten years of coal mine employment and her finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), Decision and Order at 4, 8, 9.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 6.

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 (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). 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 total disability. Director’s Exhibits 1-3. 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); see *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Claimant challenges the administrative law judge’s finding that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Specifically, claimant argues that the administrative law judge erred in failing to find that the qualifying blood gas study, administered by Dr. Rasmussen on November 13, 2006, established that claimant was totally disabled.⁴ Claimant’s Brief at 14; Director’s Exhibit 15. The newly submitted blood gas study evidence includes the results of two blood gas studies. The administrative law judge noted that the study conducted by Dr. Rasmussen on November 13, 2006 yielded qualifying values, while the study conducted by Dr. Zaldivar on March 28, 2007 yielded non-qualifying values. Decision and Order at 9; Director’s Exhibit 15; Employer’s Exhibit 4. Noting that the two studies yielded inconsistent results, the administrative law judge considered the comments of Drs. Rasmussen, Zaldivar and Castle addressing the reliability of the studies.

Dr. Rasmussen observed that claimant’s blood gas study values at rest met the disability standards and indicated that an exercise test was not done because of claimant’s severe arthritis. Director’s Exhibit 15. Dr. Rasmussen concluded that, although claimant’s resting blood gas study values met the disability standards, he was not able to state that claimant had a disabling respiratory impairment based on those results. Director’s Exhibit 17. Dr. Rasmussen further stated that he would not be able to determine whether claimant’s gas exchange would be normal or abnormal without an

⁴ A “qualifying” blood gas study yields values that are equal to, or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendix C. A “non-qualifying” study exceeds those values. See 20 C.F.R. §718.204(b)(2)(ii).

exercise study. *Id.* Dr. Zaldivar observed that claimant's resting blood gas study values were normal and that they did not demonstrate any pulmonary disability. Employer's Exhibit 4. Dr. Zaldivar explained that because an impairment due to coal workers' pneumoconiosis is permanent and irreversible, any signs of an impairment that were present during Dr. Rasmussen's blood gas study should have been evident in the results of the March 28, 2007 blood gas study he administered. Employer's Exhibit 9 at 20. Dr. Zaldivar attributed Dr. Rasmussen's results to error, claimant's seating position or his obesity. Employer's Exhibits 4, 9 at 22. Dr. Castle opined that Dr. Rasmussen's blood gas study, conducted while claimant was sitting, would be affected by the claimant's significant obesity. Employer's Exhibit 10 at 17. Dr. Castle also reviewed the blood gas study administered by Dr. Zaldivar and agreed that the study was normal and did not reflect any impairment. *Id.*

After considering the comments by Drs. Rasmussen, Zaldivar and Castle with respect to the conflicting blood gas studies, the administrative law judge noted that:

Because of the conclusions of Dr. Rasmussen, which highlight the uncertainty of his arterial blood gas test results, and the alternative listed causes of those results (such as the Claimant's obesity) ascribed by Dr. Rasmussen, Dr. Zaldivar, and Dr. Castle, as well as the contrary arterial blood gas test results of Dr. Zaldivar, which demonstrate no disability, I find that the qualifying arterial blood gas test results in the test given by Dr. Rasmussen, are not probative or indicative of a pulmonary disability, and should be given minimal weight.

Decision and Order at 13.

We conclude that the administrative law judge acted within her discretion in finding that the newly submitted blood gas study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Caldwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). Further, we find no merit in claimant's general assertion that the blood gas study results indicate that claimant "has good and bad days" and that the administrative law judge did not address whether claimant could "perform his coal mine duties on his worst day" in considering the blood gas study evidence. Claimant's Brief at 15. Claimant has the burden of submitting medical evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). We therefore affirm the administrative law judge's finding that the newly submitted blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as this finding is supported by

substantial evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In determining whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Zaldivar and Castle. Dr. Rasmussen diagnosed moderate resting hypoxia, potentially caused by claimant's obesity, coal mine dust exposure and previous cigarette smoking, but did not diagnose claimant with a disabling respiratory impairment. Director's Exhibits 15, 17. Dr. Zaldivar concluded that claimant was not totally disabled from a respiratory standpoint, stating that there was no evidence of any pulmonary impairment at all and that, from a pulmonary standpoint, claimant was capable of performing his usual coal mine work. Employer's Exhibits 4, 9. Dr. Castle opined that claimant did not have a respiratory impairment. Employer's Exhibits 5, 10.

Contrary to claimant's assertion, the administrative law judge properly found that the evidence was insufficient to establish total disability since none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment sufficient to satisfy claimant's burden of proof and the test results themselves, when considered in their totality, did not establish total respiratory disability. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 13. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability, based on the newly submitted medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's determination that the newly submitted evidence fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and her finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *White*, 23 BLR at 1-1-3; *Allen v. Mead Corporation*, 22 BLR 1-63, 1-66-67 (2000) (*en banc*); Decision and Order at 13.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge