BRB No. 10-0199 BLA

WINFRED S. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/14/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Winfred S. Wilson, Brownstown, Indiana, *pro se*.

Helen H. Cox (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, without the assistance of counsel, the Decision and Order Denying Benefits (08-BLA-5865) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119

[1] Claimant's previous claim, filed on July 21, 2005, was denied by the district director on June 28, 2006, because claimant did not establish any element of entitlement. Director's Exhibit 1. More than one year later, claimant requested modification, but his request was denied, as untimely filed. *Id.*; *see* 20 C.F.R. §725.310. Claimant filed his current claim on November 13, 2007. Director's Exhibit 3.

(2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] After crediting claimant with eleven years of coal mine employment,[3] 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 total disability pursuant to 20 C.F.R. §718.204(b)(2).[4] Thus, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect the instant miner's claim, as the new evidence does not demonstrate the existence of a totally disabling respiratory or pulmonary impairment, and there is no evidence of total disability in the record of his prior claim. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] 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*).

[4] Because the new evidence did not establish pneumoconiosis or total disability, the administrative law judge found that claimant necessarily could not establish that his pneumoconiosis arose out of coal mine employment, or that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.203, 718.204(c). Decision and Order at 8, 9.

totally disabling. 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 any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately found that the only new x-ray, dated December 12, 2007, was interpreted as negative for pneumoconiosis by Dr. Powell.[5] Decision and Order at 6; Director's Exhibit 10. Further, pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge correctly found that that there was no new biopsy evidence, and that none of the presumptions for establishing pneumoconiosis was applicable to this claim. We therefore affirm the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the new medical opinion of Dr. Powell, who did not diagnose claimant with pneumoconiosis, or "any impairing chronic respiratory disease."[6] Director's Exhibit 10 at 4. Therefore, substantial evidence supports the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Considering whether the new evidence established total disability, pursuant to 20 C.F.R. §718.202(b)(2)(i),(ii) the administrative law judge considered the new pulmonary function study and the new blood gas study, both of which were dated December 12, 2007, and correctly found that both tests were non-qualifying.[7] Director's Exhibit 10.

[5] Dr. Gaziano, a B reader, reviewed the December 12, 2007 x-ray to assess its film quality only. Director's Exhibit 10.

[6] In his December 12, 2007 report, Dr. Powell diagnosed claimant with hypertension due to "[g]enetic predisposition," and "[p]revious [g]ranulomatous [l]ung [d]isease by CXR," due to "[p]rob[able] [h]istoplasmosis." Director's Exhibit 10.

[7] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C, for establishing total disability. A

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately found that there was no new evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. Additionally, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that the new medical opinion from Dr. Powell stated that claimant has "no impairment." Director's Exhibit 10. As substantial evidence supports the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), that finding is affirmed.

Because we have affirmed the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total respiratory disability, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits.

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

"non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).