BRB No. 05-0368 BLA

WILLIE J. NORTH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	
	)	
	)	DATE ISSUED: 01/19/2006
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 - Denying Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Claim (03-BLA-5521) of Administrative Law Judge Daniel F. Solomon in a subsequent miner's 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 credited the miner with nineteen years of coal mine employment, after noting that this issue had not been contested by the parties. Decision and Order at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 12-14. Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d). *Id.* at 14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 3-6. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 6. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing only that remand for a complete and credible pulmonary evaluation is not needed in this case as such an examination has been provided.[2]

The Board's scope of review is defined by statute. The administrative law judge's

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[1]Claimant is Willie J. North, the miner, who filed his second claim for benefits on March 1, 2001. Director's Exhibit 2. Claimant's first claim for benefits, filed on July 27, 1988, was denied by Administrative Law Judge E. Earl Thomas on February 1, 1990 because claimant failed to establish total respiratory disability, although he established the existence of pneumoconiosis. Director's Exhibits 1-1, 1-31. Claimant filed another claim on April 24, 1990, which was treated as a request for modification. Judge Richard E. Huddleston dismissed claimant's first claim on September 3, 1991 because he found the evidence insufficient as a matter of law to establish modification. Director's Exhibit 1.

[2]We affirm the administrative law judge's finding of sixteen years of coal mine employment and his findings that the new evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's second claim was filed on March 1, 2001, after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) 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 (2004). Claimant's first claim was denied because claimant failed to establish total respiratory disability. Director's Exhibit 1.

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in failing to find total respiratory disability based on Dr. Baker's opinion.[3] Claimant's Brief at 3-6. The record contains the opinions of Drs. Baker, Hussain, Dahhan, and Branscomb. In his report, Dr. Baker indicated that claimant's blood gas studies demonstrated a "mild resting arterial hypoxemia" and that claimant has a "Class I impairment . . . based on the FEV1 and vital capacity both being greater than 80% of predicted." Director's Exhibit 9. Dr. Baker also noted that claimant "has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Dr. Hussain opined that claimant suffers from a moderate impairment which prevents him from performing the work of a coal miner. Director's Exhibit 7. In their reports, Drs. Dahhan and Branscomb found that claimant has no respiratory impairment and that he retains the respiratory capacity to perform his last coal mining job. Director's Exhibit 10; Employer's Exhibit 1.

[3]Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

The administrative law judge reviewed the new medical opinion evidence and found the respiratory disability assessments of Drs. Baker and Hussain to be undermined "because the clinical tests on which they rely are uniformly non-qualifying." Decision and Order at 12. While the administrative law judge noted that non-qualifying test results do not "disqualify a medical opinion as a matter of law," he questioned the probative value of the disability assessments of Drs. Baker and Hussain because these physicians relied heavily on the clinical tests in rendering their findings regarding claimant's disability.[4] *Id.* Further, regarding Dr. Baker's notation of a Class I impairment, the administrative law judge stated, "[c]ertainly a mild pulmonary impairment that precludes a miner's usual coal mine employment constitutes total disability. Dr. Baker, however, does not persuasively translate this assessment, as based on the AMA Guides, into an opinion as to whether [claimant] would be precluded from returning to the mines from a pulmonary or respiratory standpoint."[5] *Id.* at 13. Moreover, the administrative law judge properly noted that Dr. Baker's "conclusion that further coal mine dust exposure is medically contraindicated [does] not constitute an assessment of total respiratory disability." *Id.* at 12 n. 15; *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). According "greater probative weight" to the opinions of Drs. Dahhan and Branscomb because they are "better supported by the underlying documentation," the administrative law judge concluded that claimant failed to demonstrate total respiratory disability based on the new medical opinion evidence.

Contrary to claimant's assertion,[6] the administrative law judge properly discounted Dr. Baker's opinion because it is not supported by the underlying objective tests.

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[4]The administrative law judge noted that "Dr. Baker relies on the ventilatory study as a principal component of his disability finding as based on the AMA Guides, and Dr. Hussain also places weight on his testing as well as [claimant's] complaints of wheezing and shortness of breath." Decision and Order at 12.

[5]The administrative law judge noted that "[a] 'Class 1' impairment translates into a '0% Impairment of the Whole Man,' according to the *Guides*. *AMA Guides* at p. 107, Table 5-12." Decision and Order at 13 n.16.

[6]The administrative law judge considered Dr. Baker's status as claimant's treating physician but properly chose not to accord greater weight to this physician's opinion on this basis. Decision and Order at 13; *see* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims).

Minnich v. Pagnotti Enterprises, Inc., 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Furthermore, since Dr. Baker's opinion is insufficient to establish total disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Therefore, we affirm the administrative law judge's findings regarding Dr. Baker's opinion pursuant to Section 718.204(b)(2)(iv).[7] Claimant does not allege error in the administrative law judge's weighing of the opinions of Drs. Hussain, Dahhan, and Branscomb pursuant to Section 718.204(b)(2)(iv). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on the new medical evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Additionally, claimant argues that, given the administrative law judge's finding at Section 718.204(b)(2)(iv) that Dr. Hussain's opinion is undermined because he relied on non-qualifying clinical tests, the Director failed to provide him with a complete and

[7]Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting 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 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

credible pulmonary evaluation as required under Section 413(b) of the Act. Section 413(b) of the Act, 30 U.S.C. §923(b), provides that "[e]ach miner who files a claim for benefits . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a moderate impairment which prevents him from performing the work of a coal miner. Director's Exhibit 7. The administrative law judge accorded less weight to Dr. Hussain's assessment of claimant's respiratory capacity because he found this physician's opinion to be "less reasoned and documented than those of employer's experts." Decision and Order at 13. However, as the Director argues, the administrative law judge did not discredit Dr. Hussain's opinion as devoid of any weight at all. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). The Director's obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Hussain's opinion lacks any credibility, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a credible pulmonary evaluation.

Based on the foregoing, we affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim.

Accordingly, the administrative law judge's Decision and Order - Denying Claim 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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JUDITH S. BOGGS
Administrative Appeals Judge