BRB No. 04-0143 BLA

CHESTER DAVIDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CALVARY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/30/2004
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE 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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5025) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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] The administrative law judge adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish total disability 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 the evidence insufficient to establish a "material" change in conditions pursuant to 20 C.F.R. §725.309.[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his initial claim on May 15, 1995. Director's Exhibit 1. This claim was denied by the district director on October 24, 1995. *Id*. Because claimant did not pursue this claim any further, the denial of benefits became final. Claimant filed his most recent claim on May 16, 2001. Director's Exhibit 3.

[3]The administrative law judge stated that "the regulations regarding duplicate claims, as they existed prior to January 19, 2001, are applicable in this case." Decision and Order at 4. We hold that the administrative law judge's error in applying the regulations at 20 C.F.R. §725.309 (2000), rather than the amended regulations at 20 C.F.R. §725.309, is harmless because it does not affect the outcome of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]Since the administrative law judge's finding that the newly submitted evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) is not challenged on appeal, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Although the administrative law judge indicated that claimant's 2001 claim is a "duplicate" claim, it is actually considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1995 claim was finally denied. 20 C.F.R. §725.309(d). The pertinent regulations provide that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. *Id*. In considering claimant's 1995 claim, the district director found that the evidence was sufficient to establish that claimant suffered from pneumoconiosis and that the disease was caused at least in part by coal mine work. Director's Exhibit 1. However, the district director denied benefits on claimant's 1995 claim because she found that the evidence was insufficient to establish that claimant was totally disabled by the disease. *Id*.

Claimant initially contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts 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. Based on his consideration of the newly submitted reports of Drs. Baker, Dahhan and Fino, the administrative law judge stated that "[n]o recent medical narrative opinions support a finding of total disability." Decision and Order at 9. Dr. Fino opined that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 1. Further, although Drs. Baker and Dahhan opined that claimant suffers from a mild impairment, they also opined that claimant retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibits 10, 12. Thus, since Dr. Baker opined that claimant retains the respiratory capacity to perform the work of a coal miner, *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1986)(*en banc*), 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), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. Claimant has the burden of establishing each element of entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The record contains no new medical opinion evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Moreover, contrary to claimant's assertion, 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 work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Next, claimant generally contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). However, claimant does not delineate how the administrative law judge erred in his analysis of the evidence relevant to the issue of total disability due to pneumoconiosis. Claimant merely asserts that the administrative law judge erred in finding that claimant was not totally disabled as a result of coal workers' pneumoconiosis. Thus, claimant has failed to allege any specific error in the administrative law judge's findings or legal conclusions, and as such, claimant fails to provide a basis upon which the Board may review the administrative law judge's findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[5]

In light of our affirmance of the administrative law judge's findings that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b) and it is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), we hold, as a matter of law, that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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[5]Furthermore, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) is supported by substantial evidence. The record contains the newly submitted reports of Drs. Baker, Dahhan and Fino. In finding that total disability due to pneumoconiosis has not been established, the administrative law judge stated that "[n]o physician of record determined that the [c]laimant was totally disabled due to an occupationally respiratory or pulmonary impairment." Decision and Order at 10. As previously noted, Drs. Baker and Dahhan opined that claimant retains the respiratory capacity to perform the work of a coal miner. Director's Exhibits 10, 12. Additionally, Dr. Fino opined that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 1.

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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