

BRB No. 07-0126 BLA

I.M.)
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 Claimant-Petitioner)
)
 v.)
)
 U.S. STEEL MINING COMPANY) DATE ISSUED: 09/28/2007
)
 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 and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 the Decision and Order and Order on Reconsideration (05-BLA-5056) of Administrative Law Judge Daniel F. Solomon denying benefits 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). This case involves a subsequent claim filed on November 13, 2003.¹ The administrative law judge found that the newly submitted evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the applicable condition of entitlement had not changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant filed a motion for reconsideration, arguing that Dr. Hussain, who examined claimant on behalf of the Department of Labor, did not provide a reasoned opinion, and that therefore, the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. In an Order dated September 27, 2006, the administrative law judge denied claimant's motion for reconsideration.

¹ Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on January 10, 1973. Director's Exhibit 1. The SSA denied the claim on September 17, 1973, October 20, 1978, and May 3, 1979. *Id.* After claimant elected Department of Labor (DOL) review of his denied claim, the DOL denied the claim on November 26, 1980. *Id.*

Claimant filed a second claim on September 23, 1983. Director's Exhibit 1. In a Decision and Order dated November 2, 1989, Administrative Law Judge James Guill found that the evidence established that claimant suffered from pneumoconiosis arising out of his coal mine employment. *Id.* However, Judge Guill found that the evidence did not establish that claimant suffered from a totally disabling respiratory or pulmonary impairment. *Id.* Accordingly, Judge Guill denied benefits. Although claimant filed an appeal with the Board, the Board dismissed the appeal as untimely filed. *[I.M.] v. U. S. Steel Mining Co.*, BRB No. 89-4024 BLA (Mar. 30, 1990) (Order) (unpub.).

Claimant filed a third claim on February 21, 1992. Director's Exhibit 1. In a Decision and Order dated May 23, 1996, Administrative Law Judge Michael P. Lesniak found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Lesniak denied benefits. *Id.* By Decision and Order dated February 27, 1997, the Board affirmed Judge Lesniak's denial of benefits. *[I.M.] v. U. S. Steel Mining Co.*, BRB No. 96-1260 BLA (Feb. 27, 1997) (unpub.). In a Decision and Order dated February 8, 2000, Administrative Law Judge Rudolf L. Jansen denied claimant's request for modification. Director's Exhibit 1.

Although claimant filed a fourth claim on March 12, 2001, this claim was subsequently withdrawn. *See* Director's Exhibit 2. Claimant filed a fifth claim on November 13, 2003. Director's Exhibit 4.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.²

The Board 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).

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 that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b). 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*) (holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering whether the new medical opinion evidence established total disability, the administrative law judge found that Dr. Hussain's opinion regarding the extent of claimant's pulmonary impairment was not as probative as that of Dr. Crisalli, because claimant provided only "fair" effort in completing the pulmonary function study performed during Dr. Hussain's examination.³ Decision and Order at 7.

² Because no party challenges the administrative law judge's findings that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Dr. Hussain examined claimant on December 10, 2003. In a report dated

The administrative law judge noted further that when claimant provided “good” effort on the pulmonary function study performed during Dr. Crisalli’s examination four months later, claimant produced significantly higher FEV1, FVC, and MVV values.⁴ A suboptimal effort can adversely affect the results obtained on pulmonary function study. *See* 20 C.F.R. Part 718, App. B (2)(ii)(B). Thus, in this case, the administrative law judge permissibly credited Dr. Crisalli’s opinion, that claimant was not totally disabled, over that of Dr. Hussain, because Dr. Crisalli’s opinion was based upon more reliable pulmonary function study results.⁵ *See generally* *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984).

Claimant’s remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁶ We, therefore, affirm the administrative law judge’s finding

December 10, 2003, Dr. Hussain opined that claimant suffered from a moderate impairment. Director’s Exhibit 10. Dr. Hussain further indicated that claimant did not have the respiratory capacity to perform the work of a miner. *Id.*

Dr. Crisalli examined claimant on March 29, 2004. In a report dated June 8, 2004, Dr. Crisalli opined that claimant had no pulmonary functional impairment and retained the pulmonary functional capacity to perform his previous coal mine employment. Employer’s Exhibit 1.

⁴ The record reflects that on December 10, 2003, claimant’s pre-bronchodilator results with fair effort were: FEV1 1.57, FVC 2.31, and MVV 49. Director’s Exhibit 10. On March 29, 2004, claimant’s pre-bronchodilator results with good effort were: FEV1 2.13, FVC 2.83, and MVV 77. Employer’s Exhibit 1.

On December 10, 2003, claimant’s post-bronchodilator results with fair effort were: FEV1 1.59 and FVC 2.37. Director’s Exhibit 10. On March 29, 2004, claimant’s post-bronchodilator results with good effort were: FEV1 2.05 and FVC 2.67. Employer’s Exhibit 1.

⁵ Because the administrative law judge provided a proper basis for crediting Dr. Crisalli’s opinion over that of Dr. Hussain, *i.e.*, his reliance upon more reliable pulmonary function study results, the administrative law judge’s error, if any, in discrediting Dr. Hussain’s opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

⁶ The only other new medical report of record was that of Dr. Baker. The

that the newly submitted medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See 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).

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that the applicable element of entitlement has changed since the date of the denial of the prior claim. *See* 20 C.F.R. §725.309(d).

Claimant also contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, claimant selected Dr. Hussain to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 10. Dr. Hussain examined claimant on December 10, 2003. In a report dated December 10, 2003, Dr. Hussain opined that claimant suffered from a moderate impairment. *Id.* Dr. Hussain further indicated that claimant did not have the respiratory capacity to perform the work of a miner.⁷ *Id.* The administrative law judge accorded Dr. Hussain's disability diagnosis less weight because the pulmonary function study that he administered was less reliable than the pulmonary function study administered by Dr. Crisalli. Decision and Order at 7. Any flaw in Dr. Hussain's opinion was not the Director's fault, but was the result of claimant's suboptimal effort on the pulmonary function study conducted by Dr. Hussain. Consequently, we agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges*, 18 BLR at 1-93; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

administrative law judge accurately found that, because Dr. Baker did not address the extent of claimant's respiratory or pulmonary impairment, his opinion did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 7; Claimant's Exhibit 4.

⁷On its face, Dr. Hussain's opinion is complete. Dr. Hussain conducted a physical examination, recorded claimant's symptoms as well as his employment, medical, and social histories, obtained an x-ray, EKG, pulmonary function and arterial blood gas studies, and addressed all of the elements of entitlement. *See* Director's Exhibit 10.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge