BRB Nos. 07-0175 BLA
and 07-0175 BLA-A

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| D.C. | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ISLAND CREEK COAL COMPANY | ) | DATE ISSUED: 09/28/2007 |
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| Employer-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; 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 and employer cross-appeals the Decision and Order (04-BLA-6253) of Administrative Law Judge Paul H. Teitler 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 accepted the parties' stipulations that claimant has twenty-five years of coal mine employment and has pneumoconiosis.[2] Further, the administrative law judge found that the evidence developed since the prior denial of benefits did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that the new evidence did not establish a change in an application condition of entitlement pursuant to 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), (iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer argues that the administrative law judge erred in excluding relevant medical evidence. The Director responds, urging the Board to reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. The Director also urges the Board to reject employer's assertion, on cross-appeal, that the evidentiary limitations at 20 C.F.R. §725.414 are invalid. The Director further argues that employer's assertion that the administrative law judge erred in excluding the x-ray readings contained in Employer's Exhibit 6 is moot, because employer conceded that claimant has pneumoconiosis.[3]

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[1] Claimant filed his first claim on March 7, 1977. Director's Exhibit 1. It was finally denied on January 28, 1993 because claimant did not establish that he was totally disabled. *Id*. Claimant filed this claim on July 11, 2002. Director's Exhibit 3.

[2] The administrative law judge noted that claimant previously established that the pneumoconiosis arose out of coal mine employment. Decision and Order at 2.

[3] Because 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)(iii) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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). 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 was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Initially, we reject claimant's contention that the administrative law judge erred in finding that the new pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). None of the four new pulmonary function studies of record yielded qualifying[4] values. Director's Exhibits 11, 13, 16; Claimant's Exhibit 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

Claimant also contends that administrative law judge erred in finding that the new arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The record consists of four arterial blood gas studies dated September 30, 2002, November 20, 2002, April 24, 2003, and October 21, 2003. Director's Exhibits 11, 12, 16; Claimant's Exhibit 2. The study administered by Dr. Jarboe on November 20, 2002 was the only arterial blood gas study of record that yielded qualifying values. Director's Exhibit 16. The administrative law judge reasonably determined that Dr. Jarboe did not believe that the November 20, 2002 study "evidences a disability." Decision and Order at 5. In considering this study, the administrative law judge stated:

> Dr. Jarboe, who conducted the qualifying test, concluded that the fact that [c]laimant's PO2 number was low on that day was an aberration rather than an indication of a disability. (EX 3 at 24). He indicated that this may be a function of [c]laimant's heart condition. (EX 3 at 24). Dr. Jarboe also explained in his written report, also a part of EX 3, that the diffusing capacity is a function of [c]laimant's cardiac condition, with which Dr. Fino and Dr. Ammisetty agreed, as discussed below.

*Id*.

Claimant asserts that "[the administrative law judge] erred in not making a finding as to the degree of pulmonary impairment." Claimant's Brief at 9. Contrary to claimant's assertion, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Thus, we reject claimant's assertion that the administrative law judge erred in weighing the new arterial blood gas study evidence. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant further contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Martin, Ammisetty, Fino, and Jarboe. Dr. Martin opined that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 1. Dr. Ammisetty opined that claimant has a moderate pulmonary impairment due to coal dust exposure. Claimant's Exhibit 2; Employer's Exhibit 2. Dr. Ammisetty also opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.[5] Claimant's Exhibit 2. In contrast, Dr.

[5] The administrative law judge stated that "Dr. Ammisetty testified that [c]laimant does *not* have a totally disabling respiratory impairment. (EX 2 at 18)." Decision and

Fino opined that claimant has no respiratory impairment, and thus was not totally disabled from a respiratory standpoint. Director's Exhibit 13; Employer's Exhibit 4. Similarly, Dr. Jarboe opined that claimant has no disabling respiratory impairment.[6] Director's Exhibit 16; Employer's Exhibit 3.

The administrative law judge discredited the opinions of Drs. Martin and Ammisetty, because they were not supported by the underlying objective testing of record, while he credited the opinions of Drs. Fino and Jarboe, because they were supported by the underlying objective testing of record. Decision and Order at 8. In addition, the administrative law judge discredited Dr. Martin's opinion because it was not reasoned. *Id*. Consequently, the administrative law judge found that claimant failed to establish total disability at Section 718.204(b)(2)(iv).

Claimant asserts that the opinions of Drs. Martin, Ammisetty, and Jarboe demonstrate that claimant is unable to perform the duties of an underground coal miner. The administrative law judge permissibly discredited the opinions of Drs. Martin and Ammisetty because they were not supported by the underlying objective testing of record.[7] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel*

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Order at 6. During a June 30, 2005 deposition, Dr. Ammisetty initially indicated that claimant does not have a totally disabling respiratory impairment. Employer's Exhibit 2 at 18. However, based on clinical information, Dr. Ammisetty subsequently testified that claimant does not have the capacity to do the manual job of a roof bolter operator or shuttle car operator as an underground coal miner. Employer's Exhibit 2 at 23-24.

[6] Dr. Jarboe also opined that it was likely that claimant has a totally disabling impairment that was caused primarily by cardiac disease. Director's Exhibit 16. Dr. Jarboe stated that he could not exclude pneumoconiosis as a contributing factor. *Id*. During an August 4, 2005 deposition, Dr. Jarboe opined that additional information and a normal blood gas study would cause him to change his opinion that claimant was disabled based on his functional studies. Employer's Exhibit 3 at 25-26. Nonetheless, Dr. Jarboe maintained that while claimant could not do strenuous coal mine work because of the level of angina that was caused by his cardiac disease, claimant was not totally disabled from a respiratory standpoint. *Id*. at 28. The administrative law judge stated that "Dr. Jarboe explained his change in opinion from finding that [c]laimant was totally disabled to not disabled at all as a function of relying on the one abnormal ABG, and then looking at the record as a whole with additional normal ABGs and normal PFTs. (EX 3 at 25-26)." Decision and Order at 7.

[7] The administrative law judge stated that "[c]laimant did not exhibit a disability in either PFT or ABG testing." Decision and Order at 8.

*v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). In addition, the administrative law judge permissibly discredited Dr. Martin's opinion because it was not well-reasoned.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, as noted above, Dr. Jarboe opined that claimant does not have a disabling respiratory impairment. Director's Exhibit 16; Employer's Exhibit 3. In addition, Dr. Jarboe's opinion that claimant could not do strenuous coal mine work because of the level of angina that was caused by his cardiac disease does not support a finding of total disability at Section 718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991); Employer's Exhibit 3 at 28. Thus, we reject claimant's assertion that the opinions of Drs. Martin, Ammisetty, and Jarboe establish a totally disabling respiratory or pulmonary impairment. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113.

Claimant also asserts that the administrative law judge erred in failing to consider Dr. Wicker's opinion. Although the administrative law judge summarized the objective tests administered by Dr. Wicker, he did not consider Dr. Wicker's medical report. However, Dr. Wicker opined that claimant has no impairment, and thus has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 11. Because Dr. Wicker's opinion does not support a finding of total disability at Section 718.204(b)(2)(iv), we hold that the administrative law judge's error in failing to consider Dr. Wicker's opinion was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Furthermore, we affirm the administrative law judge's finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Next, claimant contends that Dr. Wicker's opinion was inconsistent with the evidence of record, and his testing was incomplete, and that therefore, the Director failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Claimant's Brief at 10. The Director responds that he met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

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[8] The administrative law judge stated that "[Dr. Martin] based his opinion that [c]laimant is totally disabled due to pneumoconiosis upon one x-ray taken in 1982, even though one cannot determine disability from an x-ray." Decision and Order at 8.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The record reflects that Dr. Wicker conducted an examination and the full range of testing required by the regulations, and addressed the elements of pneumoconiosis and total disability on the Department of Labor examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Regarding the issue of total disability, Dr. Wicker opined that claimant has no impairment, and thus has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 11. In finding that the new evidence did not establish total disability, while the administrative law judge failed to specifically consider Dr. Wicker's opinion, he found the objective tests performed by Dr. Wicker to be non-qualifying. Because Dr. Wicker reached the same conclusion as the administrative law judge regarding the issue of total disability, we hold that the administrative law judge's error in failing to specifically address Dr. Wicker's opinion of no total disability was harmless. *Larioni*, 6 BLR at 1-1278. Thus, because the administrative law judge's finding that the evidence did not establish total disability is dispositive of this claim, we agree with the Director that he met his statutory obligation to claimant. *See* Director's Brief at 2.

Finally, we reject employer's assertion, on cross-appeal, that because 30 U.S.C. §923(b) of the Act requires the administrative law judge to consider all relevant evidence, the evidentiary limitations at 20 C.F.R. §725.414 are invalid. 30 U.S.C. §923(b). The Board has rejected the argument that Section 725.414 is an invalid regulation because it conflicts with Section 923(b) of the Act. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004)(*en banc*). Therefore, we reject employer's argument that the administrative law judge erred in excluding x-ray readings and a medical report submitted by employer in excess of the evidentiary limitations.

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