

BRB No. 07-0214 BLA

E.F.)
(On behalf of J.H.F., deceased))
)
 Claimant-Petitioner)

v.)

DATE ISSUED: 09/28/2007

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

DECISION and ORDER

Respondent

Appeal of the Decision and Order – Denying Benefits of Donald J. Mosser,
Administrative Law Judge, United States Department of Labor.

E.F., London, Kentucky, *pro se*.

Allen H. Feldman (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, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (06-BLA-5306) of Administrative Law Judge Donald J. Mosser 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). This case involves a subsequent claim filed on May 22, 2002.¹ Following a hearing held on

¹ Claimant is the son of the miner. The miner first filed a claim for benefits on January 9, 1997. Director's Exhibit 1. The claim was denied by the district director on May 5, 1997 because the evidence failed to show that the miner had pneumoconiosis,

September 5, 2006, the administrative law judge issued his Decision and Order dated October 31, 2006. The administrative law judge accepted the parties' stipulation that the newly submitted evidence established that the miner suffered from pneumoconiosis prior to his death, and therefore, he found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, in considering all of the record evidence on the merits of the claim, the administrative law judge determined that the evidence was insufficient to establish that the miner was totally disabled by a respiratory or pulmonary impairment. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. He specifically asserts that the administrative law judge failed to consider an examination report by Dr. Dahhan dated January 31, 2005. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's *pro se* appeal, urging affirmance of the denial of benefits. The Director acknowledges that Dr. Dahhan examined the miner at the request of the Department of Labor on January 31, 2005, but further states that his report was not submitted into evidence before the administrative law judge. The Director advises that "[if] claimant wishes to have the report considered in connection with his father's claim, then he must file a request for modification." Director's Letter Brief at 3 n.5.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.³ 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, 363 (1965).

arising out of coal mine employment, or that he was totally disabled due to pneumoconiosis. *Id.* The miner took no further action on the denial of his initial claim until he filed a subsequent claim under the revised regulations on May 22, 2002. Director's Exhibit 4. While the case was pending, the miner died on February 21, 2005. Claimant was substituted as a party to the case and is now pursuing the claim on behalf of his father.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 4.

Because the administrative law judge accepted the parties' stipulation that the miner suffered from pneumoconiosis,⁴ he properly determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309(d).⁵ However, based on our review of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm, as supported by substantial evidence, the administrative law judge's denial of benefits. Specifically, we affirm his finding that the miner was not totally disabled.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412,416, 21 BLR 2-192, 197 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Under Section 718.204(b)(2)(i), the administrative law judge considered two pulmonary function studies dated January 23, 1997 and August 17, 2002. Director's Exhibits 1, 12. As noted by the administrative law judge, the January 23, 1997 study was non-qualifying for total disability under the regulations.⁶ Decision and Order at 9. The

⁴ The administrative law judge determined that the miner worked at least ten years in the coal mines, and he found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). We affirm the administrative law judge's finding as to length of coal mine employment, and his finding at 20 C.F.R. §718.204(c), as they are unchallenged by the Director in this appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ 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). The miner's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the requisite elements of entitlement in order to proceed with the subsequent claim, on behalf of his father's estate. 20 C.F.R. §725.309(d)(2), (3).

⁶ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B

August 17, 2002 study also failed to establish the miner's total respiratory disability since that study, taken in conjunction with Dr. Baker's examination, was specifically invalidated by Dr. Baker on the basis of poor effect. Decision and Order at 9; *see generally Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). We therefore affirm the administrative law judge's finding that claimant failed to establish that the miner was totally disabled pursuant to Section 718.204(b)(2)(i).

Under Section 718.204(b)(2)(ii), the administrative law judge properly found that the two arterial blood gas studies of record, dated August 17, 2002 and January 23, 1997, were non-qualifying for total disability. Decision and Order at 9. Thus, he correctly determined that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to that subsection. *Id.* Furthermore, as there was no evidence of record indicating that claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was unable to establish that the miner was totally disabled pursuant to Section 718.204(b)(2)(iii). *Id.*

Finally, with respect to Section 718.204(b)(2)(iv), the administrative law judge correctly considered two medical reports prepared by Dr. Baker. The record reveals that Dr. Baker examined the miner, at the request of the Department of Labor, on January 23, 1997 and August 17, 2002. Director's Exhibits 1, 12. In his initial report, Dr. Baker opined that the miner had only a mild respiratory impairment that would not prevent him from performing his usual coal mine work. In his subsequent examination report, Dr. Baker also categorized the miner's pulmonary impairment as mild, and specifically opined that the miner was not totally disabled.⁷ *Id.* Because there is no medical opinion evidence from which to conclude that the miner was totally disabled by a respiratory or pulmonary impairment prior to his death, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

and C of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii). A "non-qualifying test" produces results that exceed the table values.

⁷ The administrative law judge stated that Dr. Baker gave no opinion as to whether the miner was able to perform his last coal mine employment. Decision and Order at 10. However, Dr. Baker specifically marked a box on a Department of Labor questionnaire, indicating that the miner could perform the work of a miner or comparable work. Director's Exhibit 12.

Although claimant contends that the administrative law judge failed to consider a February 10, 2005 report by Dr. Dahhan, diagnosing that the miner was totally disabled due to pneumoconiosis, the Director correctly points out that Dr. Dahhan's report was not made a part of the official record, as it was not submitted as evidence by claimant, or the Director, while the case was before the administrative law judge. Because an administrative law judge's findings are limited to the evidence presented in the record, *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-6-7 (2004), and since that evidence presented to the administrative law judge failed to establish that the miner was totally disabled, we must affirm the denial of benefits.⁸

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, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Since claimant has failed to establish that the miner was totally disabled, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

⁸ Claimant attached a copy of Dr. Dahhan's report to his appeal letter. The Board, however, cannot consider evidence that was not submitted to the administrative law judge at the hearing below. *See* 20 C.F.R. §802.301(b). If claimant wishes to have the report considered in connection with his father's claim, then he may submit that evidence, along with a request for modification, to the district director pursuant to 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge