

BRB No. 08-0220 BLA

G.A.)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 09/30/2008
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank
James, Acting 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 Denying Benefits (2006-BLA-05995) of
Administrative Law Judge Joseph E. Kane 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 credited

¹ Claimant has filed five prior claims for benefits. Director's Exhibit 1. His most
recent prior claim, filed on January 6, 1992, was denied by Administrative Law Judge
George P. Morin, who found that while claimant established the existence of
pneumoconiosis arising out of coal mine employment, the evidence was insufficient to
establish total disability. *Id.* Claimant appealed, and the Board affirmed the denial.
[G.A.] *v. Director, OWCP*, BRB No. 95-1731 BLA (April 12, 1996) (unpub.). Claimant

claimant with ten years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and, thus, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the administrative law judge erred in failing to find that he is totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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 disturbed.² 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, 363 (1965).

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. *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).

If a miner files an application 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.

filed his current subsequent claim on May 7, 2001. Director's Exhibit 3. On September 8, 2005, Administrative Law Judge Rudolph L. Jansen denied benefits on the ground that the newly submitted evidence was insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed, asserting that he did not receive a complete pulmonary evaluation, and the Director, Office of Workers' Compensation Programs, concurred with claimant's assertion. Thus, the Board vacated the denial of benefits and remanded the case to the district director in order for the Department of Labor to satisfy its obligation to provide claimant with a complete pulmonary evaluation.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 7.

§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 the evidence failed to establish that he had a totally disabling respiratory or pulmonary impairment. Director’s Exhibit 1. Consequently, claimant was required to submit evidence establishing that he is totally disabled, in order to obtain a review of his claim on the merits. *White*, 23 BLR at 1-3.

Claimant asserts that the administrative law judge erred in failing to consider the exertional requirements of his usual coal mine work as a coal truck driver in conjunction with the medical opinion of Dr. Baker at Section 718.204(b)(2)(iv).³ Claimant’s Brief at 3. Claimant’s assertion of error is without merit. Dr. Baker examined claimant on September 5, 2001 and diagnosed pneumoconiosis and chronic obstructive pulmonary disease. Director’s Exhibit 11. Dr. Baker indicated that claimant had a mild respiratory impairment based on the FEV1 results obtained during pulmonary function testing. *Id.* The record reflects, however that the September 5, 2001 pulmonary function study was terminated prior to completion of the MVV test. *Id.* In a supplemental report dated April 28, 2006, Dr. Baker reviewed the results of a pulmonary function study conducted on April 19, 2006. Director’s Exhibits 9, 23. Dr. Baker opined, based on his prior examination and his review of all of the clinical testing of record, that claimant’s clinical pneumoconiosis “may have some mild adverse effect” on claimant’s respiratory condition. Director’s Exhibit 23. However, Dr. Baker also stated that claimant’s pneumoconiosis was “not disabling,” and he opined that claimant retained the respiratory capacity to perform his previous coal mine work. *Id.*

Contrary to claimant’s contention, as Dr. Baker correctly reported that claimant last worked as coal truck driver, and Dr. Baker specifically opined that claimant was not totally disabled for coal mine work as a result of his mild respiratory impairment, the administrative law judge was not required to further discuss the exertional requirements of claimant’s last coal mine job. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff’d*, 9 BLR 1-104 (1986); Director’s Exhibits 5, 11. Thus, we reject claimant’s assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant’s usual coal mine employment with Dr. Baker’s opinion.

Additionally, we reject claimant’s argument that because pneumoconiosis is a progressive disease, it should be assumed that his condition has worsened, thereby

³ The administrative law judge’s findings that the evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

affecting his ability to perform his usual coal mine employment. Claimant's Brief at 3-4. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical evidence, we affirm his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Because claimant failed to establish that he is totally disabled, we affirm the administrative law judge's finding that claimant was unable to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3.

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