BRB No. 87-2520 BLA

HOBERT R. FLINT)
)
Claimant-Petitioner)
)
v.)
)
)
SEWELL COAL COMPANY)
)
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, Order Denying Reconsideration, and Order Denying Motion to Vacate of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Hobert R. Flint, Little Birch, West Virginia, pro se.

Douglas A. Smoot, Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without legal representation, the Decision and Order, Order

Denying Reconsideration, and Order Denying Motion to Vacate (85-BLA-103) of Administrative Law Judge Edward J. Murty,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Jr., 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. §90l et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with twenty-five years of qualifying coal mine employment. The administrative law judge found, however, that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(l) or (a)(2), and failed to establish total disability under 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the evidence is sufficient to establish entitlement under Part 718. Employer responds, urging affirmance.[1] The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

[1] Contrary to employer's contention, the administrative law judge had jurisdiction to consider the merits of claimant's duplicate claim filed on December 5, 1983. See Dotson v. Director, OWCP, 14 BLR 1-10 (1990).

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). 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. 33 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 under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Initially, we note that claimant's assignment of error in his Motion to Vacate concerned the failure of his lay representative to properly develop and timely submit evidence, resulting in the administrative law judge's exclusion of certain items of evidence from the record pursuant to 20 C.F.R. §727.456. The administrative law

judge permissibly found, however, that claimant failed to provide an adequate reason to vacate the Decision and Order, inasmuch as claimant did not allege any error of law or fact in the Decision and Order, or error in the administrative law judge's conduct of the hearing. As the administrative law judge has wide discretion in procedural matters, see Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989), we affirm his Order Denying Motion to Vacate.[2]

[2] Claimant submitted new evidence and filed a request for modification with the administrative law judge, which was denied on November 20, 1987. Claimant has not appealed this denial. Claimant must file new evidence with the deputy commissioner if he wishes to pursue modification. See 20 C.F.R. §725.310.

Turning to the issue of total disability, the administrative law judge found that all of the pulmonary function study and blood gas study results were non-qualifying,[3] and that there was no evidence of cor pulmonale with right-sided congestive heart failure, thus claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1), (c)(2), or (c)(3). In evaluating the medical opinions of record, the administrative law judge compared the physicians' assessments of claimant's physical limitations with the exertional requirements of claimant's usual coal mine employment, and as is within his discretion found that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(4). See Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). The administrative law judge's findings under Section 718.204(c) are supported by substantial evidence, and we hereby affirm them. Inasmuch as claimant has failed to establish a requisite element of entitlement, i.e. total disability, claimant is precluded from entitlement to benefits under Part 718, and we need not address the remaining issues of whether claimant established the existence of pneumoconiosis, etiology and causation. See Trent, supra.

[3] 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 yields values that

Accordingly, the Decision and Order, Order Denying Motion for Reconsideration, and Order Denying Motion to Vacate of the administrative law judge denying benefits are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge

---

exceed those values.