BRB No. 13-0428 BLA

JAMES B. SHREWSBURY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 04/18/2014
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver, & Pancake, PLLC), Charleston, West Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5271) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 19, 2009.[1]

[1] Claimant's previous claim, filed on January 22, 1998, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1.

After crediting claimant with at least twenty-four years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge further found that the new evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge determined, therefore, that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis. Claimant also asserts that the new arterial blood gas study evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 26.

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

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 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 miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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(c); *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(c)(3). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his 2009 claim. 20 C.F.R. §725.309(c).

Claimant contends that administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis. Claimant specifically contends that the administrative law judge erred in finding that Dr. Ahmed's interpretation of an October 19, 2010 x-ray, and Dr. Rasmussen's medical opinion were insufficient to establish the existence of complicated pneumoconiosis. We disagree. Contrary to claimant's characterization of the evidence, Dr. Ahmed did not interpret the October 19, 2010 x-ray as positive for complicated pneumoconiosis, and Dr. Rasmussen did not diagnose complicated pneumoconiosis. Director's Exhibit 9; Claimant's Exhibit 1. In fact, a review of the record supports the administrative law judge's determination that there is "no evidence of complicated pneumoconiosis." Decision and Order at 17. We, therefore, affirm the administrative law judge's finding that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

Claimant also generally asserts that a qualifying exercise arterial blood gas study conducted by Dr. Rasmussen on May 4, 2009[5] is sufficient to establish the existence of a

[5] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

totally disabling pulmonary impairment. Based upon a review of all of the new arterial blood gas study evidence,[6] as well as the opinions of Drs. Castle and Zaldivar regarding the validity of Dr. Rasmussen's blood gas study results, the administrative law judge found that the May 4, 2009 blood gas study results were entitled to lesser weight. Decision and Order at 21-22. Claimant alleges no specific error in regard to the administrative law judge's findings on this issue. *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). Because claimant provides the Board with no basis upon which to review the administrative law judge's findings, we affirm the administrative law judge's determination that the new arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120.

Because claimant does not challenge the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(1)(i), (iii), (iv), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 26.

[6] Although the arterial blood gas study conducted by Dr. Rasmussen on May 4, 2009 produced qualifying values both at rest and after exercise, Director's Exhibit 9, resting arterial blood gas studies conducted by Drs. Castle and Zaldivar on November 11, 2009 and December 9, 2009 are non-qualifying. Employer's Exhibits 1, 2. Neither Dr. Castle nor Dr. Zaldivar conducted an exercise blood gas study because of claimant's "difficulty with ambulation, use of a cane, and unsteadiness." Decision and Order at 9.

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge