BRB No. 13-0115 BLA

MURILE MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 08/14/2013
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 Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05522) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this subsequent claim on December 21, 2009.[1] Director's Exhibit 3.

[1] This is claimant's second claim for benefits. His first claim, filed in 2001, was denied by Administrative Law Judge Kenneth A. Krantz in 2007 for failure to establish

The administrative law judge credited claimant with thirteen years of coal mine employment,[2] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant has pneumoconiosis, pursuant to 20 C.F.R. §718.202, or a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant did not establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new pulmonary function study evidence and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to claimant's appeal.

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).

To establish entitlement to benefits under the Act, claimant must establish 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,

---

any of the elements of entitlement. The Board affirmed the denial of benefits. *M.M.* [*Morgan*] *v. Shamrock Coal Co.*, BRB No. 07-0781 BLA (June 27, 2008) (unpub.).

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established thirteen years of coal mine employment, and that the new evidence did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 6 n.5. Because claimant established fewer than fifteen years of coal mine employment, we also affirm the administrative law judge's determination that claimant cannot invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

718.204. When 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis, or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Claimant argues that the administrative law judge erred in finding that the new pulmonary function study evidence failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i). Specifically, claimant contends that a pulmonary function study performed by Dr. Rasmussen on August 2, 2010, produced qualifying values and establishes his total disability.[4] Claimant's Brief at 3-4. This argument lacks merit. Dr. Rasmussen's pulmonary function study was the only one of four new pulmonary function studies in the record to produce qualifying values, but Dr. Rasmussen determined that the results were invalid, due to claimant's poor effort.[5] Director's Exhibit 10 at 17-21; Decision and Order at 8. Dr. Gaziano reviewed Dr. Rasmussen's study and reached the same conclusion. Director's Exhibit 10 at 2. As a result, the administrative law judge properly gave no weight to Dr. Rasmussen's pulmonary function study. *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-57 (1985); Decision and Order at 8. Therefore, we affirm the administrative law judge's finding that the new pulmonary function study evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately found that all three of the new medical opinions, by Drs. Rasmussen, Dahhan, and Rosenberg, stated that claimant is not totally disabled. Decision and Order at 10; Director's Exhibit 10; Employer's Exhibits 1, 4. Claimant asserts that the administrative law judge was required to consider the physical requirements of his usual coal mine work

[4] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[5] Although Dr. Rasmussen stated that the August 2, 2010 pulmonary function study was invalid, he further noted that the study reflected "at most [a] minimal restrictive ventilatory impairment." Director's Exhibit 10 at 4.

in conjunction with the medical reports assessing disability. Claimant's Brief at 3-4, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Taylor v. Evans & Gambrel Coal Co.*, 12 BLR 1-83 (1988); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Contrary to claimant's assertion, the physical requirements of claimant's work were considered in this case. Drs. Rasmussen, Dahhan, and Rosenberg each concluded that claimant is not totally disabled, and that he retains the capacity to return to his previous coal mine employment. Director's Exhibit 10 at 35-41; Employer's Exhibits 1, 4; Decision and Order at 10. Because none of the medical opinions supports a finding of total disability, we affirm the administrative law judge's determination that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject claimant's argument that because pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant's Brief at 4. Contrary to claimant's assertion, the administrative law judge's finding of total disability must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

We have affirmed the administrative law judge's findings that the new evidence failed to establish the existence of pneumoconiosis or that claimant is totally disabled, pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Consequently, we 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(d), and we affirm the denial of benefits. *See White*, 23 BLR at 1-7.

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

_____
REGINA C. McGRANERY
Administrative Appeals Judge