BRB No. 05-0598 BLA

ARLIS R. NEAL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITBY TRUCKING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 12/23/2005
	)	
Employer/Carrier-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 Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund, Workers' Compensation Defense Division), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6321) of Associate Chief Administrative Law Judge Thomas M. Burke denying benefits 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 claimant with twenty-three years of coal mine employment[2] based on the parties' stipulation and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an element of entitlement that was decided against claimant previously. Consequently, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that all the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a) and 718.203(b). The administrative law judge further found, however, that the medical evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[3]

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[1] Claimant filed a previous application for benefits on July 15, 1997. Director's Exhibit 1. That claim was denied on January 7, 1998 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. *Id*. Claimant did not pursue the claim any further, and the denial became final. Claimant filed his current claim on June 11, 2001. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The regulations previously found at 20 C.F.R. §718.204(c)(1)-(4), and referenced by the administrative law judge in this case, are now contained in 20 C.F.R.

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 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).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered three medical opinions in light of the exertional requirements of claimant's coal mine employment as a truck driver. Based on claimant's testimony regarding his job duties, the administrative law judge found that claimant "performed moderate work" as a truck driver.[4] Decision and Order at 11. Dr. Rasmussen diagnosed claimant with "minimal to moderate" impairment that would prevent claimant from performing "very heavy manual labor." Director's Exhibit 1. Dr. Zaldivar found "no overall pulmonary impairment" and opined that claimant "is fully capable of performing his usual coal mining work or work requiring similar exertion."[5] Employer's Exhibit 2 at 2. Dr. Porterfield diagnosed a "25% whole person impairment" based on three different cardiopulmonary diagnoses.[6] Director's Exhibit 8 at 4. The administrative law judge compared each of these diagnoses with claimant's "moderate" exertional requirements and found that the

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§718.204(b)(2)(i)-(iv). We affirm as unchallenged on appeal the administrative law judge's findings that total disability was not established under 20 C.F.R. §718.204(c)(1)-(3), pursuant to the applicable provisions at 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The administrative law judge considered claimant's testimony that, in addition to driving the truck, he had to secure a tarp and change tires. Tr. 10-13, 18. Claimant stated that the tires were "pretty heavy." Tr. at 13.

[5] Dr. Zaldivar diagnosed "moderate" obstruction based on a pulmonary function study, but indicated that the obstruction reverses, according to Dr. Porterfield's medical report. Dr. Zaldivar noted that claimant's exercise stress test was normal, indicating "no overall pulmonary impairment." Employer's Exhibit 2 at 2.

[6] Dr. Porterfield indicated that emphysema contributed 80% to the impairment, that asthma contributed 5%, and that "CWP" contributed 15%. Director's Exhibit 8 at 4.

"medical opinion evidence does not support the finding that Claimant is totally disabled due to pneumoconiosis." Decision and Order at 11.

Claimant does not challenge the administrative law judge's finding that claimant's job as a truck driver required "moderate" exertion. Instead, claimant argues that the administrative law judge substituted his judgment for that of the physicians because "the evidence in this claim does demonstrate that the claimant's impairment prevents him from performing his work since the physicians who examined him, with the exception of Dr. Zaldivar, have all concluded he does suffer moderate impairment from his pneumoconiosis." Claimant's Brief at 5.

To the extent that claimant asks us to do anything but reweigh the evidence, which we may not do, *Anderson*, 12 BLR at 1-113, he presents no reason to disturb the administrative law judge's finding. The applicable regulation required the administrative law judge to determine whether "a pulmonary or respiratory impairment . . . prevents or prevented the miner . . . [f]rom performing his or her usual coal mine work." 20 C.F.R. §718.204(b)(1)(i); *see also* 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered claimant's job duties and found that they required "moderate" exertion. He then compared that exertional requirement with (1) Dr. Rasmussen's conclusion that claimant's impairment prevents him from performing "very heavy manual labor," (2) Dr. Zaldivar's conclusion that claimant has no overall pulmonary impairment, and (3) Dr. Porterfield's diagnosis of 25% impairment. Based on this comparison, the administrative law judge found that claimant did not establish that he is totally disabled. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). On this record, viewed in light of the specific contention raised by claimant on appeal, substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv).[7]

Because claimant has failed to establish total respiratory disability, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

[7] The administrative law judge's incorrect reference to 20 C.F.R. §718.204(c)(4) does not impact his substantive finding under the regulations, which would appropriately be designated 20 C.F.R. §718.204(b)(2)(iv).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge