BRB No. 12-0156 BLA

MERLIN CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG HAZARDS, LLC	)	DATE ISSUED: 12/17/2012
	)	
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 Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

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

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05453) of Administrative Law Judge Stephen M. Reilly, with respect to a request for modification on a claim filed on June 23, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] In considering

[1] Claimant's claim, filed on June 23, 2006, was denied by Administrative Law Judge Larry W. Price in a Decision and Order issued on February 28, 2008. Director's Exhibit 58. Judge Price found that claimant did not establish a totally disabling respiratory impairment. *Id*. The Board affirmed the denial of benefits. *M.C.* [*Cornett*] *v.*

claimant's modification request pursuant to 20 C.F.R. §725.310, the administrative law judge determined that there was no mistake in a determination of fact with regard to the previous denial of benefits. He also found that claimant did not establish a change in conditions, as the newly submitted evidence failed to establish that claimant is totally disabled. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 and did not establish an essential element of entitlement, based on a weighing of the evidence as a whole.[2] Therefore, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in concluding that he is not totally disabled.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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.[4] 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).

ICG Hazard, LLC, BRB No. 08-0494 BLA (Feb. 10, 2009) (unpub.). Claimant filed his request for modification on November 3, 2009. Director's Exhibit 70.

[2] The administrative law judge did not consider the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4). In pertinent part, amended Section 411(c)(4) states that a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] In arguing that the evidence is sufficient to establish total disability, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 3. However, under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because 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 3, 6.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge considered the newly submitted treatment records relevant to the issue of total disability and found that they did not contain an opinion stating that claimant's respiratory condition prevented him from engaging in his usual coal mine employment. Decision and Order at 4-5. Therefore, the administrative law judge concluded that the newly submitted medical evidence did not establish a change in conditions on the issue of total disability at 20 C.F.R. §725.310. *Id*. at 5. The administrative law judge also found that claimant did not establish a mistake in a determination of fact, as the evidence as a whole does not support a finding of total disability under 20 C.F.R. §718.204(b)(2). *Id*. at 5-6.

Claimant asserts that the administrative law judge's finding that he did not establish total disability is in error, as the administrative law judge did not consider the exertional requirements of claimant's usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 3-4, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp*., 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant further states, "[i]t can be reasonably concluded that [the claimant's usual coal mine work] involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that, "[t]aking into consideration the claimant's condition against such duties as well as the medical opinion of Dr. Ratliff which states that the claimant is a 'disabled person' ([Director's Exhibit] 74 at 7), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment."[5] Claimant's Brief at 3.

Contrary to claimant's contention, a miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v.*

[5] Claimant also asserts that, because pneumoconiosis is a progressive and irreversible disease, and a "considerable amount of time . . . has passed since the initial diagnosis of pneumoconiosis," the administrative law judge should have concluded that claimant's condition has worsened to the point that he is now totally disabled. Claimant's Brief at 4. However, contrary to claimant's assertion, a finding of total disability must be based solely on the medical evidence of record. *See White v. New White Coal Co*., 23 BLR 1-1, 1-7 n.8. (2004).

Evans and Gambrel Co., 12 BLR 1-83, 1-88 (1988). Furthermore, the administrative law judge rationally concluded that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), as none of the pulmonary function studies or blood gas studies were qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6-7.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge explicitly discussed the exertional requirements of claimant's position as a dozer operator and considered the medical opinion evidence as a whole. Decision and Order at 7-8. The administrative law judge permissibly determined that the medical opinions of Drs. Ebeo, Rasmussen, Jarboe, and Dahhan were insufficient to establish total disability, as these physicians determined that claimant retains the pulmonary capacity to perform his job as a dozer operator or work requiring similar effort. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *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, 1-151 (1989) (en banc); Decision and Order at 7-8. Finally, the administrative law judge acknowledged Dr. Ratliff's notation, in claimant's treatment records, that "[claimant] is a disabled person," but rationally accorded little weight to this statement because Dr. Ratliff did not identify the nature of claimant's disability or cite any objective evidence in support of his conclusion. Director's Exhibit 74 at 7; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 8.

We consider claimant's arguments in this appeal to be tantamount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm, as rational and supported by substantial evidence, the administrative law judge's findings at 20 C.F.R. §718.204(b)(2), and his overall conclusion, based on his consideration of all of the evidence, that claimant failed to establish total disability, an essential element of entitlement.[6] *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (en banc), *aff'd*, 9 BLR 1-104 (1986) (en banc). We further affirm the denial of benefits.

[6] The administrative law judge's determination that claimant did not establish total disability, based on a weighing of all of the evidence of record, constitutes a finding on the merits of entitlement. The administrative law judge's omission of the applicability of amended Section 411(c)(4) from consideration does not constitute error, as claimant's failure to establish total disability precludes invocation of the presumption. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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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JUDITH S. BOGGS
Administrative Appeals Judge