

BRB No. 03-0589 BLA

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| CARLOS MULLINS, JR. |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| CLINCHFIELD COAL COMPANY |) | |
| |) | DATE ISSUED: 02/26/2004 |
| Employer |) | |
| |) | |
| 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Carl E. McAfee (McAfee Law Firm, P.C.), Norton, Virginia, for claimant.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-BLA-5415) of Administrative Law Judge Mollie W. Neal 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.

§901 *et seq.* (the Act).¹ Initially, the administrative law judge found that this case involves the filing of a subsequent claim dated November 16, 2001, pursuant to 20 C.F.R. §725.309.² Decision and Order at 2, 3. Based on a stipulation of the parties, the administrative law judge credited claimant with at least twenty years of coal mine employment. Decision and Order at 3; Hearing Transcript at 11. Addressing the merits of entitlement, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 4-6. In addition, the administrative law judge found that the new evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 6-7. Consequently, the administrative law judge found that claimant failed to demonstrate a change in any condition of entitlement upon which the prior claim was denied. Accordingly, the administrative law judge denied claimant's application for benefits.

On appeal, claimant contends that the administrative law judge erred in failing to consider this claim pursuant to the regulations set forth at 20 C.F.R. §727.203 (1999), arguing that the evidence was sufficient to invoke the interim presumption under Section 727.203(a) (1999). Employer has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject claimant's contention that the regulations set forth at Section 727.203 (1999) are relevant. The Director further states that he will not otherwise address the merits of the administrative law judge's findings.³

¹ The Department of Labor has 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR (Jan. 22, 2004).

In this case, claimant's initial application for benefits, filed on August 7, 1995, was denied by the district director on November 29, 1995, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1.

³ The parties do not challenge the administrative law judge's decision to credit claimant with at least twenty years of coal mine employment or her findings that employer is the properly designated responsible operator and that there is one dependent

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 challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in failing to apply the regulations set forth at Section 727.203 (1999). In particular, claimant argues that the administrative law judge erred in failing to apply the proper law in this case as the evidence of record was sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203 (1999). Claimant's Brief at 2. Citing the holding of the United States Court of Appeals for the Fourth Circuit in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(*en banc*), claimant contends that since he presented positive evidence of entitlement and based on his years of coal mine employment, the administrative law judge was required to invoke the interim presumption set forth at Section 727.203 (1999). Claimant's Brief at 2-3. These contentions lack merit.

In setting forth the procedural history of this case, the administrative law judge correctly stated that claimant filed his current application for benefits on November 14, 2001. Decision and Order at 2; Director's Exhibit 3. Therefore, the administrative law judge properly determined that this case is governed by the regulations set forth at 20 C.F.R. Part 718, as claimant's application for benefits was filed after March 31, 1980, the implementation date for the Part 718 regulations.⁴ 20 C.F.R. §§718.2, 725.4(a) (2002). Consequently, claimant's contention that he is entitled to invocation of the interim presumption at Section 727.203(a) (1999) is without merit as the regulations contained therein do not apply in this case. 20 C.F.R. §§725.4(a), (d) (2002), 727.203 (1999); *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

In addition, since claimant has not otherwise challenged the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and that the new evidence

for purposes of augmentation. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ In addition, claimant's initial claim for benefits, filed August 7, 1995, is likewise governed by the 20 C.F.R. Part 718 regulations, as it was also filed after March 31, 1980. Decision and Order at 2; Director's Exhibit 1; 20 C.F.R. §§718.2, 725.4(a) (2002).

was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, since claimant failed to establish either the existence of pneumoconiosis or a total respiratory disability, we affirm the administrative law judge's denial of this claim based on her finding that claimant failed to demonstrate a change in any condition of entitlement upon which the prior claim was denied. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR (Jan. 22, 2004).

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

BETTY JEAN HALL
Administrative Appeals Judge