U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0112 BLA

EDGAR WHITAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/28/2019
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2009-BLA-05400) of Administrative Law Judge Larry A. Temin 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 May 15, 2008,[1] and is before the Board for a second

[1] Claimant filed five prior claims for benefits, all of which were either withdrawn or finally denied. Director's Exhibits 1-2. His most recent prior claim, filed on October

time.

In the initial decision, Administrative Law Judge John P. Sellers, III found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore found that claimant did not establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). Accordingly, he denied benefits.

On appeal, the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant did not receive a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. Based on that concession, the Board vacated Judge Sellers' denial of benefits, and remanded the case to the district director to allow for a complete pulmonary evaluation, and for reconsideration of the merits of the claim in light of the new evidence. *Whitaker v. Director, OWCP*, BRB No. 12-0432 BLA (Mar. 26, 2013) (unpub.).

After further development of the evidence, the case was forwarded to the Office of Administrative Law Judges, and assigned to Administrative Law Judge Larry A. Temin (the administrative law judge). In a Decision and Order dated November 7, 2017, the administrative law judge accepted the parties' stipulation that claimant had 10.5 years of coal mine employment.[2] He therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).[3] The administrative law judge further found that the new evidence did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and thus, did not establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). Accordingly, he denied benefits.

26, 2001, was denied by an administrative law judge on April 10, 2006, because the evidence did not establish total disability. Director's Exhibit 2. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Whitaker v. Director, OWCP*, BRB No. 06-0637 BLA (Feb. 27, 2007) (unpub.).

[2] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 32-33. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20. C.F.R. §718.204(b)(2)(iv). The Director responds in support of the denial of benefits.[4]

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 establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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 an award of benefits.[5] *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant has 10.5 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this affirmance, we also affirm the administrative law judge's finding that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), as he did not establish the requisite fifteen years of qualifying coal mine employment.

[5] 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 that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309(c).

§718.204(b)(2)(iv),[6] the administrative law judge considered the medical opinions of Drs. Dahhan and Forehand. He permissibly credited Dr. Forehand's opinion that claimant is not disabled from a respiratory or pulmonary impairment, Director's Exhibit 28 at 5, over Dr. Dahhan's contrary opinion,[7] Director's Exhibits 15, 28 at 504, because he found that Dr. Forehand, unlike Dr. Dahhan, was aware of the exertional requirements of claimant's last coal mine employment.[8] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order at 12.

The administrative law judge also permissibly accorded greater weight to Dr. Forehand's opinion that claimant is not totally disabled from a pulmonary standpoint because he found that it is better supported by the objective evidence of record. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 12; Director's Exhibits 13, 15, 28. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that

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[6] We affirm, as unchallenged on appeal, the administrative law judge's determination that the new pulmonary function studies and blood gas studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). *See Skrack*, 6 BLR at 1-711. Moreover, because there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[7] Dr. Dahhan initially opined that claimant has a moderate impairment and is totally disabled from a respiratory standpoint. Director's Exhibit 15. In a supplemental report, Dr. Dahhan opined that claimant's impairment is mild, without opining as to whether claimant is totally disabled. Director's Exhibit 28 at 504.

[8] Dr. Forehand opined that claimant "retains sufficient residual ventilatory capacity to carry out all of the duties of his last coal mining job," and that "there is no indication that [claimant] has a respiratory impairment or a work-limiting respiratory disability that would prevent him from returning to his last coal mining job and carrying out all of the required duties." Director's Exhibit 28. The administrative law judge accurately noted that Dr. Forehand indicated that claimant's last coal mine employment required him to lift fifty pounds without help, and one hundred pounds with the help of a crane. Decision and Order at 12; Director's Exhibit 28. The administrative law judge found this consistent with claimant's testimony that his last coal mining job as a welder required him to lift fifty to seventy-five pounds several times a day, and move one hundred pounds with the help of a crane. Decision and Order at 12; Director's Exhibits 1, 2, 6. Conversely, the administrative law judge noted that Dr. Dahhan did not discuss the exertional requirements of claimant's last coal mining job. Decision and Order at 12.

the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new 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 failed to establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). We, therefore, affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge