BRB No. 11-0106 BLA

ROBERT H. McMILLIAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/29/2011
	)	
RANDY D, LLC	)	
	)	
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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Offices), Hazard, 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 (09-BLA-5227) of Administrative Law Judge Robert B. Rae rendered on a subsequent claim[1] filed pursuant

[1] Claimant's previous claim, filed on April 29, 1993, was denied as abandoned on July 15, 1993. Decision and Order at 2. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Apparently no medical evidence was submitted in connection with claimant's 1993 claim, because claimant failed to cooperate in the processing of the claim. Employer's Brief at 2. The administrative law judge noted that the record of claimant's 1993 claim could not be located. Decision and Order at 2. Claimant filed his

to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least sixteen years of coal mine employment, as stipulated.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, 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 contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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 order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

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current claim on February 13, 2008. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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] The administrative law judge's findings that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

one of these elements precludes entitlement.[4] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Fino, and Dahhan. Dr. Rasmussen reported that claimant's pulmonary function and blood gas studies were "normal," and that his diffusion capacity test was "minimally reduced." Director's Exhibit 12 at 34, 38. Based on those results, Dr. Rasmussen opined that claimant has "no significant loss of lung function," and retains the respiratory ability to perform his usual coal mine work as an electrician and bridge carrier operator, with its requirement for heavy labor. *Id*. at 35, 38. Dr. Fino opined that claimant's objective tests reflect that his "pulmonary system is normal," and Dr. Fino opined that claimant can perform all of the requirements of his job as an electrician and machine operator, with its requirement for sustained heavy labor. Director's Exhibit 16 at 9, 10; Employer's Exhibit 1. Dr. Dahhan stated that claimant's pulmonary function study indicates mild, reversible obstruction, and that, from a respiratory standpoint, claimant is able to perform his usual coal mine employment as a bridge operator. Director's Exhibit 14 at 3. The administrative law judge found that, since all of the physicians opined that claimant is capable of performing his usual coal mine employment from a respiratory or pulmonary standpoint, the medical opinion evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Claimant argues that, in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The specific argument claimant sets forth is that:

> The claimant's usual coal mine work included being a bridge carrier operator, scoop operator and belt man. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Fino and Rasmussen (who did diagnose pulmonary impairments), it is rational to conclude that the claimant's condition prevents him from engaging in his

[4] In this case, although claimant's current claim is a subsequent claim under 20 C.F.R. §725.309(d), in effect, it was considered and denied on its merits, as it is the only claim for which medical evidence was submitted.

> usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 3. Contrary to claimant's characterization of the evidence, Dr. Fino concluded that claimant has "no respiratory impairment," Employer's Exhibit 1, and Dr. Rasmussen determined that he has "no significant loss of lung function." Director's Exhibit 12 at 38. They therefore concluded that claimant can perform all the tasks of his usual coal mine employment, including those requiring heavy manual labor. *Id*. Moreover, contrary to claimant's argument, a statement that a miner should limit further exposure to coal dust is not 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. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Claimant argues further that the administrative law judge did not consider claimant's usual coal mine work "in conjunction with Dr. Rasmussen's opinion of disability." Claimant's Brief at 4. As just discussed, Dr. Rasmussen opined that claimant has "no significant loss of lung function" and, thus, is not totally disabled. Director's Exhibit 12 at 35, 38. Moreover, even assuming claimant were correct that Dr. Rasmussen diagnosed an impairment, the record reflects that Dr. Rasmussen understood that claimant's usual coal mine employment as a bridge carrier operator required "considerable heavy and some very heavy manual labor." Director's Exhibit 12 at 32. Thus, the administrative law judge did not err in relying on Dr. Rasmussen's opinion that claimant can perform his usual coal mine employment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-303 (2003).

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), based on the medical opinion evidence.[5] Because we have affirmed the administrative law judge's finding that the evidence did not establish total respiratory disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.

[5] We reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 4. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Finally, claimant contends that the case must be remanded for consideration under a recent amendment to the Act. While claimant's claim was pending before the administrative law judge, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Because claimant failed to demonstrate the existence of a totally disabling respiratory or pulmonary impairment, we need not remand this case for consideration under Section 411(c)(4).

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