BRB No. 10-0603 BLA

BOBBY R. COOTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 06/28/2011
	)	
Employer/Carrier-Respondents	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-5297) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed

[1] Claimant first filed a claim for benefits on November 13, 1995, which was denied by the district director on April 9, 1996, because the evidence was insufficient to

pursuant to 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). In a Decision and Order issued on June 21, 2010, the administrative law judge credited claimant with twenty-three years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence failed to establish that claimant is totally disabled and, thus, found that claimant was unable to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that, because claimant was not totally disabled, he was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis, set forth in the amended version of Section 411(c)(4) of the Act. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he is not entitled to the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When 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

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establish total disability. Director's Exhibit 1. Claimant filed a second claim on January 31, 2002, which was denied by Administrative Law Judge Joseph E. Kane on January 24, 2006, because claimant failed to establish total disability and demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed and the denial was affirmed by the Board on September 28, 2006. *Coots v. Leeco, Inc*., BRB No. 06-0419 BLA (Sept.28, 2006) (unpub.); Director's Exhibit 2. Claimant took no action with regard to that denial until he filed his current subsequent claim on April 1, 2008. Director's Exhibit 4.

[2] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law 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*); Director's Exhibits 1, 2, 5.

date upon which the order denying the prior claim became final."[3] 20 C.F.R. §725.309(d); *see 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(d)(2). In this case, because claimant's prior claim was denied for failure to establish total disability, claimant was required to submit new evidence establishing that he is totally disabled, in order for the administrative law judge to review his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

Additionally, relevant to this living miner's claim, 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. 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)).

Claimant argues on appeal that, contrary to the administrative law judge's finding, he is entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis since he has at least fifteen years of coal mine employment and has been diagnosed with a respiratory impairment. Claimant's argument, however, is without merit.

The administrative law judge properly found that claimant was not eligible for the Section 411(c)(4) presumption because the newly submitted evidence does not establish a totally disabling respiratory or pulmonary impairment. The administrative law judge properly found that the two newly submitted pulmonary function studies, dated May 28, 2008 and September 9, 2008, were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8; Director's Exhibits 13, 18. He also properly found that the two newly submitted arterial blood gas studies, dated May 28, 2008 and September 9, 2008, were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.* Additionally, because the record does not contain any evidence to establish that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly concluded that claimant

[3] In order to establish entitlement to benefits in a living miner's claim 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*).

failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

Furthermore, contrary to claimant's assertion, the medical opinion evidence does not establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). As noted by the administrative law judge, the record submitted in conjunction with the subsequent claim, contains two newly submitted medical reports from Drs. Rasmussen and Broudy.[4] Decision and Order at 8; Director's Exhibits 13, 18. Dr. Rasmussen examined claimant on May 28, 2008, at the request of the Department of Labor. Director's Exhibit 13. Dr. Rasmussen opined that claimant has only "a minimal loss of lung function as reflected by his impairment in oxygen during exercise," and specifically stated that claimant "retains the pulmonary capacity to perform moderate and heavy manual labor." *Id*. Dr. Broudy examined claimant on September 2, 2008, and indicated that the pulmonary function and arterial blood gas studies were normal. He similarly opined that claimant "does retain the respiratory capacity to perform the work of an underground coal worker or do similarly arduous manual labor." Director's Exhibit 18. Thus, because the administrative law judge properly found that the medical opinions establish that claimant is not totally disabled, we affirm the administrative law judge's finding, based on the newly submitted medical evidence, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *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*).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the newly submitted evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(1)(i)-(iv), we affirm the administrative law judge's findings that claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to the amended version of Section 411(c), and that he failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant is not entitled to benefits.

[4] Claimant cites to the medical opinions of Drs. Baker and Hussain, submitted in the prior claim, to support his assertion that he is entitled to the Section 411(c)(4) presumption. Claimant's Brief at 3. We note, however, that Drs. Broudy and Hussain each opined, at the time of their respective examinations, that claimant was not totally disabled. Director's Exhibit 2.

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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REGINA C. McGRANERY
Administrative Appeals Judge