BRB No. 11-0642 BLA

JEFFREY L. CLARK (Executor of the ESTATE OF BOBBY M. CLARK)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/14/2012
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, 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[1] appeals the Decision and Order on Remand (2007-BLA-05818) of Administrative Law Judge Daniel F. Solomon, denying benefits on a claim filed pursuant

[1] Claimant is the son of the miner, who filed this claim on August 14, 2006. Director's Exhibit 3. The miner died on July 7, 2010. Claimant was appointed as executor of the miner's estate on September 17, 2010. By Order dated November 15, 2011, the Board amended the caption of this case to list the miner's son as the claimant, on behalf of the miner's estate.

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). This case, involving a miner's subsequent claim,[2] is before the Board for the second time.

In his initial decision in this case, the administrative law judge credited the miner with at least thirty-two years of coal mine employment.[3] The administrative law judge found, on the basis of the new pulmonary function study evidence, that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), and therefore demonstrated a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). The administrative law judge then considered the miner's claim on its merits, and awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding a July 2, 2008, pulmonary function study to be qualifying,[4] and therefore erred in finding that the new pulmonary function study evidence established total disability. The Board therefore vacated the administrative law judge's finding that total disability was established, and instructed him to reconsider that issue on remand. *Clark v. Island Creek Coal Co.*, BRB No. 09-0592, slip op. at 7-8 (Aug. 27, 2010) (unpub.). Further, the Board vacated the administrative law judge's findings that the miner established the existence of legal pneumoconiosis, and that his disability was due to pneumoconiosis. *Id*. at 9-12. The Board remanded the case, and directed the administrative law judge to make an explicit finding as to whether the new evidence established a change in an applicable condition pursuant to 20 C.F.R. §725.309(d). *Id*. at 12. If the administrative law judge found a change in an applicable condition, the Board directed him to consider all relevant evidence and determine whether the miner established the elements of entitlement. *Id*. Finally, because the miner's claim was filed after January 1, 2005, the Board also instructed the administrative law judge, on remand,

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[2] The miner previously filed a claim for benefits on November 13, 2001. The district director denied that claim on May 8, 2003, finding that the miner failed to establish any element of entitlement. Director's Exhibit 1 at 7-11. The miner did not pursue that claim further.

[3] The miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989) (en banc).

[4] A qualifying pulmonary function study yields values equal to or less than those listed in the table at 20 C.F.R. Part 718, Appendix B, for establishing total disability. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

to determine whether the miner established invocation of the presumption under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), that he is totally disabled due to pneumoconiosis, and, if so, whether employer rebutted the presumption. *Id*.

On remand, the administrative law judge first found that the miner established the existence of legal pneumoconiosis, based on the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Next, after finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered whether the weight of the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). He determined that none of the physicians who addressed the issue had adequately considered the miner's job duties, and, thus, he concluded that the medical opinion evidence did not permit him to find the miner totally disabled:

> Although it is plausible that Claimant cannot be a mine inspector, the Administrative Procedure Act requires that every adjudicatory decision must be accompanied by a rationale. Even if I accept the history as alleged, I find that Claimant has not provided a sufficient report to permit such an explication. I am not free to speculate as to total disability.

Decision and Order at 7 (citations omitted).

Therefore, the administrative law judge found that the miner did not establish total disability pursuant to 20 C.F.R. §718.204(b), and further found that the miner was not entitled to the Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner did not prove that he was totally disabled. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief, reiterating his arguments regarding total disability. The Director, Office of Workers' Compensation Programs, has 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).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3,

718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant contends that the administrative law judge erred in discrediting the opinions of Drs. Baker, Rasmussen, and Simpao that the miner was totally disabled. Claimant's Brief at 3-6. Claimant's argument lacks merit.

To establish total disability, claimant must establish that the miner suffered from a pulmonary or respiratory impairment that prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). The Board defines a miner's "usual coal mine work" as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). The miner worked for employer from 1972 to 1983, but his most recent coal mine work was as an inspector for the Mine Safety and Health Administration from 1987 to 1994. *See Bartley v. Director, OWCP*, 12 BLR 1-89, 1-90-91 (1988); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-42-44 (1981) (holding that a federal mine inspector is a miner for purposes of the Act); Director's Exhibit 4. Therefore, as the administrative law judge correctly noted, Decision and Order at 7, to establish total disability, claimant must prove that the miner's impairment prevented him from doing the work of a mine inspector.

The administrative law judge reasonably concluded that the medical opinion evidence in this case did not support a finding of total disability. Although Drs. Baker, Rasmussen, and Simpao opined that the miner was totally disabled, their opinions did not reflect specific consideration of the requirements of the miner's work as a mine inspector. Dr. Rasmussen noted in his report that the miner worked as a mine inspector, but went no further. Claimant's Exhibit 5. Dr. Baker merely stated in his report and in his deposition testimony that the miner spent approximately ninety percent of his time as a mine inspector underground. Claimant's Exhibit 1; Baker Deposition at 6. In his report, Dr. Simpao noted only that, as an inspector, the miner worked eight hours a day for five days a week, spent five hours a day sitting and driving, and walked "long distances." Director's Exhibit 14 at 14. Because Drs. Baker, Rasmussen, and Simpao did not compare the miner's capacity for work with the exertional requirements of his job as a mine inspector, the administrative law judge did not err by declining to credit their opinions on the issue of total disability.[5] *See Crockett Colleries, Inc., v. Barrett*, 478 F.3d

[5] Review of the record reveals that, when he filed this subsequent claim, the miner listed his job title as "shuttle car & inspector," and described his duties as "Inspector of the mines. Also operated equip[ment] in the process of mining coal," without elaborating. Director's Exhibit 5 at 1. As for the physical activity required by the job, the miner wrote only that the time per day that he spent sitting, standing, crawling, lifting and carrying "varies". *Id*. at 2. At his deposition, the miner testified that he worked as a mine

350, 357, 23 BLR 2-472, 2-485 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). As claimant raises no other allegations of error, we affirm the administrative law judge's finding that the miner did not establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

We therefore affirm the administrative law judge's finding that the miner failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b). Because claimant is unable to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718 and a necessary fact that must be established for invocation of the Section 411(c)(4) presumption, we affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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inspector after he stopped working as a miner, but he offered no testimony, and was not asked any questions, about his duties as an inspector. Miner's Deposition at 10-25.

Accordingly, the administrative law judge's Decision and Order on Remand 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