BRB No. 12-0641 BLA

BENNY R. HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/26/2013
	)	
	)	
Self-Insured 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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Fogle Keller Purdy, PLLC), Lexington, 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 (2011-BLA-05136) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent claim[1] filed on

[1] Claimant filed an initial claim for benefits on December 23, 2003, which was denied by Administrative Law Judge Janice K. Bullard on July 31, 2006, because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. The denial was affirmed by the Board in

November 17, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge determined that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, found that claimant is not entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also indicated that she had reviewed all of the record evidence and found that, because claimant failed to establish total disability, he was not entitled to benefits under 20 C.F.R. Part 718. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal unless specifically instructed 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.[3] 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).

In order to establish entitlement to benefits pursuant to the regulations at 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202,

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Harris v. Shamrock Coal Co., BRB No. 06-0902 BLA (Mar. 27, 2007) (unpub.). *Id*. Claimant took no further action until filing the current subsequent claim on November 17, 2009. Director's Exhibit 3.

[2] Based on the filing date of the current subsequent claim, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis, if he establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. Director's Exhibit 4; *see* 33 U.S.C. 921(c); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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(d); *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, claimant failed to establish any of the requisite elements of entitlement in his prior claim. Director's Exhibit 1. Therefore, claimant is required to establish, based on the newly submitted evidence, at least one element in order to obtain a merits review of his subsequent claim. *See White*, 23 BLR at 1-3.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that claimant did not establish total disability, because the only newly submitted pulmonary function study, dated May 10, 2010, was non-qualifying.[4] Decision and Order at 5. The administrative law judge further found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) because the only newly submitted blood gas study, dated May 10, 2010, was non-qualifying. *Id*. at 6. In addition, because there is no evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge determined that claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that there was one newly submitted medical opinion by Dr. Rasmussen, who opined that claimant is not totally disabled. Decision and Order at 6; Director's Exhibit 11. As there was no newly submitted evidence to support a finding of total disability, the administrative law judge concluded that claimant was unable to invoke the amended Section 411(c)(4) presumption. Decision and Order at 7.

Claimant asserts that the administrative law judge was required to consider the physical requirements of his usual coal mine work in conjunction with the medical report assessing disability. Claimant's Brief at 3, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Taylor v. Evans & Gambrel Coal Co.*, 12 BLR 1-83 (1988); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black*

[4] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Diamond Coal Co., 7 BLR 1-236 (1984). Claimant states, "[i]t can be reasonably concluded that" his usual coal mine work as a continuous miner operator, shuttle car driver, and electrician involved being exposed "to heavy concentrations of dust on a daily basis" and that:

> [t]aking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Rasmussen (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his 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 assertion, the physical requirements of claimant's work were considered in this case. The administrative law judge noted that claimant worked "various positions in underground coal production, including as a shuttle car driver, a continuous miner operator, and lastly, as an electrician." Decision and Order at 3. The administrative law judge found correctly that Dr. Rasmussen noted claimant's work history in his report and diagnosed a mild respiratory impairment, but specifically opined that claimant "retains the pulmonary capacity to perform his regular coal mine employment." Director's Exhibit 11; *see* Decision and Order at 6. As the administrative law judge permissibly credited Dr. Rasmussen's opinion, we affirm her finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] *See Cornett*, 227 F.3d at 577, 22 BLR at 2-123; *see also Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

Additionally, we reject claimant's argument that because pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Contrary to claimant's assertion, the administrative law judge's finding of total disability must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge properly found that the newly submitted evidence did not establish that claimant is totally disabled, we affirm her finding that claimant failed to invoke the rebuttable presumption at amended Section 411(c)(4). Furthermore, as claimant did not establish total disability, a requisite element of entitlement, we affirm the denial of benefits pursuant to 20 C.F.R. Part 718.

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