

BRB No. 11-0522 BLA

WINFRED SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 03/28/2012
	)	
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 Denying Benefits in Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in Subsequent Claim (2009-BLA-05643) of Administrative Law Judge Christine L. Kirby, rendered on a subsequent claim<sup>1</sup> filed on April 26, 2004, pursuant to the Black Lung Benefits Act, 30

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<sup>1</sup> Claimant filed an initial claim for benefits on September 10, 1990, which was denied by the district director on February 5, 1991, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibit 3.

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(1)) (the Act).<sup>2</sup> The administrative law judge found that claimant established at least thirteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined, based on his review of all of the record evidence, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled.<sup>3</sup> 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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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.<sup>5</sup> See 20 C.F.R. §§718.3, 718.202, 718.203,

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<sup>2</sup> On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the April 26, 2004 filing date of this subsequent claim, the amendments are not applicable.

<sup>3</sup> In rendering his argument on appeal, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 2. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

<sup>5</sup> Because this case involves a subsequent claim, claimant was required, under 20 C.F.R. §725.309, to first establish, based on the newly submitted evidence, a change in an applicable condition of entitlement since the denial of his prior claim. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The administrative law judge assumed that

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).

The administrative law judge denied benefits because she found that claimant did not establish total disability. Pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) the administrative law judge found that the three pulmonary function and three arterial blood gas studies of record, dated October 5, 1990, June 7, 2004 and August 12, 2004, were non-qualifying for total disability under the regulations.<sup>6</sup> Decision and Order at 7-8, 11; Director's Exhibits 1, 12, 42. Additionally, the administrative law judge determined that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence of record that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 7 n.2. Because claimant does not assign specific error to the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that a preponderance of the medical opinion evidence failed to establish a totally disabling respiratory impairment. Claimant asserts on appeal that the administrative law judge was required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 3, citing *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant states, "[i]t can be reasonably concluded that the claimant's usual coal mine work involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that, "[t]aking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment." Claimant's Brief at 3. Contrary to claimant's contention, however, a miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567,

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claimant satisfied the requirements of 20 C.F.R. §725.309 and, thus, reviewed all of the record evidence relevant to the issue of total disability. Decision and Order at 11.

<sup>6</sup> A "non-qualifying" pulmonary function study yields values that exceed the requisite table values for total disability set forth at Appendix B of 20 C.F.R. Part 718. See 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" arterial blood gas study yields values that exceed the requisite table values at Appendix C of 20 C.F.R. Part 718. See 20 C.F.R. §718.204(b)(2)(ii).

12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Furthermore, the administrative law judge addressed claimant's usual coal mine work in conjunction with the medical opinions. Decision and Order at 8-11. The administrative law judge acknowledged claimant's testimony that his usual coal mine work as a continuous miner operator involved heavy lifting. *Id.* at 4. The administrative law judge properly found that none of the medical opinions of record has concluded that claimant is totally disabled from performing his usual coal mine work. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; Decision and Order at 11.

The record reflects that Dr. Baker examined claimant, in conjunction with his prior claim, on October 5, 1990. Director's Exhibit 1. Dr. Baker opined that claimant had "mild to no respiratory impairment," but did not state whether claimant had the respiratory capacity to perform his usual coal mine work. *Id.* Dr. Simpao examined claimant on June 7, 2004, and specifically opined that claimant has a "mild pulmonary impairment, which would not prevent him from working in the coal mine industry." Director's Exhibit 12. Dr. Rosenberg also examined claimant on August 12, 2004, and reported that claimant had normal objective testing with no significant obstruction or restriction. Director's Exhibit 42. In a supplemental report dated January 28, 2010, Dr. Rosenberg specifically opined that, "from a pulmonary perspective, [claimant] is not totally disabled from performing his previous coal mining job or other similarly arduous types of labor." Employer's Exhibit 3. Dr. Broudy prepared a consultative report on July 13, 2006, based on his review of the examination findings of Drs. Simpao and Rosenberg, and agreed with those physicians that claimant is not totally disabled, as there is "no evidence of pulmonary impairment." Director's Exhibit 42.

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). Based on her weighing of all of the medical opinion evidence, the administrative law judge rationally found that claimant failed to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), and failed to satisfy his overall burden to establish total disability.<sup>7</sup> *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines*

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<sup>7</sup> Claimant also asserts that since 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. Claimant's Brief at 3. However, contrary to claimant's assertion, the administrative law judge's finding of total disability must be based solely on the medical evidence of record. *See White*, 23 BLR at 1-7 n.8.

*Corp.*, 9 BLR 1-48 (1986) (en banc), *aff'd*, 9 BLR 1-104 (1986) (en banc); Decision and Order at 11-12. Because claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Subsequent Claim is affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge