U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0236 BLA

GLEN ALLEN TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/21/2019
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, District Chief Administrative Law Judge, United States Department of Labor.

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

Leonard H. Gerson (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05083) of District Chief Administrative Law Judge Jennifer Gee, rendered on a subsequent claim filed on July 30, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant filed an initial claim on October 3, 2002, which was denied by the district director for failure to establish total disability. Director's Exhibit 1. He requested a hearing and the claim was referred to the Office of Administrative Law Judges (OALJ). *Id.* On

amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found claimant established at most 14.78 years of underground coal mine employment. Because he had fewer than fifteen years of qualifying employment, she determined that he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She further found that claimant did not establish total disability based on the new evidence and thus was unable to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not establish total disability based on the medical opinion evidence. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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 his 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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November 1, 2005, the claim was dismissed by the OALJ because claimant refused to attend a medical examination scheduled by Leeco, Incorporated, the responsible operator that was ultimately dismissed as a party to this claim. *Id*. Claimant filed a second claim on August 20, 2007, which was denied by the district director because claimant again did not establish total disability. Director's Exhibit 2.

[2] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *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."[4] 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish total disability. Director's Exhibit 2. Therefore, he was required to submit new evidence establishing that he is totally disabled in order to obtain review of his claim on the merits. 20 C.F.R. §725.309(c)(3); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013).

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability may be established by pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant contends the administrative law judge erred in finding that the medical opinions do not establish total disability at 20 C.F.R. §718.204(b)(2)(iv),[5] without comparing the exertional requirements of his usual coal mine employment with the physicians' assessment of his respiratory impairment. Claimant's Brief at 3. He further contends that because pneumoconiosis is a progressive and irreversible disease, and considerable time has passed since his initial diagnosis of pneumoconiosis, it can be assumed that his condition has worsened such that he is unable to perform his usual coal mine employment. *Id*. at 4. Claimant's arguments lack merit.

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[4] To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and the totally disabling impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-10.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that claimant last worked as a roof bolter, "which required heavy physical labor on a consistent basis throughout the day." Decision and Order at 11. She also considered the new medical opinions of Drs. Rasmussen and Dahhan. *Id*. at 12-13; Director's Exhibits 11, 24. Dr. Rasmussen concluded that claimant "has clinical pneumoconiosis, but without measurable loss of lung function" and "has normal lung function and retains the pulmonary capacity to perform his usual coal mine employment." Director's Exhibit 11 at 42. Similarly, Dr. Dahhan opined that claimant "has no functional pulmonary impairment and or [sic] disability. [He] retains the physiological capacity to return to his previous coal mining work." Director's Exhibit 24 at 16. Contrary to claimant's argument, because neither physician diagnosed him with any respiratory or pulmonary impairment, a comparison of the physicians' opinions with the exertional requirements of his usual coal mine employment was unnecessary.[6] *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997) (an administrative law judge "may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all"); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). As Drs. Rasmussen and Dahhan opined that claimant has no respiratory impairment and retains the respiratory capacity to perform his usual coal mine work, we affirm the administrative law judge's finding that their opinions do not support claimant's burden to establish total disability.[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000).

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[6] The record also includes Dr. Simpao's opinion, submitted in conjunction with claimant's prior 2002 claim. Director's Exhibit 1. The administrative law judge noted that Dr. Simpao diagnosed a moderate impairment but did not identify any specific physical limitations that would allow her to conclude that claimant is totally disabled from his usual coal mine employment. Decision and Order at 14. Although the administrative law judge considered Dr. Simpao's opinion on total disability, his opinion is not relevant to the analysis at 20 C.F.R. §725.309, which requires claimant to establish a change in an applicable condition of entitlement based on new evidence. *See Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013).

[7] The administrative law judge also found that "the treatment records do not contain any references to [c]laimant's physical limitations that would tend to establish that he cannot perform the duties of his previous coal mine job or one requiring similar physical effort." Decision and Order at 15.

We also reject claimant's argument that he must be assumed totally disabled because pneumoconiosis is a progressive disease and a significant amount of time has passed since Drs. Rasmussen and Dahhan authored their medical opinions. Claimant's Brief at 4. An administrative law judge's finding of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8. 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.[8] *See Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). The medical opinions presented to the administrative law judge concluded that claimant does not have any respiratory impairment, and neither the Board nor the administrative law judge can assume that claimant's condition has now become disabling.

Because claimant raises no other specific challenge to the administrative law judge's consideration of the medical opinions, we affirm her finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm her finding that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and we further affirm the denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[8] Claimant argues that his diagnosis of pneumoconiosis precludes him from engaging coal mine employment because that work exposed him to heavy concentrations of dust. A recommendation to avoid further dust exposure, however, is not equivalent to a finding of total respiratory disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge