BRB No. 12-0482 BLA

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| MILLER RICE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| | ) | DATE ISSUED: 05/10/2013 |
| 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.), 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05793) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent claim filed on September 23, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge

[1] Claimant's initial claim, filed on February 14, 2001, was denied by Administrative Law Judge Joseph E. Kane in a Decision and Order dated January 22, 2004. Director's Exhibit 1. Judge Kane found that claimant did not establish the

found that "upon . . . review of all the evidence" claimant did not establish a totally disabling pulmonary or respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and that claimant failed to establish invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Decision and Order at 7. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in concluding that he is not totally disabled.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.[4] 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).

In order to establish entitlement to benefits 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

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existence of pneumoconiosis. *Id*. The Board affirmed the denial of benefits. *Rice v. Shamrock Coal Co., Inc*., BRB No. 04-0431 BLA (Oct. 28, 2004) (unpub.).

[2] In pertinent part, amended Section 411(c)(4) states that a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] In arguing that the evidence is sufficient to establish total disability, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 2. However, 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).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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).

Claimant asserts that the administrative law judge's finding that he did not establish total disability is in error, as the administrative law judge did not "mention" claimant's usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 3-4, *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 further 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."[5] Claimant's Brief at 3.

Contrary to claimant's contention, 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, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Furthermore, we affirm, as unchallenged on appeal, the administrative law judge's finding 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 5-6.

Contrary to claimant's contention, under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge explicitly noted that claimant held various coal mining positions, including shuttle car operator, and most recently worked as a tipple superintendent monitoring coal dust levels. Decision and Order at 3. In addition, the administrative law judge permissibly concluded that the preponderance of the medical opinion evidence, including reports by Drs. Rasmussen, Broudy and Vuskovich, determined that claimant retains the pulmonary capacity to perform coal mine work as a washer operator and superintendent or work requiring similar effort. *Id.* at 3, 6; *see* Director's Exhibits 11, 13-14; Employer's Exhibit 2. We therefore affirm the administrative law judge's finding that claimant failed to establish a totally disabling

[5] Claimant also asserts that, because pneumoconiosis is a progressive and irreversible disease, and a "considerable amount of time . . . has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 3-4. Contrary to claimant's assertion, a finding of total disability must be based solely on the medical evidence of record. *See White v. New White Coal Co*., 23 BLR 1-1, 1-7 n.8. (2004).

respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See 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).

Because claimant has raised no other challenges to the administrative law judge's findings that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2), or invocation of the rebuttable presumption at 30 U.S.C. §921(c)(4), these findings are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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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JUDITH S. BOGGS
Administrative Appeals Judge