U.S. Department of Labor

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

BRB No. 17-0456 BLA

DUAINE SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HACKER & SMITH TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 05/18/2018
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-BLA-5031) of Administrative Law Judge Peter B. Silvain, Jr., denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 20, 2012.[1]

The administrative law judge credited claimant with 19.1 years of underground coal mine employment,[2] but found that the new evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), [3] or establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption.[5] Employer responds in support of the denial of benefits. The

[1] Claimant's initial claim, filed on November 15, 1993, was denied as abandoned on May 17, 1994. Director's Exhibit 1.

[2] Claimant'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, 1-202 (1989) (en banc).

[3] 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), as implemented by 20 C.F.R. §718.305.

[4] The administrative law judge also found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304 and that, therefore, claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 20.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), or complicated pneumoconiosis at 20 C.F.R. §718.304. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-20.

Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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. 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 be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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(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." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(c)(3); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

Claimant contends that it was error for the administrative law judge to find that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv) without comparing the exertional requirements of claimant's usual coal mine employment with a physician's assessment of claimant's respiratory impairment. Claimant's Brief at 2-4. Claimant further contends that, since pneumoconiosis has been proven to be a progressive and irreversible disease, and considerable time has passed since claimant's initial diagnosis of pneumoconiosis, it can be assumed that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. *Id*. Claimant's arguments lack merit.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Baker, Rosenberg, and Jarboe. Decision and Order at

19. The administrative law judge accurately found that all three physicians opined that claimant is not totally disabled from his usual coal mine employment by a respiratory or pulmonary impairment. *Id.*; Director's Exhibit 16; Employer's Exhibits 4-5. Thus, because none of the physicians opined that claimant is totally disabled from a respiratory or pulmonary perspective, the administrative law judge properly found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order at 19. As Drs. Baker, Rosenberg, and Jarboe acknowledged claimant's usual coal mine work in rendering their opinions, the administrative law judge was not required to make an independent comparison of the physicians' opinions with the exertional requirements of claimant's usual coal mine employment.

We reject claimant's assertion that total disability is established because "it can be reasonably concluded" that claimant's regular coal mining duties "involved [claimant] being exposed to heavy concentrations of dust on a daily basis." Claimant's Brief at 3. Even if one of the physicians had recommended against further coal mine dust exposure, such a recommendation would not be sufficient to establish total respiratory disability. *See Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989). We also reject claimant's argument that he must be assumed to be totally disabled in light of the progressive and irreversible nature of pneumoconiosis, as 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's Brief at 3.

Therefore, as claimant makes no further specific challenge to the administrative law judge's consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant failed to establish total disability. 20 C.F.R. §802.211, In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits.[6] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[6] The administrative law judge did not address whether claimant established a change in an applicable condition of entitlement by establishing pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge found that even if claimant had established pneumoconiosis based on the new evidence, "the claim must be denied regardless, as [claimant] is unable to establish total disability." Decision and Order at 20 n. 104. Claimant does not challenge this aspect of the administrative law judge's decision. Therefore, it is affirmed. *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge