BRB No. 04-0343 BLA

RILEY HACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	
	)	DATE ISSUED: 11/30/2004
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5343) of Administrative Law Judge Stuart A. Levin denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901

et seq. (the Act). This case involves a claim filed on February 5, 2001.[1] After crediting claimant with twelve years of coal mine employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1997 claim became final. The administrative law judge also considered all of the evidence of record and found that it was insufficient to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. Employer also argues that 20 C.F.R. §725.414, a revised regulation limiting a party's evidentiary submissions, is invalid. The Director, Office of Workers' Compensation Programs, has filed a limited brief, contending that Section 725.414 is valid.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

---

[1] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on May 19, 1997. Director's Exhibit 1A. The district director denied the claim on September 16, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1997 claim.

Claimant filed a second claim on February 5, 2001. Director's Exhibit 2.

[2] We reject employer's contention that that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. In a recent decision, the Board rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); s*ee Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published). The Board also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); s*ee Dempsey*, *supra*.

Claimant argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Claimant specifically argues that the administrative law judge erred in finding that Dr. Baker's opinion is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. The administrative law judge noted that Dr. Baker, in a report dated August 15, 2001, opined that claimant suffered from a "minimal" pulmonary impairment. Decision and Order at 5; Director's Exhibit 10. However, the administrative law judge further noted that Dr. Baker, in a questionnaire accompanying his report, indicated that claimant did not suffer from any pulmonary impairment. *Id.* The administrative law judge also noted that Dr. Baker opined that claimant retained the respiratory capacity to perform the work of a coal miner. *Id.* The administrative law judge, therefore, reasonably found that Dr. Baker's opinion was insufficient to support a finding that claimant was unable, from a pulmonary standpoint, to perform his usual coal mine employment.

The record also contains newly submitted medical opinions from Drs. Chaney, Williams, Dahhan, Rosenberg and Vuskovich. The administrative law judge properly noted that neither Dr. Chaney nor Dr. Williams addressed whether claimant suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 8; Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge further properly found Drs. Dahhan,[4] Rosenberg[5] and Vuskovich[6] opined that claimant retained

[3]Since no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] In a report dated November 21, 2001, Dr. Dahhan opined that there were no objective findings to indicate any pulmonary impairment and/or disability. Director's Exhibit 12. Dr. Dahhan also opined that, from a respiratory standpoint, claimant retained the physiological capacity to continue his previous coal mining work. *Id.*

[5] In a report dated April 14, 2003, Dr. Rosenberg opined claimant did not suffer from any impairment that would prevent him from performing his previous coal mining job. Employer's Exhibit 3.

[6] In a report dated June 12, 2003, Dr. Vuskovich opined that there was no evidence of a pulmonary or respiratory impairment. Employer's Exhibit 2. Dr. Vuskovich further opined that claimant retained the pulmonary capacity to continue working in the coal industry. *Id*.

the pulmonary capacity to perform his usual coal mine employment.[7] Decision and Order at 9. Inasmuch as it is supported by substantial evidence,[8] we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Upon consideration of all of the evidence of record (including the evidence submitted in connection with claimant's previous 1997 claim), the administrative law judge found that the evidence was insufficient to establish total disability due to pneumoconiosis. Because no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and

---

[7] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, because there is no newly submitted medical opinion evidence that supports a finding of total disability, the administrative law judge's failure to make such findings constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to 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).

(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge