BRB No. 10-0216 BLA

DANNY R. LEWIS Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 11/18/2010 DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (08-BLA-5625) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 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(*l*)) (the Act). The administrative law judge credited claimant

[1] Claimant's first claim for benefits, filed on March 7, 2003, was denied as abandoned on October 1, 2003. Director's Exhibit 1 at 4, 48. 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); Decision and Order at 18. There was no medical evidence submitted in connection with claimant's 2003 claim. Claimant filed his current claim on July 19, 2006. Director's Exhibit 3.

with at least ten years of coal mine employment, as stipulated,[2] and found that the medical evidence developed since the denial of claimant's prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[3] Thus, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), or total disability pursuant to Section 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), filed a response brief in support of the administrative law judge's denial of benefits. Claimant filed a reply brief, reiterating his contentions on appeal.[4]

By Order dated May 28, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director has responded. The Director states that the recent amendment to the Act does not affect this case, as the evidence does not establish a totally disabling respiratory

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[2] The record indicates that 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] Because the new evidence did not establish pneumoconiosis or total disability, the administrative law judge found that claimant necessarily could not establish that his pneumoconiosis arose out of coal mine employment, or that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.203, 718.204(c). Decision and Order at 26.

[4] The administrative law judge found that the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was inapplicable, and that claimant did not otherwise establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), because none of the valid pulmonary function or blood gas studies were qualifying, and because there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24. Those findings are unchallenged on appeal. Therefore, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

impairment.[5] 30 U.S.C. §921(c)(4). We agree. As will be discussed below, we affirm the administrative law judge's finding that the evidence submitted with claimant's subsequent claim does not establish total disability pursuant to Section 718.204(b)(2). Further, no medical evidence was ever developed in claimant's abandoned claim. Director's Exhibit 1. As the evidence does not demonstrate total disability, Section 1556 does not affect this case.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement.[6] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered five medical opinions with regard to total disability, including the treatment report of Dr. Almusaddy. Dr. Baker, who identified claimant's last coal mine employment as a roof bolter, opined that, although claimant has a minimal pulmonary impairment, he has the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12 at 5-6. Drs. Broudy and Dahhan agreed that claimant is not totally disabled. Employer's Exhibits 1 at 2; 3 at 4; 4 at 2; 6 at 2. Drs. Almusaddy and Burchett did not address whether claimant has a totally disabling pulmonary impairment. Director's Exhibit 35 at

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[5] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1-2. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[6] In this case, although claimant's current claim is a subsequent claim under 20 C.F.R. §725.309(d), in effect, it was considered and denied on its merits, as it is the only claim for which medical evidence was submitted.

376; Claimant's Exhibit 2. The administrative law judge found that the opinions of Drs. Baker, Broudy, and Dahhan were well-reasoned and well-documented, and he accorded these opinions probative weight. The administrative law judge accurately noted that neither Dr. Almusaddy, nor Dr. Burchett, offered an opinion regarding claimant's total disability.

Claimant argues that the administrative law judge "erred in failing to find that [claimant] is totally disabled due to pneumoconiosis as per the medical evidence." Claimant's Brief at 3. Claimant's statements, that Dr. Baker's opinion "should be given more weight," and that the "opinions of a claimant's treating physician and of all physicians who physically examine[d] the claimant" merited greater weight, Claimant's Brief at 4, do not assist claimant in this case, as no medical opinion supports a finding of total disability. We, therefore, affirm the administrative law judge's finding that the medical opinions of record do not establish total disability pursuant to Section 718.204(b)(2)(iv). *See Gee v. W. G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*).

Because we have affirmed the administrative law judge's finding that the evidence did not establish total respiratory disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. Consequently, we need not address the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Anderson*, 12 BLR at 1-112; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge