BRB No. 12-0122 BLA

ROY LEE HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 11/23/2012
	)	
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 Denying Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05046) of Administrative Law Judge Stephen M. Reilly (the administrative law judge) on a subsequent claim filed on December 14, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with fourteen years of coal mine employment,

based on the parties' stipulation. He also found that the medical evidence developed since the denial of claimant's previous claim failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant.[1] The administrative law judge found, therefore, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 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 Dr. Rasmussen's medical opinion failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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 demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due

[1] The administrative law judge noted that the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) was established in claimant's previous claim. Decision and Order at 5; Director's Exhibit 1 at 2-11.

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law 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).

to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.[3]

Where a miner files a claim for benefits more than one year after the final denial of a 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 date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *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(d)(2). In this case, the administrative law judge found that claimant's prior claim was denied for failure to establish a total respiratory disability. Consequently, in order to obtain review of the merits of the current claim, claimant had to submit new evidence establishing a total respiratory disability. *See* 20 C.F.R. §725.309(d)(2), (3).

Considering the medical opinion evidence, the administrative law judge noted that Dr. Rasmussen initially stated that claimant was totally disabled, from a respiratory standpoint, from performing very heavy manual labor. Decision and Order at 10; Director's Exhibit 14 at 37. Subsequently, however, on reviewing claimant's job duties, Dr. Rasmussen opined that, while claimant was incapable of performing heavy or very heavy manual labor, he would be able to perform his usual coal mine employment as a "rock truck driver." Decision and Order at 10; Director's Exhibit 14 at 47. The administrative law judge found that claimant's work as a "rock truck driver" required only moderate exertion. Decision and Order at 9. Weighing the opinion of Dr. Rasmussen against the exertional requirements of claimant's usual coal mine employment as a "rock truck driver," the administrative law judge found that claimant failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).[4] Further, on weighing all of the new evidence together pursuant to Section 718.204(b), the administrative law judge found that a total respiratory disability was not established thereunder.[5]

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[3] Because claimant has not established at least fifteen years of qualifying coal mine employment, he is not entitled to consideration of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[4] The only other new opinion submitted was by Dr. Jarboe, who opined that claimant could, from a respiratory standpoint, perform his job as a "rock truck driver." *See* Decision and Order at 10.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the new pulmonary function and blood gas studies were non-qualifying and did not, therefore, establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(i), (ii).

Contrary to claimant's assertion, the administrative law judge properly determined that the opinion of Dr. Rasmussen did not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv), after weighing the opinion against the exertional requirements of claimant's usual coal mine employment.[6] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Additionally, we reject claimant's argument that a recommendation against further coal dust exposure establishes a total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). We also reject claimant's general argument that, because pneumoconiosis is a progressive and irreversible disease, it should be concluded that claimant is totally disabled. *See White*, 23 BLR at 1-7 n.8; Claimant's Brief at 5-6. Consequently, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion does not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Further, as the administrative law judge found that the new evidence failed to establish a total respiratory disability pursuant to Section 718.204(b), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability and a change in an applicable condition of entitlement pursuant to Sections 718.204(b) and 725.309(d).[7]

[6] Specifically, the administrative law judge found that claimant's job as a "rock truck driver" involved only "moderate labor." Decision and Order at 9. Further, while acknowledging that claimant also assisted in "truck loading" and "drilling when the trucks were non-operational," the administrative law judge found that there was no evidence to indicate that any of these tasks involved more than "moderate" labor. Decision and Order at 9.

[7] Claimant also contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established on the merits pursuant to 20 C.F.R. §718.202(a). Thus, even though the administrative law judge noted that the existence of pneumoconiosis was established in the earlier claim, he went on to find that, even if a change in applicable condition were established, *i.e.*, a total respiratory disability, claimant would not be entitled to benefits because he failed to establish the existence of pneumoconiosis. Because we affirm the administrative law judge's finding that a total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b) and, therefore, a change in applicable condition of entitlement was not established, we need not address claimant's argument regarding the existence of pneumoconiosis. *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.

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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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BETTY JEAN HALL
Administrative Appeals Judge