BRB No. 99-0249 BLA

TOLBERT R. WHITT Claimant-Petitioner v. LIBERTY BELL FUEL, INCORPORATED and CLICK & LEFFEW COAL COMPANY, INCORPORATED and DALE COAL, INCORPORATED and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND Employers/Carrier -Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Richard G. Rundle (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employers.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-BLA-1900) of Administrative Law Judge Edward Terhune Miller 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). Claimant filed an application for benefits on March 3, 1988 which he subsequently withdrew. Director's Exhibit 38; *see* 20 C.F.R. §725.306. Claimant filed another application for benefits on October 8, 1991 which was finally denied by the district director on March 9, 1992 because the medical evidence failed to establish any element of entitlement. Director's Exhibit 39. On April 6, 1993, claimant filed the current application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The district director denied the claim, and claimant requested a hearing, which was held on March 29, 1995.

In a Decision and Order issued on October 5, 1995, the administrative law judge accepted the parties' stipulation to thirty-five years of coal mine employment, found that the evidence developed since the prior denial established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but concluded that the same evidence failed to establish that claimant had become totally disabled since the prior denial pursuant to 20 C.F.R. §718.204(c). Consequently, under the duplicate claim standard then applicable to this claim arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge found that a material change in conditions was not established as required by Section 725.309(d) and denied benefits. *See Lisa Lee Mines v. Director, OWCP [Rutter I]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *rev'd en banc*, *[Rutter II],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Thereafter, claimant submitted additional evidence and timely requested modification of the denial of benefits pursuant to 20 C.F.R. §725.310. The district director denied modification and pursuant to claimant's request, forwarded the case to the Office of the Administrative Law Judges for a hearing. Director's Exhibits 24, 25.

Prior to the scheduling of a hearing, the administrative law judge issued an order directing the parties to show cause as to why a hearing should be held. Order to Show Cause, June 12, 1997. Claimant and carrier responded in writing that they

waived their right to a hearing and requested a decision on the documentary record. Carrier's Letter, June 26, 1997; Claimant's Letter, July 8, 1997; *see* 20 C.F.R. §725.461(a).

Considering the claim on the record only, the administrative law judge found that the evidence developed in the duplicate claim plus that submitted on modification did not demonstrate a material change in conditions as required by Section 725.309(d) because it failed to establish total respiratory disability pursuant to Section 718.204(c). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to compare a 40% impairment assessed by physicians of the West Virginia Occupational Pneumoconiosis Board with the duties of claimant's usual coal mine employment to determine whether he is totally disabled. Carrier has not responded and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act 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 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1] We affirm as unchallenged on appeal the administrative law judge's findings that the duplicate claim evidence and the evidence submitted on modification did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred by failing to determine whether a pulmonary impairment prevents claimant from performing the job duties of a foreman. Claimant's Brief at 4-5. Specifically, claimant points to the testimony of two West Virginia Occupational Pneumoconiosis Board physicians who stated that an August 29, 1995 pulmonary function study, which was non-qualifying[2] under Department of Labor standards, "would suggest [a] 40% impairment." Claimant's Modification Exhibit (unstamped). Contrary to claimant's contention, the administrative law judge considered this brief testimony but permissibly found that it "[did] not provide a reliable basis for a finding of total disability under the Act," because the physicians used disability criteria different from those applicable to this claim and did not relate the 40% impairment they assessed to claimant's ability to perform his usual coal mine employment. Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-152 (1989)(*en banc*)(the weight to be accorded a state workers' compensation board finding is a matter within the administrative law judge's discretion). Therefore, we reject claimant's contention and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4). Consequently, we also affirm the administrative

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

law judge's otherwise unchallenged finding that total respiratory disability was not established pursuant to Section 718.204(c).[3]

[3] As the administrative law judge found in the duplicate claim and on modification, all of the objective studies were non-qualifying, and the physicians who were familiar with the specific duties required by claimant's job as a foreman opined that his minimal respiratory impairment left him with sufficient respiratory capacity to perform that job. Director's Exhibits 9, 10, 15, 18-20; Employer's Exhibit 5; Claimant's Modification Exhibits (unstamped); *see Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-22 (4th Cir. 1991). Under the "single-element" duplicate claim standard of *Rutter II* applicable at the time the administrative law judge issued his current decision, he should have considered all of the evidence in the record because he had already found that claimant established the element of pneumoconiosis. [1995] Decision and Order at 7. The error is harmless, however, *see Larioni v. Director, OWCP,* 6 BLR 1-1276, 1278 (1984), because the objective studies submitted with claimant's prior claims are non-qualifying and the associated physical examination reports diagnose "no significant loss of respiratory function," (Rasmusssen, 1988) and "[n]o pulmonary impairment," (Daniel, 1991). Director's Exhibits 38, 39.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge