

BRB No. 11-0409 BLA

BILLY G. ROBERTS)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 10/24/2011
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Billy G. Roberts, Smilax, Kentucky, *pro se*.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM

Claimant, without the assistance of counsel, appeals the Decision and Order (09-BLA-5842) of Administrative Law Judge Larry S. Merck denying benefits on a claim filed pursuant to 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). This case involves a subsequent claim filed on August 27, 2004.¹ The administrative law judge initially noted that the Director, Office of

¹ Claimant initially filed a claim for benefits on February 5, 1993. Director's Exhibit 1. In a Decision and Order dated August 29, 1995, Administrative Law Judge J. Michael O'Neill found, *inter alia*, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge O'Neill denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge

Workers' Compensation Programs (the Director), conceded that claimant suffers from pneumoconiosis. The administrative law judge, therefore, found that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2004 claim on the merits. After crediting claimant with twenty-four years of coal mine employment,² the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director responds in support of the administrative law judge's denial of benefits.³

In a *pro se* appeal filed by a claimant, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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'Keefe 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 living 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

O'Neill's denial of benefits. *Roberts v. Director, OWCP*, BRB No. 95-2141 BLA (Apr. 25, 1996) (unpub.). Claimant's subsequent request for modification was denied on February 27, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

² The record reflects that claimant's coal mine employment was in Kentucky. Hearing Transcript at 10, 13; 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 (1989)(*en banc*).

³ Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case, because it was filed before January 1, 2005.

Total Disability

The administrative law judge correctly noted that all of the new pulmonary function studies and arterial blood gas studies⁴ are non-qualifying.⁵ Decision and Order at 9. We, therefore, affirm the administrative law judge's finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

Because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

The record contains three new medical opinions submitted by Drs. Simpao, Baker, and Rasmussen. Dr. Simpao opined that claimant suffers from a moderate impairment that would "affect his ability to perform [his] regular coal mining duties." Director's Exhibit 10. The administrative law judge permissibly accorded little weight to Dr. Simpao's opinion, because he found that it was equivocal on the issue of total disability. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Conversely, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Baker and Rasmussen, that claimant retains the respiratory capacity to perform his previous coal mine employment, because he found that their opinions were better supported by the results of their objective studies. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 10-11; Director's Exhibits 23, 28. Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's determination that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

⁴ The record contains four new pulmonary function studies conducted on September 21, 2004, April 9, 2006, May 18, 2006, and May 27, 2009. Director's Exhibits 10, 23, 28. The record contains three new arterial blood gas studies conducted on September 21, 2004, May 18, 2006, and May 27, 2009. *Id.*

⁵ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

The administrative law judge noted that the record also contains evidence submitted in connection with claimant's 1993 claim. However, the administrative law judge reasonably relied upon the more recent medical evidence, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Wetzel*, 8 BLR at 1-142 n.6; *Gillespie v. Badger Coal Co.*, 7 BLR 1-839, 1-841 (1985); Decision and Order at 12. Consequently, we affirm the administrative law judge's finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

In light of our affirmance of the administrative law judge's finding that the evidence 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 under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

BETTY JEAN HALL
Administrative Appeals Judge