BRB No. 11-0607 BLA

CARL W. MAGGARD	)	
	)	
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.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2010-BLA-5418) of Administrative Law Judge Larry S. Merck 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.

[1] Claimant filed his first claim for benefits on December 12, 2005. Director's Exhibit 1 at 62-65. The district director denied the claim on August 8, 2006. *Id*. at 5-6, 8-9. Claimant took no further action regarding that claim. He filed this claim on May 21, 2009. Director's Exhibit 3.

§§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge credited claimant with 8.87 years of coal mine employment,[3] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5-6. Therefore, the administrative law judge determined that claimant had not shown a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Director's Exhibit 1 at 5, 8-9; Decision and Order at 12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.[4]

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).

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[2] 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. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there will be a rebuttable presumption that he 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)).

[3] 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*).

[4] We affirm, as unchallenged, the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding that claimant cannot establish total disability through the irrebuttable presumption at 20 C.F.R. §718.304 because the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1); *Skrack*, 6 BLR at 1-711.

To establish entitlement to benefits under the Act, a claimant must establish 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. When 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). Claimant's prior claim was denied because he failed to establish the existence of a totally disabling pulmonary or respiratory impairment. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant specifically challenges the administrative law judge's evaluation of Dr. Baker's 2006 opinion. The record reflects, however, that Dr. Baker's 2006 opinion was developed in connection with claimant's prior claim. Director's Brief at 5; Director's Exhibit 1 at 46. Because claimant must establish a change in the applicable condition of entitlement through *new* evidence, Dr. Baker's 2006 opinion is not relevant to the current claim. *See* 20 C.F.R. §725.309(d)(2), (3); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997). Therefore, we need not address claimant's arguments regarding Dr. Baker's report. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant next contends that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine work, in conjunction with the medical opinions, in determining that claimant is not totally disabled. This argument lacks merit. The administrative law judge correctly found that Dr. Rasmussen, who offered the only relevant medical opinion of record, opined that claimant retains "normal lung function" sufficient to perform his regular coal mine employment. Decision and Order at 11; Director's Exhibit 10 at 35, 38. Because Dr. Rasmussen did not diagnose a pulmonary impairment, the administrative law judge did not need to consider the exertional requirements of claimant's coal mine work. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Moreover, the record demonstrates that Dr. Rasmussen was aware of the nature of claimant's coal mine employment when he provided his opinion. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Director's Exhibit 10 at 32, 37.

We also reject claimant's argument that, because pneumoconiosis is progressive and irreversible, it can be assumed that his condition has worsened, and that his ability to

do his usual coal mine work has been adversely affected. An administrative law judge's findings must be based not on assumptions, but only upon medical evidence in the record. *See* 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8. As claimant raises no further arguments regarding the evaluation of the new medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

We therefore affirm the administrative law judge's findings that claimant has not established that he suffers from a totally disabling pulmonary or respiratory impairment, pursuant to 20 C.F.R. §718.204(b), and thus has failed to establish a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). Furthermore, in light of our affirmance of the administrative law judge's finding that total disability was not established, we hold that Section 1556 does not affect this case because the Section 411(c)(4) presumption is unavailable to claimant. 30 U.S.C. §921(c)(4). We also need not address claimant's contention that the administrative law judge erred in crediting him with 8.87 years of coal mine employment instead of 9.87 years.[5] Any error by the administrative law judge in calculating claimant's years of employment is harmless. *See* 30 U.S.C. §921(c)(4); *Larioni*, 6 BLR at 1-1278.

[5] Pursuant to Section 1556 of Public Law No. 111-148, a miner may only be entitled to the rebuttable presumption of total disability due to pneumoconiosis if he establishes that he has at least fifteen years of coal mine employment *and* a totally disabling respiratory impairment. 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)). Furthermore, no other presumption based on years of employment is relevant to this claim. *See* 20 C.F.R. §718.203(b); Director's Brief at 6.

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