BRB No. 13-0174 BLA

INARD ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANADA COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/24/2013
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Inard Anderson, Pikeville, Kentucky, *pro se*.

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

Emily Goldberg-Kraft (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2010-BLA-05503) of Administrative Law Judge Theresa C. Timlin rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on October 17, 2008.[1] Director's Exhibit 6.

After crediting claimant with at least thirteen years of coal mine employment,[2] the administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established that claimant has clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits,[3] the administrative law judge initially found that claimant established the existence of clinical pneumoconiosis,[4] pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge further found, however, that while claimant is entitled to the presumption that

[1] Claimant filed five previous claims, four of which were finally denied, and one of which was withdrawn. Director's Exhibits 1-5. His most recent prior claim, filed on May 13, 2006, was finally denied because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 4.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. 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).

[3] In light of the progressive nature of pneumoconiosis, the administrative law judge permissibly limited her review of the prior evidence to that which was developed in the twenty year period between 1992 and the date of the administrative law judge's decision. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc).

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), employer/carrier (employer) rebutted the presumption. Finally, the administrative law judge found that claimant failed to establish that he has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.[5]

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting that the administrative law judge erred in finding that employer rebutted the presumption that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), but that the error may be harmless. Employer responds, urging affirmance of the denial of benefits.[6]

In order to establish entitlement to benefits under 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

After finding that claimant established the existence of clinical pneumoconiosis, the administrative law judge reviewed the evidence of record to determine whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge accurately found that none of the eight pulmonary function studies or seven blood gas studies performed since 1992 yielded qualifying values[7]

[5] The administrative law judge properly found that claimant is unable to invoke the presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish fifteen years of coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 8.

[6] The Director, Office of Workers' Compensation Programs (the Director), asserts that if the Board affirms the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), any error by the administrative law judge in finding that claimant's pneumoconiosis did not arise out of coal mine employment is harmless. Director's Brief at 1 n.1. Employer agrees with the Director, conceding that the administrative law judge erred in evaluating the medical evidence pursuant to 20 C.F.R. §718.203(b), but asserting that the error is harmless, as claimant did not establish total disability. Employer's Brief at 8 n.3.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part

pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).[8] Decision and Order at 15-16; Director's Exhibits 2-4, 18; Employer's Exhibits 2, 3. Additionally, the administrative law judge correctly noted that there was no evidence of cor pulmonale with right-sided congestive heart failure, under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately found that in 1992, Dr. Mettu diagnosed a mild respiratory impairment, but did not comment on the miner's ability to perform his usual coal mine work. Director's Exhibit 2. The administrative law judge further found that, more recently, in 2004, 2006, 2009, and 2010, Drs. Rasmussen, Habre, and Rosenberg each opined that claimant's mild to moderate respiratory impairment would not prevent him from performing his usual coal mine work.[9] Decision and Order at 17; Director's Exhibits 2-4, 18; Employer's Exhibits 1-3. Noting that all of the physicians who offered an opinion as to claimant's capacity for work opined that his respiratory impairment is not totally disabling, the administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because it is supported by substantial evidence, we affirm the administrative law judge's finding. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc).

In weighing together the contrary probative evidence, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge rationally determined that the evidence of

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718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge additionally noted that none of the objective tests of record, dating back to 1975, yielded qualifying values. Decision and Order at 15-16.

[9] In 1992, Dr. Mettu diagnosed a mild respiratory impairment, but did not comment on the miner's ability to perform his usual coal mine work. Director's Exhibit 2. In 2004 and 2006, Dr. Rasmussen opined that claimant had a mild respiratory impairment but retained the respiratory capacity to perform his usual coal mine work. Director's Exhibits 3, 4. In 2009, Dr. Habre stated that claimant's pulmonary function studies reflected moderate obstructive airways disease, but opined that claimant retained the respiratory capacity to perform his usual coal mine work. Director's Exhibit 18. In 2004 and 2010, Dr. Rosenberg opined that claimant's mild respiratory impairment would not prevent him from performing his usual coal mine work. Employer's Exhibits 1-3.

record, as a whole, did not demonstrate that the miner suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R.§ 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 26. Therefore, we affirm the administrative law judge's conclusion that the preponderance of the evidence did not establish total disability, pursuant to 20 C.F.R. §718.204(b)(2). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

As claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[10] *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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[10] In light of this holding, we decline to address the allegations by employer and the Director that the administrative law judge erred in weighing the medical opinions relevant to the cause of claimant's pneumoconiosis pursuant to 20 C.F.R. §718.203(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).