BRB No. 96-0683 BLA

WILLIAM A. RIFE)
)
Claimant-Petitioner)
)
v.)
)
HARMAN MINING CORPORATION)
) DATE ISSUED:
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

William A. Rife, Vansant, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant[1], without the assistance of counsel[2], appeals the Decision and Order

[1]Claimant is William A. Rife, the miner, who filed his first two claims for benefits on October 23, 1973 and February 28, 1980. Director's Exhibit 50. Claimant was awarded benefits in a Decision and Order issued on February 26, 1987 by Administrative Law Judge Ainsworth H. Brown. Director's Exhibit 50. The claim was ultimately denied, however, because claimant failed to terminate his employment prior to March 26, 1988. Director's Exhibit 50; Memorandum of July 27, 1994. Claimant filed the present claim for benefits on October 21, 1992. Director's Exhibit

(94-BLA-1760) of Administrative Law Judge

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[2]Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, filed an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

Charles P. Rippey 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). The administrative law judge first determined that because there was no denial of claimant's previous claim, the present claim is not a duplicate claim pursuant to 20 C.F.R. §725.309 but instead is a new claim which requires an examination of all the evidence of record. The administrative law judge then determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, Claimant generally challenges the denial of benefits. Employer responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Initially, we address the administrative law judge's finding that the present claim is not a duplicate claim pursuant to Section 725.309. The administrative law judge stated that this is not a duplicate claim because claimant's previous claim was never denied. Decision and Order at 2. We disagree. 20 C.F.R. §725.503A(a) states:

In the case of a claimant who is employed as a miner at the time of a

> final determination of such miner's eligibility for benefits, no benefits shall be payable unless: (1) The miner's eligibility is established under section 411(c)(3) of the act; or (2) the miner terminates his or her coal mine employment within 1 year from the date of the final determination of the claim.

Section 725.503A(b) states:

> . . .If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in §725.310, if applicable, or by filing a new claim under this part.

Because, claimant was awarded benefits on February 26, 1987 and continued to work as of June, 1988, the claim was denied pursuant to Section 725.503A(b).[3] Thus, the administrative law judge erred in stating that the claim was not denied and not a duplicate claim pursuant to Section 725.309. This error, however, is harmless in this case since the administrative law judge properly considered all of the evidence of record pursuant to 20 C.F.R. Part 718. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge properly found that the record contains no qualifying pulmonary function study or arterial blood gas study evidence and no evidence of cor pulmonale with right sided congestive heart failure.[4] Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the

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[3]The record contains letters from claimant indicating that he continued to work as of June, 1988 and a letter returned to the claims examiner from Harman Mining Corporation which states that claimant was working as of April 11, 1988. Director's Exhibit 50. Also, a memorandum dated July 27, 1994, from the district director, states that the prior claim, filed on April 1, 1978, is finally denied, administratively closed, and is not subject to reopening. Department of Labor Exhibit 1.

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

eight medical opinions of record. Director's Exhibits 12, 44, 34, 50; Employer's Exhibit 2. Only one physician, Dr. Cardona, diagnosed a totally disabling respiratory impairment. Director's Exhibit 50. The administrative law judge permissibly found that the preponderance of the medical opinion evidence does not support a finding of total respiratory disability. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Perry*, *supra*. Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4). Further, because claimant has failed to establish total respiratory disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry*, *supra*.

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