BRB No. 09-0762 BLA

EARL TRENT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 07/20/2010
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order–Denying Benefits-Errata of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order–Denying Benefits-Errata (08-BLA-5802) of Administrative Law Judge Robert B. Rae rendered on a claim 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. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that the parties' stipulation to at least twenty-two years of coal mine employment[1] was supported by the record, and he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis or total disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), declined to submit a response brief in this appeal.[2]

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).

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded and assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's finding that the evidence does not establish total disability.[3]

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[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 7. 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*).

[2] We affirm the administrative law judge's finding of twenty-two years of coal mine employment, and his finding that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] 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.

To be entitled to benefits under the Act, claimant must demonstrate 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues 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). Dr. Rasmussen, whose opinion is the only medical opinion of record, noted that claimant's coal mine employment involved heavy and sometimes very heavy manual labor. Dr. Rasmussen opined that claimant has normal lung function and that he retains the pulmonary capacity to perform his regular coal mine job. Director's Exhibit 11. The administrative law judge found that this medical opinion shows that claimant retains the capacity to perform his usual coal mine employment. Decision and Order at 8.

Without referring to any specific medical opinion, claimant contends that the administrative law judge must consider the physical requirements of a claimant's usual coal mine employment in determining whether claimant is totally disabled. Claimant's Brief at 5. Contrary to claimant's suggestion, medical opinions such as that of Dr. Rasmussen, diagnosing no impairment, need not be discussed in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, we reject claimant's allegation that, because pneumoconiosis is a progressive disease, it has worsened and thus, adversely affected his ability to perform his usual coal mine work. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7, n.8 (2004). Consequently, we reject claimant's contentions and affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that the evidence does not establish the existence a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Because we affirm the administrative law judge's finding that the evidence does not establish total disability, one of the essential elements of entitlement

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Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she 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)).

pursuant to Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112. Further, in light of our affirmance of the administrative law judge's finding that total disability was not established, we agree with employer and the Director that Section 1556 does not affect this case, as invocation of the Section 411(c)(4) presumption is unavailable. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Supplemental Decision and Order–Denying Benefits-Errata is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge