

BRB No. 09-0596 BLA

THURMAN A. HURLEY)
)
 Claimant-Petitioner)
)
 v.)
)
 ROYALTY SMOKELESS COAL)
 COMPANY)
)
 and)
) DATE ISSUED: 04/30/2010
 A. T. MASSEY)
)
 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 Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for
employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank
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: SMITH, McGRANERY, and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5214) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim¹ 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).² The administrative law judge credited claimant with 7.5 years of coal mine employment.³ Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits, viewed in light of claimant's 7.5 years of coal mine employment, did not establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge therefore determined that claimant failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his length of coal mine employment finding. Claimant also contends that, assuming, *arguendo*, the length of coal mine employment determination was correct, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, requesting that the Board reject claimant's request to remand the case to the district director based upon the Director's alleged failure to provide claimant with a complete pulmonary evaluation.

¹ Claimant filed his first claim for benefits on February 8, 2002, which was denied by the district director on April 11, 2003. Director's Exhibit 1. Claimant filed a second claim on March 9, 2005, which was denied by the district director on October 21, 2005, based on claimant's failure to establish that his total disability was due to pneumoconiosis. Director's Exhibit 2. Claimant filed his current claim on February 9, 2007. Director's Exhibit 4.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.

³ The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 4, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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).

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. Where 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). The prior denial was based on claimant's failure to establish that his total disability was due to pneumoconiosis. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing total disability due to pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant contends that the administrative law judge erred in crediting him with only 7.5 years of coal mine employment. Specifically, claimant alleges that his Social Security earnings records do not reflect all of his coal mine employment because he was sometimes paid in cash. Claimant argues further that, for those years in which earnings were reported on his Social Security records, the administrative law judge failed to take into account claimant's testimony that he was being paid a daily wage below the average earnings for coal miners in those years. Claimant concludes that he should have been credited with at least 10.5 years of coal mine employment. We disagree.

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-68, 1-72 (1996)(*en banc*); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). In considering the evidence submitted by claimant, the administrative law judge may use any reasonable method of calculation. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988).

The administrative law judge noted that claimant alleged between ten and thirteen years of coal mine employment, while employer agreed to only 6.22 years of coal mine employment.⁴ Decision and Order at 4; Hearing Transcript at 5; Director's Exhibits 1, 2,

⁴ A length of coal mine employment of 6.22 years was found established by the district director. Director's Exhibit 20.

4. The administrative law judge considered claimant's written summary of his employment history, his testimony, and his Social Security earnings records. Even crediting claimant's testimony as to his daily wage, the administrative law judge found that the evidence established 7.5 years:

The Miner's testimony and Social Security earnings records reveal no more than 7.5 years of coal mine employment. The miner testified that he worked approximately one year at the age of 15; that testimony is not contradicted (TR 12-13). The Miner also testified that in 1957, 1958, 1965, and 1966 he earned only \$3 per day. I find this unlikely, but even [if] it is true, his total earnings in these years would equal no more than two years. Finally, the Social Security earnings statement establishes about 4.5 years of coal mining with Royalty Smokeless. Therefore, I find that the Miner has established no more than 7.5 years of coal mine employment.

Decision and Order at 2-3.

The administrative law judge discussed all of the relevant evidence of record and set forth rational bases for his conclusions. We conclude that substantial evidence supports his findings, and that he reasonably credited claimant with 7.5 years of coal mine employment. *See Dawson*, 11 BLR at 1-60. Therefore, we affirm the administrative law judge's length of coal mine employment finding.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered three new medical opinions. Dr. Forehand, considering a coal mine employment history of thirteen years and a smoking history of one pack per day for forty-six years, concluded that claimant's total disability is due, 35% to pneumoconiosis and 65% to cigarette smoking. Director's Exhibit 11. Subsequently, after being asked by the district director to assume that claimant had 6.22 years of coal mine employment, Dr. Forehand opined that claimant's disability is due solely to smoking. *Id.* Viewing Dr. Forehand's two reports in light of the fact that claimant established 7.5 years of coal mine employment, the administrative law judge found that Dr. Forehand's opinion did not establish that claimant's total disability is due to pneumoconiosis. Both Drs. Castle and Fino opined that claimant's total disability is due to cigarette smoking. Employer's Exhibits 1, 4. Thus, the administrative law judge concluded that the new medical opinion evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

As set forth above, we have rejected claimant's argument that he should have been credited with 10.5 years of coal mine employment, and we have affirmed the administrative law judge's finding of 7.5 years of coal mine employment. Claimant does not otherwise challenge the administrative law judge's analysis and weighing of Dr. Forehand's disability causation opinion. Therefore, we affirm the administrative law

judge's finding that the new medical opinions did not establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983). Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d).

Claimant also contends that, because Dr. Forehand's opinion did not address the cause of claimant's total disability in light of a history of 7.5 years of coal mine employment, the Director failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 14-15. The Director responds that Dr. Forehand's opinion satisfied the Director's obligation to provide claimant with a complete pulmonary evaluation. Director's Brief at 2-3. We agree with the Director.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Forehand conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Although Dr. Forehand initially considered a coal mine employment history of thirteen years, he was later provided with a history of 6.22 years, and opined that claimant's disability is due solely to smoking. We agree with the Director that the administrative law judge's decision to credit claimant with "slightly more than 6.22 years of coal mine employment [did] not render Dr. Forehand's report . . . incomplete" on the issue of disability causation. Director's Brief at 2; *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009). Consequently, we conclude that the Director fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge