

BRB No. 09-0626 BLA

TED COLLETT)
)
 Claimant-Petitioner)
)
 v.)
)
 GREAT WESTERN COAL,)
 INCORPORATED)
) DATE ISSUED: 04/16/2010
 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 Denying Benefits of Alice M. Craft,
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 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: DOLDER, Chief Administrative Appeals Judge, SMITH and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5168) of
Administrative Law Judge Alice M. Craft (the administrative law judge) rendered on a
subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30

¹ Claimant filed his initial claim for benefits on May 7, 2001. Director's Exhibit 1
at 252. That claim was denied on September 21, 2004, by Administrative Law Judge

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 twenty years of coal mine employment³ and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b), and therefore, did not 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 finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject claimant's contention and affirm the denial of benefits.⁴

The Board 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Edward Terhune Miller, for failure to establish total disability. *Id.* at 35. Claimant appealed, and the Board affirmed Judge Miller's denial of benefits on August 30, 2005. *Id.* at 1-2. The record does not reflect that claimant took any further action until filing the instant claim, on November 29, 2006. Director's Exhibit 3.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant miner's claim, as the evidence does not demonstrate the existence of a totally disabling respiratory or pulmonary impairment.

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. If a miner files an application 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 that he was totally disabled. Director’s Exhibit 1 at 6. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical report of Dr. Rasmussen. Dr. Rasmussen reported that claimant’s pulmonary function and blood gas studies were “normal,” and concluded that claimant has “normal resting lung function. Based on these studies, [claimant] retains the pulmonary capacity to perform his last regular coal mine job.”⁵ Director’s Exhibit 10 at 4. The administrative law judge found that:

Dr. Rasmussen found that neither the Claimant’s history of coal mine dust exposure, nor his previous cigarette smoking, has caused measureable loss of lung function. Dr. Rasmussen stated specifically that the Claimant retains the pulmonary capacity to perform his last regular coal mine job.

Decision and Order at 8-9; Director’s Exhibit 10. The administrative law judge therefore determined that the new medical opinion evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9.

Claimant asserts that the administrative law judge erred in failing to consider the physical requirements of claimant’s previous coal mine work as a general inside laborer and repairman, in conjunction with Dr. Rasmussen’s opinion. Specifically, claimant asserts that:

[A]n [administrative law judge] would be in error in finding a claimant able to perform his usual coal mine work without considering the physical

⁵ Dr. Rasmussen noted that exercise blood gas studies could not be performed, due to claimant’s inability to walk on a treadmill because of back pain. Director’s Exhibit 10 at 4.

requirements of such work. It can be reasonably concluded that claimant's regular coal mining duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Rasmussen (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 3.

We disagree. Substantial evidence supports the administrative law judge's finding, as Dr. Rasmussen specifically opined that claimant does not have a pulmonary or respiratory impairment. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 9; Claimant's Exhibit 10 at 4. Further, a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge rationally determined that Dr. Rasmussen's opinion did not support a finding of total disability, since Dr. Rasmussen explicitly stated that claimant "retains the pulmonary capacity to perform his last regular coal mine job."⁶ Decision and Order at 9; Director's Exhibit 10 at 4. Therefore, contrary to claimant's assertion, it was unnecessary for the administrative law judge to compare Dr. Rasmussen's opinion with the exertional requirements of claimant's usual coal mine work. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

⁶ The record reflects that Dr. Rasmussen was aware of the exertional requirements of claimant's job as a general inside laborer and repairman. Director's Exhibit 10 at 3. Additionally, the results of both the pulmonary function and arterial blood gas testing were not qualifying and were found by Dr. Rasmussen to be normal, and there was no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibit 10; 20 C.F.R. §718.204(b)(2).

We also reject claimant's argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant's Brief at 4. The Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's determination that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement that was previously adjudicated against him, we affirm the administrative law judge's finding that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3. Therefore, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge