

BRB No. 13-0296 BLA

JAMES D. BROCK)
)
 Claimant-Petitioner)
)
 v.)
)
 CAMPBRANCH COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-) DATE ISSUED: 04/18/2014
 INSURANCE FUND)
)
 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 on Second Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Second Remand (2004-BLA-6558) of Administrative Law Judge Alice M. Craft rendered on a claim filed on May 23, 2003,¹ pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the third time.

When this case was first before the Board, pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the claim was timely filed pursuant to 20 C.F.R. §725.308, that claimant worked for fifteen years in coal mine employment, and that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). The Board, however, vacated the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), based on the opinions of Drs. Rasmussen and Caudill. The Board held that the administrative law judge erred in finding that the medical opinion evidence established total disability without first determining the exertional requirements of claimant's usual coal mine employment. The Board, therefore, vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to "render a specific finding as to [the exertional requirements of] claimant's usual coal mine employment, and reconsider whether the medical opinion evidence is sufficient to establish that claimant is totally disabled from his usual coal mine employment by a respiratory or pulmonary impairment." *J.B. [Brock] v. Campbranch Coal Co.*, BRB No. 07-0484 BLA, slip op. at 10, (Mar. 31, 2008)(unpub.). The Board also vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remanded the case for reconsideration of that issue, if reached.

On remand, the administrative law judge determined that claimant's usual coal mine work, as a foreman/superintendent for employer, involved heavy manual labor and that the medical opinion evidence was sufficient to establish that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Further, considering all the relevant evidence, the administrative law judge found that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). Additionally, the administrative law judge found that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

¹ The 2010 amendments to the Black Lung Benefits Act do not apply to this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2; *see* 30 U.S.C. §921(c)(4)(2012).

Employer appealed. The Board held that the administrative law judge erred in “summarily stat[ing] that the record as a whole supported her finding that claimant’s work required heavy manual labor, without distinguishing between claimant’s description of the exertional requirements of his earlier coal mine employment and his work for employer.”² *Brock v. Campbranch Coal Co.*, BRB No. 10-0299 BLA, slip op. at 5, (Jan. 11, 2011)(unpub.). Additionally, the Board held that the administrative law judge failed to “address[] the fact that the work descriptions claimant provided to Drs. Caudill and Rasmussen included duties claimant performed in prior jobs. *Id.* Thus, the Board vacated the administrative law judge’s finding of total disability pursuant to Section 718.204(b)(2)(iv), and remanded the case for reconsideration thereunder. In particular, the Board “instructed [the administrative law judge] to render a specific finding as to the exertional requirements of claimant’s usual coal mine work as a superintendent with employer, and to consider whether the physicians had an accurate understanding of this work, prior to finding that claimant has satisfied his burden of proving total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).” *Id.* The Board further instructed the administrative law judge to determine whether total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(c), if reached. Additionally, the Board instructed the administrative law judge to explain her credibility determinations, and the bases for all of her findings of fact and conclusions of law, in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §932(a), as incorporated into the Act by 30 U.S.C. §932(a).

On remand, the administrative law judge found that claimant failed to provide sufficient information regarding the exertional requirements of claimant’s usual coal mine work for her to determine whether claimant is totally disabled from performing that employment pursuant to Section 718.204(b)(2)(iv). Accordingly, she denied benefits.

On appeal, claimant contends that employer should be dismissed as the responsible operator pursuant to an agreement reached between the Department of Labor and the carrier, identifying the Black Lung Disability Trust Fund as the party responsible for the payment of benefits. Claimant therefore contends that his September 1990-September 1991 work for employer should not be considered his usual coal mine work. Instead, claimant contends that his January 1987-January 1989 coal mine employment for his previous employer should be deemed his usual coal mine work. Thus, claimant contends that, as the administrative law judge previously found that the record as a whole

² The Board noted that the exertional requirements described by claimant on Form CM-913 pertain to the job he held from January 1987 to January 1989, and not his most recent coal mine job as a superintendent for employer from September 1990 to September 1991. *Brock v. Campbranch Coal Co.*, BRB No. 10-0299 BLA, slip op. at 4-5, (Jan. 11, 2011)(unpub.).

supported a finding that claimant's usual coal mine employment required heavy manual labor, the Board should reinstate the administrative law judge's previous decision of December 24, 2009 awarding benefits. Alternatively, claimant contends that the Board should vacate the administrative law judge's decision denying benefits and remand the case for further consideration of the exertional requirements of claimant's work for his previous employer. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), contends that there is "no reason to discount the miner's employment with employer for purposes of identifying usual coal mine employment simply because that entity is now unable to pay benefits." Director's Response Brief at 4. Instead, the Director contends that, as claimant raises no other argument regarding his work for employer, the administrative law judge's denial of benefits should be affirmed. *Id.* at 3-4.

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.³ 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Contrary to claimant's contention, employer's inability to pay benefits does not constitute a reason to disregard claimant's employment with employer for the purpose of identifying claimant's usual coal mine employment, the exertional requirements of that employment, and whether claimant is totally disabled from performing that employment. *See* 20 C.F.R. §§718.204(b)(1)(i); 725.490-725.495. We, therefore, reject claimant's assertion that the exertional requirements of his work for employer should not be considered in determining whether the evidence establishes that he has a totally disabling respiratory impairment. Moreover, claimant does not specifically challenge the administrative law judge's finding that he failed to establish the exertional requirements of his work for employer. Claimant's Brief at 8-10. Thus, we affirm the administrative

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3; Director's Response Brief at 1 n.1.

law judge's finding that claimant has failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge