BRB No. 09-0800 BLA

MOSES BROCK Claimant-Petitioner v. NALLY & HAMILTON ENTERPRISES, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/12/2010 DECISION and ORDER

Appeal of the Decision and Order–Denying Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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 Decision and Order–Denying Benefits (08-BLA-5040) of Administrative Law Judge Kenneth A. Krantz rendered on a subsequent claim[1] 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 credited claimant with twenty years of coal mine employment,[2] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 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 finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law

[1] Claimant's first claim for benefits, filed on July 29, 1994, was denied by the district director on December 29, 1994. Director's Exhibit 1. Claimant filed a second claim on April 3, 2001, which was a subsequent claim pursuant to 20 C.F.R. §725.309(d), as it was filed more than one year after the previous denial. Director's Exhibit 2. When claimant's second claim was being considered, his previously denied claim was not found in the record. Because the administrative law judge who adjudicated the second claim could not determine the basis for the previous denial, he considered the evidence submitted in connection with claimant's second claim to determine whether it established any element of entitlement. Director's Exhibit 2 at 52, 55. Since no element was established, benefits were denied. Director's Exhibit 2 at 69. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on September 23, 2005, based on claimant's failure to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Brock v. Nally & Hamilton Enters.*, BRB No. 05-0270 BLA (Sept. 23, 2005)(unpub.); Director's Exhibit 2 at 2. Claimant filed his current claim on December 18, 2006. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 6, 8, 9. 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*).

judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief in this appeal.[3]

By Order dated May 20, 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 new evidence does not establish total disability.[4] Claimant responds that this case should be remanded to the administrative law judge for further proceedings because "[t]he presumption contained within §921(c)(4) applies." Claimant's Supplemental Brief at 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).

To establish entitlement 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

[3] We affirm the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] 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. 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)).

"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 total disability. Director's Exhibit 2 at 6. Consequently, claimant had to submit new evidence establishing total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant argues that the administrative law judge erred in finding that the three new medical opinions did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Simpao, who examined claimant on behalf of the Department of Labor, reported that claimant's pulmonary function and blood gas studies were "normal," and opined that claimant's "pulmonary impairment . . . would not prevent him from doing his former coal mine employment duties" as a service worker. Director's Exhibit 12 at 21. Dr. Dahhan examined claimant on behalf of employer and obtained a "normal" pulmonary function study; he reported that claimant's blood gas study "showed minimum [sic] hypoxemia." Employer's Exhibit 1 at 2. Dr. Dahhan concluded that claimant "has no evidence of any significant impairment and/or disability," and "retains the physiological capacity to return to his previous coal mining work. . . . *Id*. Dr. Fino examined claimant on behalf of employer and reported that claimant's pulmonary function study, blood gas study, and diffusion capacity were all "normal." Employer's Exhibit 2 at 6. Dr. Fino concluded that "[t]here is no respiratory impairment present." *Id.* at 10. Based on this evidence, the administrative law judge found that the new medical opinions did not establish that claimant is totally disabled.

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 3. Contrary to claimant's contention, a medical opinion such as that of Dr. Fino, diagnosing no impairment, need not be compared with the exertional requirements of claimant's usual coal mine employment. *Wetzel v. Director, OWCP,* 8 BLR 1-139, 1-142 (1985). Moreover, the record reflects that Drs. Dahhan and Fino were aware of the nature of claimant's coal mine employment when they opined that he is not totally disabled. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); Director's Exhibit 12 at 18; Employer's Exhibit 1 at 1. We therefore reject claimant's contention that the administrative law judge erred in his analysis of the medical opinions. 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,* 23 BLR at 1-7, n.8. Consequently, we reject claimant's contentions and affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that the new evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and we affirm the denial of benefits pursuant to 20 C.F.R. §725.309(d). 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 Decision and Order–Denying Benefits 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