

BRB No. 07-0299 BLA

J.M.D.)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 12/19/2007
)
 SUNNY RIDGE COAL COMPANY)
)
 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 Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denial of Claim (04-BLA-6254) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge

¹ Claimant's first claim for benefits, filed on October 5, 1977, was finally denied on May 2, 1980, because the evidence did not establish any element of entitlement.

credited claimant with twenty years of coal mine employment, as stipulated.² The administrative law judge found that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge determined that the newly submitted evidence did not establish a change in an applicable condition of entitlement since the date upon which the denial of claimant's prior claim became final, 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 newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, agreeing with claimant that the administrative law judge did not consider relevant medical opinion evidence. Employer did not file a response brief.³

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'Keefe 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."

Director's Exhibit 1, internal exhibits 24-09, 24-01. Claimant's second claim for benefits, filed on March 12, 1998, was denied on May 21, 2002, because claimant did not establish total disability. Director's Exhibit 1, internal exhibit 1. Claimant filed his third and instant claim on June 9, 2003. Director's Exhibit 3.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202, 1-203 (1989)(*en banc*); Decision and Order at 2; Director's Exhibit 1, internal exhibit 2.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by a respiratory or pulmonary impairment. Director’s Exhibit 1, internal exhibit 1. 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), both claimant and the Director contend that, in evaluating whether the new medical opinion evidence established total disability, the administrative law judge failed to consider Dr. Simpao’s medical report diagnosing claimant with a moderate impairment. This contention has merit. The record reflects that Dr. Simpao examined and tested claimant on July 14, 2003, at the Director’s request, pursuant to the Director’s obligation to provide claimant with a complete pulmonary evaluation. Director’s Exhibit 8; *see* 20 C.F.R. §725.406. Dr. Simpao rendered a medical report in which he indicated that claimant’s pulmonary function study results reflected a moderate degree of obstructive airway disease, and he opined that claimant has a moderate impairment. Director’s Exhibit 8. This report was admitted into evidence. Hearing Tr. at 6; Director’s Exhibit 8. However, the administrative law judge did not discuss Dr. Simpao’s report, but instead inaccurately stated that no new medical opinions were submitted.⁴ Decision and Order at 7-8.

The administrative law judge’s failure to discuss and weigh relevant evidence requires remand. *See* 20 C.F.R. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we vacate the administrative law judge’s finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge should determine whether Dr. Simpao’s opinion that claimant has a moderate pulmonary impairment establishes that claimant’s respiratory or pulmonary condition prevents him from performing his usual coal mine employment.⁵ *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). If, on remand, the administrative law judge finds that Dr. Simpao’s opinion establishes total disability

⁴ The record reflects that the administrative law judge considered Dr. Simpao’s July 14, 2003 pulmonary function and blood gas studies in his decision, but found them to be nonqualifying and thus insufficient to establish total disability. Decision and Order at 5, 7.

⁵ The administrative law judge identified claimant’s last coal mine employment as a bulldozer operator. Decision and Order at 5; November 2, 2005 Transcript at 12.

pursuant to Section 718.204(b)(2)(iv), the administrative law judge must weigh together all contrary probative evidence regarding disability to determine whether it establishes claimant's total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

In his Motion to Remand, the Director has expressed his concern that resolution of this case should not be delayed further. Accordingly, he stated that if, on remand, the administrative law judge finds that Dr. Simpao's opinion "is incomplete or wholly lacking in probative value," the administrative law judge "should reopen the record for the Director to cure the perceived defects in Dr. Simpao's report or to submit a new pulmonary examination." Director's Motion to Remand at 2-3.

However, we reject claimant's argument that he must be considered totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 3. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Accordingly, the administrative law judge's Decision and Order Denial of Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge