BRB No. 11-0328 BLA

JUNIOR S. FYFFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINTOP RESTORATION, INCORPORATED	)	DATE ISSUED: 01/20/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 – Denial of Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Junior S. Fyffe, Flat Gap, Kentucky, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits in a Subsequent Claim (2008-BLA-5830) of Administrative Law

Judge Larry. S. Merck, rendered 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).[1] The administrative law judge credited claimant with at least sixteen years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish that claimant has clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, based on his review of the entire record, the administrative law judge found that claimant failed to establish either the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by

[1] Claimant filed his first claim for benefits on September 14, 1992, which was denied by the district director on February 22, 1993, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on March 2, 2000, which was denied by the district director by reason of abandonment on June 5, 2000. *Id*. Claimant filed a third claim on May 2, 2001, which was denied by Administrative Law Judge Thomas F. Phalen, Jr., on March 16, 2005, because claimant failed to establish any of the elements of entitlement. *Id*. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Fyffe v. Mountaintop Restoration Inc*., BRB No. 05-0619 BLA (Sept. 30, 2005) (unpub.). Claimant took no further action until he filed the current subsequent claim on October 15, 2007. Director's Exhibit 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because he failed to establish any of the requisite elements of entitlement, he was required to establish at least one of those elements in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3). The administrative law judge determined that claimant established a change in an applicable condition of entitlement by proving that he has pneumoconiosis. However, the administrative law judge determined, based on his review of all of the evidence on the merits, that claimant is not totally disabled. We review the administrative law judge's decision for error in his finding that claimant failed to establish total disability.

If the irrebuttable presumption described at 20 C.F.R. §718.304 does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to or less than those in Appendix B, blood gas studies showing values equal to or less than those set forth in Appendix C, by evidence establishing cor pulmonale with right-sided congestive heart failure, or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

I. Complicated Pneumoconiosis -- 20 C.F.R. §718.304(a)

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a)

when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered four readings of two x-rays, dated January 3, 2008 and March 15, 2008, relevant to whether claimant has complicated pneumoconiosis. Director's Exhibits 16, 20; Employer's Exhibit 4. The administrative law judge permissibly concluded that the January 3, 2008 x-ray is "inconclusive," as it has one positive reading for complicated pneumoconiosis, by Dr. Halbert, dually-qualified as a Board-certified radiologist and B reader, and one negative reading for complicated pneumoconiosis, by Dr. Wheeler, also a dually-qualified radiologist.[3] Decision and Order at 23; Director's Exhibit 16; Employer's Exhibit 4. Because the only other x-ray, dated March 15, 2008, was read as negative for complicated pneumoconiosis, by Dr. Dahhan, a B reader, *see* Director's Exhibit 20, we affirm the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order at 10, 22-23; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Pursuant to 20 C.F.R. §718.304(c),[4] the administrative law judge found that there was no CT scan evidence to support a finding of complicated pneumoconiosis. Decision and Order at 20. The administrative law judge noted that, while Dr. Spitz interpreted two CT scans, dated November 30, 2006 and June 17, 2008, as showing large opacities, Dr. Spitz specifically opined that the findings "are not consistent with coal workers' pneumoconiosis." Employer's Exhibit 2. The administrative law judge further found

[3] Dr. Barrett read the January 3, 2008 film for quality purposes only. Employer's Exhibit 4.

[4] There is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

that Dr. Wheeler read the June 17, 2008 CT scan as showing masses and nodules consistent with granulomatous disease, but not complicated pneumoconiosis. Decision and Order at 20; Employer's Exhibit 4. Additionally, the administrative law judge found that claimant's treatment records did not contain a diagnosis of complicated pneumoconiosis. Decision and Order at 20; Employer's Exhibit 9.

With regard to the medical opinion evidence, the administrative law judge found that only one physician, Dr. Mettu, diagnosed complicated pneumoconiosis, based on Dr. Halbert's positive reading of the January 3, 2008 x-ray.[5] Decision and Order at 13; Director's Exhibit 16. The administrative law judge gave Dr. Mettu's opinion less weight because Dr. Mettu testified, in his April 14, 2009 deposition, that the large opacity "could be" due to rheumatoid nodules, a malignancy, an infection, or pneumoconiosis. Decision and Order at 13; Employer's Exhibit 11 at [8]. As noted by the administrative law judge, Dr. Mettu also indicated that a lung biopsy was necessary in order to make a definite diagnosis. Decision and Order at 13; Employer's Exhibit 11 at 8. Because the administrative law judge rationally found that Dr. Mettu "equivocates" on whether claimant has complicated pneumoconiosis or some alternate disease, we affirm the administrative law judge's finding that there is "no well-reasoned or well-documented" opinion to establish that claimant has complicated pneumoconiosis under 20 C.F.R. §718.304(c). Decision and Order at 13; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 188, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

In light of the forgoing, we affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant has not invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Melnick*, 16 BLR at 1-33.

II. Total Disabilty – 20 C.F.R. §718.204(b)

In considering whether claimant established total disability at 20 C.F.R. §718.204(b), the administrative law judge indicated that he reviewed the evidence submitted with the prior claims but "because of the age of the prior evidence," he considered it to be "less probative of claimant's current condition." Decision and Order at 26. We affirm the administrative law judge's reliance on the more recent evidence to determine whether claimant is totally disabled. *See generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

[5] Dr. Mettu examined claimant on January 3, 2008, at the request of the Department of Labor. Director's Exhibit 16.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the record developed in conjunction with the current subsequent claim contains three pulmonary function studies, dated January 3, 2008, March 15, 2008 and June 17, 2008. Director's Exhibits 16, 20; Employer's Exhibit 8. Because none of the pulmonary function studies was qualifying for total disability under the regulatory criteria,[6] the administrative law judge properly found that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 24.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three arterial blood gas studies, dated January 3, 2008, March 15, 2008 and June 17, 2008. Director's Exhibits 16, 20; Employer's Exhibit 8. Because none of the arterial blood gas studies was qualifying for total disability under the regulatory criteria,[7] the administrative law judge properly found that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 24-25.

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure, and, therefore, that claimant is unable to establish total disability pursuant to that subsection. Decision and Order at 25 n.11.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Sikder, Mettu, Dahhan and Rosenberg, along with treatment records from Dr. Kousa. Decision and Order at 25-26. The administrative law judge found that Dr. Sikder examined claimant on April 12, 2005, and diagnosed "stage 1 obstructive pulmonary disease" but that he did not offer an opinion as to whether claimant is totally disabled. Decision and Order at 25; Director's Exhibit 19. The administrative law judge found that Dr. Mettu diagnosed "no pulmonary impairment," based on his examination of claimant on January 3, 2008. Decision and Order at 25; Director's Exhibit 16. The administrative law judge also found that Dr. Dahhan examined claimant on March 15, 2008, and opined that claimant has no respiratory or pulmonary impairment. Decision and Order at 25-26; Director's Exhibit 20; Employer's Exhibit 7. The administrative law judge further noted that in consultative reports dated December 9 and 15, 2008, and in a deposition conducted on February 18, 2009, Dr.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] A "qualifying" arterial blood gas study shows values equal to or less than those set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Rosenberg opined that claimant is not totally disabled. Decision and Order at 26; Employer's Exhibits 5, 6, 10. Finally, the administrative law judge reviewed claimant's treatment records from Dr. Kousa and found that they contained no diagnosis of total disability. Decision and Order at 26; Employer's Exhibit 9.

Because there is no medical opinion evidence to establish that claimant is totally disabled, we affirm the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(i)(iv). In light of the foregoing, we further affirm, as supported by substantial evidence, the administrative law judge's overall finding, pursuant to 20 C.F.R. §718.204(b), that claimant is not totally disabled by a respiratory or pulmonary impairment.[8]

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded.[9] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[8] Congress enacted recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability 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)). Because we affirm the administrative law judge's finding that claimant is not totally disabled, we also affirm his finding that claimant is unable to invoke the rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 7-8 n.4.

[9] Because we have affirmed the denial of benefits, we need not reach employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 725.309. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge