

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 16-0588 BLA

RONNIE E. WHITEHEAD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 06/27/2017
c/o JAMES RIVER SERVICES 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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05737) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed on July 27, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that the record supported the parties' stipulations that claimant has twenty-seven years of underground coal mine employment, and pneumoconiosis that arose out of his coal mine employment. The administrative law judge further determined that claimant was unable to prove he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)<sup>1</sup> or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled. The Director, Office of Workers' Compensation Programs,<sup>2</sup> responds, urging affirmance of the denial of benefits.

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

<sup>2</sup> The administrative law judge noted that on February 11, 2015, counsel for the employer filed a Motion to Withdraw as Counsel, "stating that the Employer filed for Chapter 11 Bankruptcy protection on April 7, 2014, and would no longer continue providing funding for their Federal Black Lung self-insured program." Decision and Order at 2 n.2. The administrative law judge further noted that on March 30, 2015, LaTasha T. Thomas entered her appearance as counsel for the Director, Office of Workers' Compensation Programs. *Id.*

<sup>3</sup> 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*, 12 BLR 1-200 (1989) (en banc). Director's Exhibit 3.

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Total disability is established by: 1) qualifying pulmonary function studies; 2) qualifying arterial blood gas studies; 3) establishing the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

We affirm, as unchallenged on appeal, the administrative law judge's findings that the pulmonary function and arterial blood gas study evidence is non-qualifying for total disability and that claimant failed to establish that he suffers from cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8-9. Moreover, claimant does not contend that he suffers from complicated pneumoconiosis and therefore is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304.

On appeal, claimant instead generally asserts that the administrative law judge failed to adequately consider the physical requirements of claimant's usual coal mine work when assessing the physician opinions on disability. Claimant's Brief at 3, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We disagree. The administrative law judge considered claimant's testimony that his last coal mine job was as a mobile bridge operator, which "required physical strength," and that he was a working foreman prior to that position, working right alongside the men in various positions that involved heavy manual labor. Decision and Order at 3-5; Hearing Transcript at 11-15, 23; Director's Exhibits 13 at 5-6, 14, 16-17. The administrative law judge correctly noted, however, that Dr. Rasmussen and Dr. Dahhan "both concluded, based on their examinations and clinical findings, and the results of the pulmonary function and arterial blood gas testing, that [c]laimant's does not have a respiratory or pulmonary impairment that prevents him from returning to his previous job in the coal mines." Decision and Order at 11; Director's Exhibits 9, 10. As both Dr. Rasmussen and Dr. Dahhan identified claimant's usual coal mine job, and opined that claimant was not totally disabled, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261, (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121.

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. *See Anderson*, 12 BLR at 1-112; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because claimant failed to establish a totally disabling respiratory or pulmonary impairment, which is a required element of entitlement, we affirm the administrative law judge's findings that claimant failed to invoke the Section 411(c)(4) presumption, and that he failed to establish entitlement pursuant to 20 C.F.R. Part 718.<sup>4</sup>

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<sup>4</sup> Claimant also generally asserts that, because pneumoconiosis is a progressive and irreversible disease, and considerable time has passed since claimant's initial diagnosis of pneumoconiosis, it can be assumed that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. An administrative law judge's finding of total disability, however, must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Claimant does not identify specific error by the administrative law judge, and his general assertion that the physical requirements of claimant's work were not considered in this case or that the record supports a finding of total disability are without merit. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge