

BRB No. 05-0700 BLA

RICHARD SAYLOR)
)
 Claimant-Petitioner)
)
 v.)
)
 GATLIFF COAL COMPANY) DATE ISSUED: 03/22/2006
)
 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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6311) of Administrative Law Judge Pamela Lakes Wood denying benefits 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 credited claimant with at least ten years of coal mine employment based on the parties' stipulation and adjudicated this claim² pursuant to the regulations contained in 20 C.F.R. Part 718.³ On the merits, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).⁴ Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant filed his first claim on December 1, 1993. Director's Exhibit 1. On January 13, 1997, Administrative Law Judge Richard E. Huddleston issued a Decision and Order denying benefits on the grounds that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability. *Id.* The Board affirmed Judge Huddleston's denial of benefits on the sole ground that claimant failed to establish the existence of pneumoconiosis. *Saylor v. Renfro Construction Co.*, BRB No. 97-0619 BLA (Jan. 22, 1998)(unpub.). The Board held that any error regarding Judge Huddleston's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(c)(4) (2000) would be harmless. *Saylor*, BRB No. 97-0619 BLA, slip op. at 4. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on August 3, 2001. Director's Exhibit 3.

³Although the administrative law judge noted that the instant case involves a subsequent claim, she did not render a finding with respect to the issue of whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge specifically stated, "[e]xtended discussion of this issue is unnecessary, as the preponderance of the evidence clearly shows that, even if the claim is reopened and considered on the merits, [c]laimant cannot prevail." 2005 Decision and Order at 9.

⁴The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.⁵

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Fino, and Rosenberg.⁶ In a January 9, 2002 report, Dr. Baker opined that claimant's impairment is minimal. Director's Exhibit 11. In an attached form, Dr. Baker checked both a box indicating that claimant has no impairment and a box indicating that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In a March 25, 2004 report, Dr. Fino opined that claimant does not have a disabling respiratory impairment. Employer's Exhibit 7. Similarly, in a September 27, 2002 report, Dr. Rosenberg opined that claimant does not have a significant impairment and could perform his previous coal mining job or other similar arduous types of labor. Employer's Exhibit 2. Further, in an April 23, 2004 deposition, Dr. Rosenberg opined that claimant retains the respiratory capacity to return to his previous coal mining job or other, similar, arduous manual labor. Employer's Exhibit 11. Based on her review of the medical opinion evidence, the administrative law judge stated that "[t]here is thus no evidence supporting a finding of total disability under [S]ection 718.204 apart from the [c]laimant's own testimony, which is insufficient to establish total disability under [S]ection 718.204(d)(5)."⁷ 2005 Decision and Order at 11.

⁵Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶In a March 9, 2004 report, Dr. Vuskovich opined that "[claimant] had the pulmonary capacity to continue working in the coal industry, or to engage in any occupation that requires pulmonary capacity comparable to that required for successful coal industry employment." Employer's Exhibit 9. The administrative law judge did not consider Dr. Vuskovich's opinion at 20 C.F.R. §718.204(b)(2)(iv) on the grounds that it is not reasoned and it exceeds the evidentiary limitations set forth in 20 C.F.R. §725.414. 2005 Decision and Order at 11.

⁷The administrative law judge stated, "[w]ith respect to the evidence that was previously of record, I agree with Judge Huddleston's determination that it does not

Claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine job with Dr. Baker's assessment of claimant's pulmonary impairment. Contrary to claimant's assertion, the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) is based on her consideration of the exertional requirements of claimant's last usual coal mine job as a dozer operator with Dr. Baker's assessment that claimant's impairment is minimal. The administrative law judge specifically stated, "[in] considering the medical evidence along with the [c]laimant's testimony and description of his work, which was not particularly arduous, I find that he has not established that he is incapable of performing his last and usual coal mine employment as a dozer operator." 2005 Decision and Order at 11. Thus, we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine job with Dr. Baker's assessment of claimant's pulmonary impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Furthermore, we note that claimant has offered no evidence to establish that a minimal impairment would prevent a miner from performing his work as a dozer operator. Thus, claimant has failed to prove that this diagnosis would support a finding of total disability. Claimant appears to argue that the work of a dozer operator involves such heavy dust exposure that a miner with a minimal impairment would be barred from that employment. That contention, however, is irrelevant to a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

We also reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to 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). Furthermore, as claimant raises no other argument at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore*

establish total disability. (DX 1)." 2005 Decision and Order at 10. The administrative law judge further stated that "the evidence submitted in connection with the instant claim does not establish total disability either." *Id.*

and Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge