

BRB No. 07-0573 BLA

N.M.)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 03/27/2008
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Gregory F. Jacob, 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
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2005-BLA-05836)
of Administrative Law Judge Joseph E. Kane 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). Claimant filed his subsequent claim
on March 29, 2004.¹ Director's Exhibit 4. Because the Director, Office of Workers'

¹ Claimant originally filed claims with the Social Security Administration on
December 20, 1972 and the Department of Labor (DOL) on August 30, 1977. Director's
Exhibit 1. DOL denied both claims on November 19, 1980. *Id.* Following a formal
hearing, Administrative Law Judge Arthur C. White denied benefits in a Decision and
Order issued on December 5, 1983. *Id.* Claimant filed a duplicate claim on May 30,

Compensation Programs (the Director), conceded that claimant suffered from coal workers' pneumoconiosis, the administrative law judge found that claimant had demonstrated a change in an applicable condition of entitlement since the denial of his prior claim as required by 20 C.F.R. §725.309 and, thus, considered the claim on the merits. Noting that the medical evidence developed in conjunction with claimant's prior claims was between six and twenty years old, the administrative law judge gave greater weight to the newly submitted evidence relevant to whether claimant was totally disabled. After weighing all of the newly submitted evidence, the administrative law judge determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in failing to consider the exertional requirements of his usual coal mine work, prior to finding that he was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director 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.² 33 U.S.C. §921(b)(3), as incorporated by 30

1991, which was denied by Administrative Law Judge Bernard J. Gilday on July 18, 1994. *Id.* Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*N.M.*] *v. Perry County Coal Co.*, BRB No. 94-3688 BLA (May 26, 1995) (unpub.); Director's Exhibit 1. Claimant filed a second duplicate claim on April 29, 1997. Director's Exhibit 2. On March 19, 1999, Administrative Law Judge Thomas F. Phalen, Jr., denied benefits, finding that claimant failed to demonstrate a material change in conditions because the newly submitted evidence failed to establish either the existence of pneumoconiosis or total disability. *Id.* The denial was also affirmed by the Board. [*N.M.*] *v. Director, OWCP*, BRB No. 99-0665 BLA (Mar. 28, 2000) (unpub.); Director's Exhibit 2. On October 20, 2000, claimant filed a request for modification. Director's Exhibit 4. On March 26, 2002, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order denying benefits, which was affirmed by the Board on appeal. [*N.M.*] *v. Director, OWCP*, BRB No. 02-0496 BLA (Mar. 18, 2003) (unpub.); Director's Exhibit 3. Claimant took no further action with regard to the denial of his modification request, but filed the current claim on March 29, 2004. Director's Exhibit 4.

² Because claimant's coal mine employment was in Kentucky, 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*); Director's Exhibit 1.

U.S.C. §932(a); *O’Keeffe 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In this case, claimant contends that the administrative law judge erred in failing to find that he established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).³ Claimant asserts that the administrative law judge “made no mention of [claimant’s] usual coal mine work in conjunction with Dr. Rasmussen’s opinion of disability.” Claimant’s Brief at 3. Claimant further asserts that “taking into consideration [claimant’s] condition against his duties [as a track man], as well as the medical opinion of Dr. Rasmussen (who did diagnose a pulmonary impairment), it is rational to conclude that claimant’s condition prevents him from engaging in his usual coal employment.” *Id.*

Claimant’s arguments are without merit. In this case, the administrative law judge properly noted that the record contains only one newly submitted medical opinion by Dr. Rasmussen, who conducted a pulmonary evaluation at the request of the Department of Labor. Director’s Exhibit 12. Contrary to claimant’s assertion, although Dr. Rasmussen interpreted claimant’s blood gas study as showing mild hypoxemia, he further opined that claimant had “no significant loss of lung function.” *Id.* Dr. Rasmussen also stated that claimant was capable of performing his usual coal mine work as a trackman, which required “very heavy manual labor.” *Id.* Because Dr. Rasmussen rendered his disability assessment in terms of claimant’s capacity to perform his last coal mining job, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence at Section 718.204(b)(2)(iv). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en*

³ We affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant has pneumoconiosis and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and his finding that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

banc), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).⁴ Furthermore, we affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2). See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Insofar as claimant failed to establish total disability, a requisite element of entitlement in a miner's claim filed under Part 718, benefits are precluded. *Anderson*, 12 BLR at 1-112.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

⁴ Additionally, claimant argues that since pneumoconiosis is a progressive and irreversible disease, it is reasonable to conclude that "during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine employment." Claimant's Brief at 3-4. Contrary to claimant's contention, however, an administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Based on the record evidence in this case, the administrative law judge properly concluded that claimant is not totally disabled.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge