

BRB No. 07-0240 BLA

G.N.)
Claimant-Petitioner)
)
v.)
)
ASHER TRUCKING, INCORPORATED)
)
and) DATE ISSUED: 10/24/2007
)
EMPLOYERS INSURANCE OF WAUSAU)
)
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Carl Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Rita A. Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5086) of Administrative Law Judge Thomas F. Phalen, Jr., 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 a subsequent claim on November 13, 2003.¹ Director’s Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on July 6, 2004. Director’s Exhibit 16. Claimant requested a hearing, which was held on April 18, 2006. Based on the parties’ stipulation, the administrative law judge credited claimant with sixteen years of coal mine employment. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, after considering all the record evidence, the administrative law judge also found that claimant failed to establish, by a preponderance of the evidence, that he suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in finding that he was not totally disabled “pursuant to 20 C.F.R. §718.204(c).”² Additionally, based on the administrative law judge’s determination that Dr. Simpao failed to provide an opinion as to whether claimant was totally disabled, claimant asserts that the Department of Labor (DOL) failed to provide him with a credible and complete pulmonary evaluation to substantiate his claim as required under the Act.³ Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, also responds, asserting that DOL has satisfied its obligation to

¹ Claimant initially filed a claim for benefits on July 10, 2000, which was denied by the district director on October 18, 2000 for failure to establish any of the requisite elements of entitlement. Director’s Exhibit 1. Claimant took no further action with regard to the denial of the July 10, 2000 claim until he filed his current subsequent claim on November 13, 2003. Director’s Exhibit 3.

² Although claimant asserts that the administrative law judge erred by not finding that he was totally disabled, he references the regulation at 20 C.F.R. §718.204(c). Claimant’s Brief at 2. We note, however, that under the revised regulations, Section 718.204(c) is the regulation pertaining to disability causation while 20 C.F.R. §718.204(b)(2) is the regulation relevant to whether claimant is able to establish total respiratory or pulmonary disability.

³ Dr. Simpao performed an examination of claimant at the request of the Department of Labor on December 18, 2003. Director’s Exhibit 9.

provide claimant with a complete pulmonary evaluation pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406.

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

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" 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 any of the requisite elements of entitlement. In this case, the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant was totally disabled by a respiratory or pulmonary impairment, one of the elements of entitlement previously adjudicated against claimant in his prior claim. Consequently, the administrative law judge found that claimant had established a change in an applicable condition of entitlement under Section 725.309 and then proceeded to evaluate all of the record evidence relevant to claimant's entitlement to benefits. Decision and Order – Denial of Benefits (Decision and Order) at 12.

In order to establish entitlement to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he suffers from pneumoconiosis, arising out of coal mine employment, and that he is totally disabled 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After reviewing all of the record evidence, including the evidence submitted with claimant's prior claim, the administrative law judge denied benefits, in part, because he determined that claimant does not have pneumoconiosis. Pursuant to Section

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

718.202(a)(1), the administrative law judge found that the four x-rays of record were negative for pneumoconiosis. Decision and Order at 15-16. Because there is no biopsy evidence contained in the record, the administrative law judge also found that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). *Id.* at 16. Similarly, because claimant was unable to avail himself of any of the presumptions found at 20 C.F.R. §§718.304, 718.305, or 718.306, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *Id.* Lastly, the administrative law judge credited the opinions of Drs. Dahhan and Broudy, that claimant does not suffer from clinical or legal pneumoconiosis, over the contrary opinion of Dr. Simpao, and thus found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id.* at 16-17.

Because claimant does not raise any allegation of error with respect to the administrative law judge's determinations under Section 718.202(a)(1)-(4), we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant does not have pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), it is not necessary to address claimant's argument, that the administrative law judge erred in not finding that he was totally disabled, or his assertion that he did not receive a complete pulmonary evaluation based on the administrative law judge's determination "that Dr. Simpao failed to make any findings regarding the issue of pulmonary impairment." Claimant's Brief at 4. Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, *see Trent*, 11 BLR at 1-27, benefits are precluded.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge