

U.S. Department of Labor

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



BRB No. 15-0006 BLA

WAYNE HOWARD)
)
 Claimant-Petitioner)
)
 v.)
)
 SHAMROCK COAL COMPANY,)
 INCORPORATED, c/o JAMES RIVER)
 SERVICES COMPANY)
)
 and)
)
 SUN COAL COMPANY,) DATE ISSUED: 10/21/2015
 INCORPORATED, c/o WELLS FARGO)
)
 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 Denying Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for
employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-6175) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on December 21, 2009,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Although the administrative law judge credited claimant with fifteen years of coal mine employment, he found that the newly submitted medical opinion evidence, developed since the denial of the prior claim, was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment. Based on this finding, the administrative law judge determined that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge also found that claimant failed to establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c),³ and denied benefits accordingly.

¹ Claimant filed an initial claim for benefits on February 23, 1993, which was denied by the district director on July 13, 1993, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on March 26, 2001. Director's Exhibit 2. In a Decision and Order issued on December 5, 2003, Administrative Law Judge Alice M. Craft found that claimant established the existence of legal pneumoconiosis, but failed to establish a totally disabling respiratory or pulmonary impairment, and therefore denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Howard v. Shamrock Coal Company, Inc.*, BRB No. 04-0295 BLA (Aug. 20, 2004) (unpub.). Claimant took no further action until filing the current subsequent claim. Director's Exhibit 3.

² Relevant to this claim, amended Section 411(c)(4) provides that if a miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions that are substantially similar to those of an underground mine, and also has a totally disabling respiratory or pulmonary impairment, he or she is entitled to a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

³ The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c).

On appeal, claimant argues that the administrative law judge erred in finding the newly submitted medical opinion evidence to be insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁴ Although the administrative law judge did not render a finding regarding the existence of pneumoconiosis, claimant asserts that the evidence of record is sufficient to establish the disease. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to claimant's appeal.

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.⁵ 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).

To establish entitlement to benefits under the Act, claimant must establish 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. When 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(c); *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(c)(3). Claimant's prior claim was denied because he failed to establish a totally disabling respiratory or pulmonary impairment. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309(c)(3), (4).

⁴ Although claimant's counsel references 20 C.F.R. §718.204(c) (2000) as the applicable regulation for determining total disability, the 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), as set forth in the 2001 revised regulations.

⁵ Because claimant's coal mine employment was in Kentucky and Tennessee, 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 Exhibits 2, 4, 6; Hearing Transcript at 13.

Claimant notes that an administrative law judge is required to consider the physical requirements of his usual coal mine work in conjunction with the physician's opinions assessing disability. Claimant's Brief at 6-7, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Claimant states, "[i]t can be reasonably concluded that [his] usual coal mining duties involved [him] being exposed to heavy concentrations of dust on a daily basis." *Id.* at 7. In addition, claimant argues as follows:

Taking into consideration [claimant's] condition against such duties, as well as the medical opinion of Dr. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Id. at 7. Claimant further contends that, since pneumoconiosis has been proven to be 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. *Id.*

Claimant does not identify specific error by the administrative law judge, and his general assertion that the record supports a finding of total disability is without merit.⁶ *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). The administrative law judge noted correctly that there are two newly submitted medical reports. Decision and Order at 6; Director's Exhibit 12; Employer's Exhibit 2. Dr. Baker performed the examination of claimant for the Department of Labor on December 3, 2010. Director's Exhibit 12. Based on the results of the pulmonary function testing, he diagnosed claimant with a "mild impairment" of respiratory function. *Id.* at 19. Dr. Baker indicated that claimant worked as a roof bolter, and opined that claimant retained the respiratory capacity to perform his usual coal mine work or comparable work, in a dust-free environment. *Id.* Dr. Dahhan also examined claimant on June 19, 2011, and diagnosed a "mild impairment" of respiratory function based on the pulmonary function testing. Employer's Exhibit 2 at 3. Dr. Dahhan indicated that all of claimant's "mining

⁶ A physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989).

employment was underground operating a bolt machine” and further stated that claimant has the “physiological capacity to return to his previous coal mining work or job of comparable physical demand.” *Id.* at 1, 3.

As both Dr. Baker and Dr. Dahhan correctly identified claimant’s usual coal mine job,⁷ 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).⁸ *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. We specifically reject claimant’s assertion that total disability has been established in this case because claimant established the existence of legal pneumoconiosis, and pneumoconiosis is a progressive and irreversible disease. An administrative law judge’s finding of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *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, we affirm the administrative law judge’s findings that claimant failed to invoke the amended Section 411(c)(4) presumption, and that he failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).⁹

⁷ Claimant testified at the April 23, 2014 hearing that he worked as a roof bolter. Hearing Transcript at 17; *see* Director’s Exhibit 5.

⁸ We affirm, as unchallenged on appeal, the administrative law judge’s findings that the newly submitted pulmonary function and arterial blood gas study evidence is non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence in the record that he suffers from cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

⁹ Because the administrative law judge found that claimant failed to establish total disability, we need not address claimant’s argument that the evidence of record establishes the existence of pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge