BRB No. 08-0244 BLA

C.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	DATE ISSUED: 09/22/2008
	)	
and	)	
	)	
AMERICAN MINING 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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5765) of Administrative Law Judge Larry S. Merck (the administrative law judge) denying benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1] Claimant filed his first claim on February 5, 2001. Director's Exhibit 1. It was

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with twenty-nine years of coal mine employment based on the parties' stipulation,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)[3] or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, claimant challenges the administrative law judge's finding that the medical opinion evidence did not 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 benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

---

finally denied on June 29, 2004. *Id*. Claimant filed this claim on August 4, 2005. Director's Exhibit 3.

[2] The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibit 6. Accordingly, 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 (1989)(*en banc*).

[3] Administrative Law Judge Larry S. Merck (the administrative law judge) concluded that the issue of whether the evidence established that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203 was moot, in light of his finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

[4] Because the administrative law judge's length of coal mine employment finding and his findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the new reports of Drs. Simpao, Dahhan, and Rosenberg. Dr. Simpao diagnosed a mild pulmonary impairment, and opined that claimant was not totally disabled due to his pulmonary impairment. Director's Exhibit 9. Similarly, Dr. Dahhan opined that claimant does not have a pulmonary impairment or disability, and that he retains the respiratory capacity to continue his previous coal mining work or a job of comparable physical demand. Employer's Exhibit 1. Lastly, Dr. Rosenberg opined that from a pulmonary perspective claimant was not disabled from performing his previous coal mining job or other similarly arduous types of labor. Employer's Exhibit 7.

Because Dr. Simpao opined that claimant was not totally disabled due to his mild pulmonary impairment,[5] Director's Exhibit 9, the administrative law judge was not required to make a comparison of Dr. Simpao's opinion with the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Simpao's disability assessment.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no new credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

[5] Dr. Simpao noted that claimant's usual coal mine job as a prep plant operator required him to shovel samples of coal off from the beltline that weighed approximately fifteen pounds and carry 4 x 8 sheets of metal and other heavy objects during shifts of ten hours. Director's Exhibit 9.

Furthermore, Administrative Law Judge Thomas F. Phalen, Jr. properly found that the medical evidence submitted in the prior claim was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv).[6] Thus, because the medical evidence as a whole is insufficient to establish total disability on the merits, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).[7] Consequently, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

---

[6] On July 31, 2003, Administrative Law Judge Thomas F. Phalen, Jr., issued a Decision and Order - Denying Claimant's Request to Modify Prior Denial of Benefits. Director's Exhibit 1. Judge Phalen considered all the evidence that was submitted in the prior claim in finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b), and thus, that he failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *Id*. In its Decision and Order, the Board noted that Judge Phalen erred in considering whether the evidence was sufficient to establish modification of the district director's denial of claimant's claim. [*C.T.*] *v. Manalapan Mining Co*., BRB No. 03-0765 BLA, slip op. at 3 (Jun. 29, 2004)(unpub.). Nonetheless, the Board held that "because [Judge Phalen], in his consideration of whether there was a mistake in a determination of fact, considered all of the evidence of record, he effectively addressed the merits of claimant's claim." [*C.T.*], BRB No. 03-0765 BLA, slip op. at 3. The Board affirmed Judge Phalen's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b). [*C.T.*], BRB No. 03-0765 BLA, slip op. at 5, 6.

[7] In view of our disposition of the case on the merits at 20 C.F.R. §718.204(b), we decline to address claimant's contentions that the administrative law judge erred in finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and thereby, his finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge