BRB No. 05-0693 BLA

RAYMOND LARRY JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIANGLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/21/2006
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY, INCORPORATED	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr., (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Lance O. Yeager (Ferreri & Fogle), Louisville, Kentucky, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5654) of Administrative Law Judge Robert L. Hillyard 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).[1] The administrative law judge credited claimant with sixteen years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[3]

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. 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).

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*

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[1] Claimant's initial application for benefits, filed on November 3, 1993, was denied on April 11, 1994 because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed his current application for benefits on February 2, 2001. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Decision and Order at 4; Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has sixteen years of coal mine employment, and that he did not establish the existence of pneumoconiosis or that he is totally disabled with the new evidence, pursuant to 20 C.F.R. §§718.202(a)(1)-(a)(4), 718.204(b)(2)(ii)-(b)(2)(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.204(b)(2)(i), claimant contends that the administrative law judge erred in finding that he did not establish total disability. Specifically, claimant argues that the administrative law judge found that both of claimant's new pulmonary function studies were qualifying[4] for total disability, yet gave no explanation for why these two studies did not establish that claimant is totally disabled. Claimant's Brief at 2-3; *see* Decision and Order at 5-6, 14; Director's Exhibit 10; Employer's Exhibit 4. Employer responds that since claimant failed to establish the existence of pneumoconiosis, entitlement is precluded and "any argument concerning total disability is a moot point." Employer's Brief at 5.

We conclude that claimant's contention has merit, but we agree with employer that on this record as weighed by the administrative law judge, it is pointless to remand this case. The applicable regulation provides that "[i]n the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability." 20 C.F.R. §718.204(b)(1)(ii). The administrative law judge must therefore identify and weigh any contrary probative evidence in determining whether total disability is established. *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991). In the case at bar, after noting that claimant's pulmonary function studies

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

were qualifying and that his blood gas studies were non-qualifying, and after discrediting all of the medical opinions, the administrative law judge made the following finding:

> As a result of the qualifying pulmonary function testing, nonqualifying blood gas testing, and the lack of a well-reasoned opinion that the Claimant suffers from total pulmonary or respiratory disability, I find that claimant has failed to establish total disability under § 718.204(b)(2).

Decision and Order at 16. Claimant is correct that the administrative law judge merely stated a conclusion, without explaining whether or on what basis claimant's qualifying pulmonary function studies were outweighed by any contrary probative evidence. *See* 20 C.F.R. §718.204(b)(1)(ii); *Collins*, 21 BLR at 1-191; *Beatty*, 16 BLR at 1-13-14.

However, in this particular case claimant has not identified an error requiring remand. To establish his entitlement to benefits, claimant must prove that he suffers from pneumoconiosis. *Anderson*, 12 BLR at 1-112. Claimant alleges no error in the administrative law judge's finding that the new evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Review of the record of claimant's prior denied claim discloses no evidence of pneumoconiosis.[5] Director's Exhibit 1. Thus, on this record as weighed by the administrative law judge, claimant's entitlement is precluded. Even were the administrative law judge to find that claimant has established that he is totally disabled, the administrative law judge would have to deny the claim on its merits because claimant cannot establish the pneumoconiosis element. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, the administrative law judge's error at total disability was harmless in this case. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits.

[5] The record of claimant's 1993 claim contained no positive x-ray readings for pneumoconiosis, no biopsy evidence, and none of the presumptions by which the existence of pneumoconiosis may be established were applicable to that claim. *See* 20 C.F.R. §718.202(a)(1)-(a)(3). Additionally, the sole medical opinion submitted in that claim did not diagnose claimant with pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); Director's Exhibit 1.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge