BRB No. 10-0596 BLA

FRANK J. BREWER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TERRY GLENN COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/08/2011
	)	
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 Administrative Law Judge Paul C. Johnson, Jr., United States Department of Labor.

Frank J. Brewer, Cawood, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2009-BLA-5061) of Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge) on a subsequent claim[2] filed on October 22, 2007, pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge accepted the parties' stipulation to twenty-one years of coal mine employment. He further found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, because the newly submitted x-ray, biopsy and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), and (4), an element of entitlement previously adjudicated against claimant. Considering the case on the merits, the administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established at 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge found, however, that the evidence of record failed to establish total disability pursuant to 20 C.F.R. §718.204(b). He, therefore, found that claimant was not entitled to the presumption of totally disabling pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] or entitlement pursuant to 20 C.F.R. Part 718. Benefits were, accordingly, denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief.[4]

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[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his first claim for benefits on March 25, 1991. The claim was denied on March 30, 1992, for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1.

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[4] We affirm the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, and that

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In finding that total disability was not established on the record at Section 718.204(b), the administrative law judge first correctly found that none of the pulmonary function and blood gas studies submitted with the first claim was qualifying. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii); Director's Exhibit 1. Further, the administrative law judge correctly found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv) because Drs. Broudy and Dahhan found either, that claimant had "no ventilatory impairment[,]" or that "he retained the respiratory capacity to perform his coal-mine employment." *See* 20 C.F.R. §718.204(b); *Gee*, 9 BLR at 1-4; Decision and Order at 15; Director's Exhibit 1. The administrative law judge properly concluded, therefore, that the old medical evidence did not establish total disability. *See* Decision and Order at 14-15.

Turning to the medical evidence submitted with the subsequent claim, the administrative law judge properly found that it failed to establish total disability at

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pneumoconiosis arising out of coal mine employment was established on the record at 20 C.F.R. §§718.202(a) and 718.203(b), as those findings are not challenged. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 13.

[5] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. 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*).

Section 718.204(b). Specifically, the administrative law judge properly found that the new pulmonary function and blood gas studies did not establish total disability at Section 718.204(b)(2)(i) and (ii), as none of the new pulmonary function studies was qualifying and that, while two of the four blood gas studies were qualifying, the two more recent blood gas studies were non-qualifying. *See Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); Decision and Order at 6; Director's Exhibits 14, 17; Employer's Exhibits 3, 4, 7, and 8. Further, the administrative law judge correctly found that there was no evidence in the record that could establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as "[c]laimant presented no evidence showing cor pulmonale with right-sided congestive heart failure." Decision and Order at 6.

Considering the new medical opinion evidence, the administrative law judge properly found that the opinions of Drs. Dahhan and Vuskovich, who found that claimant was not totally disabled, were more credible than the contrary opinions of Drs. Forehand, Rosenberg and Stoltzfus. Specifically, the administrative law judge properly found the opinions of Drs. Dahhan and Vuskovich better reasoned, because they were based on a more thorough assessment of all of claimant's objective testing, and more in keeping with the weight of the non-qualifying testing of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); Employer's Exhibits 5, 9. In contrast, the administrative law judge properly accorded less weight to Dr. Forehand's opinion, because it was not based on a complete review of all of claimant's objective testing. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Director's Exhibit 14. Regarding the opinion of Dr. Rosenberg, the administrative law judge properly accorded it less weight because it was less thorough and complete concerning the totality of claimant's respiratory condition. *See Stark*, 9 BLR at 1-37; Claimant's Exhibit 2. Further, the administrative law judge properly accorded Dr. Stoltzfus's opinion less weight because he did not identify the test results to which he referred in his report and did not indicate the test results on which he based his conclusion. *See Clark*, 12 BLR at 1-155; *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Claimant's Exhibit 3. Finally, the administrative law judge properly found that claimant's hospitalization records failed to establish a total respiratory disability, as those records addressed claimant's significant cardiovascular disease, contained evidence showing that claimant's lungs were normal, and contained evidence of normal pulmonary function studies. *See Clark*, 12 BLR 1-155; Decision and Order at 17-18; Employer's Exhibits 11-14. The administrative law judge, therefore, properly determined that, based on the totality of the medical evidence of record, claimant failed to establish total disability at Section 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd. on recon.* 9 BLR 1-236 (1987). Because the administrative law judge properly found that total disability, an essential element of entitlement, was not established, the administrative law judge properly found that claimant was not entitled to benefits. *See Gee*, 9 BLR at 1-4.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge