BRB No. 06-0160 BLA

MARSH EWELL BLANTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	DATE ISSUED: 05/17/2006
	)	
Employer-Respondent	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (2004-BLA-6796) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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). The administrative law judge credited claimant with sixteen years of qualifying coal mine employment, as stipulated by the

parties and supported by the record, and adjudicated this claim, filed on March 30, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the x-ray evidence of record at 20 C.F.R. §718.202(a)(1), and his finding that total disability was not established at 20 C.F.R. §718.204(b).[1] Claimant alternatively asserts that Dr. Baker's report is internally inconsistent on the issue of the existence of pneumoconiosis, and therefore the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required pursuant to 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, declining to address the merits of this appeal but urging the Board to reject claimant's argument that the Director failed to provide claimant with a pulmonary examination that complies with the requirements of Section 413(b) of the Act.[2]

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.[3] 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).

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[1] Although claimant refers to the provisions at 20 C.F.R. §718.204(c), *see* Claimant's Brief at 4-5, under the amended regulations, total respiratory or pulmonary disability is established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

Initially, we reject claimant's argument that the Director failed to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The record reflects that Dr. Baker's pulmonary evaluation of claimant addressed all the elements of entitlement and was based upon a physical examination, x-ray, pulmonary function study, arterial blood gas study, electrocardiogram, claimant's symptoms, and employment, medical and smoking histories. Director's Exhibit 9; Decision and Order at 7. Claimant's argument that Dr. Baker's report is internally inconsistent is rejected. While Dr. Baker diagnosed bronchitis based on history and attributable it to coal dust exposure, the administrative law judge properly found that Dr. Baker's diagnosis did not constitute legal pneumoconiosis, as the physician did not term the condition "chronic," *see* 20 C.F.R. §718.201(a)(2), and he also indicated that claimant had no occupational lung disease caused by coal mine employment.[4] Director's Exhibit 9; Decision and Order at 7, 9. Dr. Baker further determined that claimant had no respiratory or pulmonary impairment but retained the respiratory capacity to perform his usual coal mine employment, and the administrative law judge accorded Dr. Baker's opinion full weight on the issue of total disability, finding that it was well-reasoned and documented. Decision and Order at 7, 11. As discussed *infra*, substantial evidence supports the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b). We agree with the Director's assertion that his statutory obligation is discharged and that any flaw is ultimately harmless. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406(a); *see generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Turning to the issue of total respiratory disability, as claimant has not identified any specific legal or factual error in the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(b)(1), (b)(2)(i)-(iii) because the record contains no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the pulmonary function studies and blood gas studies of record produced non-qualifying values, and there was no evidence of cor pulmonale with right-sided congestive heart failure, we affirm the administrative law judge's findings thereunder, as

[4] There is no necessary inconsistency in Dr. Baker's statements, and the administrative law judge found the opinion overall well-reasoned.

unchallenged on appeal. Decision and Order at 9-11; *see 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); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Although claimant does not challenge the administrative law judge's finding at Section 718.204(b)(2)(iv) that every physician concluded that claimant was not disabled, claimant does assert that total disability is also a legal determination to be made by the administrative law judge through comparison of the exertional requirements of claimant's usual coal mine employment with the medical assessments of claimant's respiratory impairment. Claimant's Brief at 5. Contrary to claimant's arguments, however, the physicians of record did not assess any physical limitations which the administrative law judge could compare with the exertional requirements of claimant's former job duties as a miner helper and belt worker; rather, the administrative law judge accurately determined that Drs. Baker, Broudy and Rosenberg considered claimant's work history and opined that claimant had no respiratory impairment but retained the respiratory capacity to perform his usual coal mine employment.[5] Decision and Order at 11; Director's Exhibit 9; Employer's Exhibits 1, 3; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge properly found that the opinions of Drs. Baker, Broudy and Rosenberg were well-reasoned and supported by the objective evidence of record, and reasonably concluded that the record failed to support a finding of total disability under Section 718.204(b)(2).[6] Decision and Order at 11; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings pursuant to Section 718.204(b)(2) are supported by substantial evidence and thus are affirmed. Consequently, claimant is

[5] We reject claimant's general contention that the inadvisability of claimant's return to work in dusty conditions is sufficient to establish a totally disabling respiratory impairment. Claimant's Brief at 5; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Claimant also asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 5-6. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

[6] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(1), (b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's findings. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

precluded from entitlement to benefits under 20 C.F.R. Part 718, and we need not reach claimant's remaining arguments on appeal regarding the issue of the existence of pneumoconiosis. *Anderson*, 12 BLR 1-111.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge