

BRB No. 08-0111 BLA

A. O.)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN COALS CORPORATION) DATE ISSUED: 09/15/2008
)
 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 Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5203) of Administrative law Judge Stephen L. Purcell rendered 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).¹ The administrative law judge credited claimant with thirty-three years of coal mine employment² pursuant to the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed his claim for benefits on August 29, 2001, which the district director denied on May 19, 2003. Director's Exhibits 2, 22. Claimant requested a hearing and the matter was referred to the Office of Administrative Law Judges (OALJ) on August 2, 2003. Director's Exhibits 23, 28. Thereafter, Administrative Law Judge Thomas F. Phalen, Jr., remanded the case to the district director to provide claimant with a complete pulmonary evaluation. Following the completion of this additional evidentiary development, the case was again referred to the OALJ. Director's Exhibits 29, 31.

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, the Board will apply the law 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 total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Dahhan, and Hussain. The administrative law judge found that, because Drs. Dahhan and Hussain opined that claimant could perform his usual coal mine employment from a respiratory standpoint, and because Dr. Baker “did not find total disability,” the medical opinion evidence was insufficient to establish total disability. Decision and Order at 9.

Claimant contends that the administrative law judge erred in finding Dr. Baker’s opinion insufficient to establish total disability and erred in failing to properly address the exertional requirements of claimant’s usual coal mine employment in discussing the medical opinions at Section 718.202(b)(2)(iv). Claimant’s Brief at 6-7. Claimant’s contentions lack merit. In his December 5, 2001 report, Dr. Baker stated that claimant had an impairment based on a diagnosis of pneumoconiosis because persons with pneumoconiosis should limit further exposure to coal dust, and would be considered “100% occupationally disabled for work in the coal mining industry” Director’s Exhibit 8 at 2. Dr. Baker also stated:

Patient has a Class 2 impairment with the FEV1 or vital capacity between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Id.

In weighing Dr. Baker’s opinion, the administrative law judge properly found that Dr. Baker’s statement that claimant should not work in order to avoid further coal dust exposure does not support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); Decision and Order at 9. Additionally, the administrative law judge accurately determined that Dr. Baker did not discuss whether claimant was totally disabled from his usual coal mine work as a result of his “Class 2” impairment.

Moreover, the administrative law judge credited the opinions of Drs. Dahhan and Hussain, that claimant had no respiratory impairment that would preclude the performance of his usual coal mine duties. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Director’s Exhibits 7, 9, 30. The record reflects that, in so opining, Dr. Dahhan indicated that he was aware of claimant’s job as a mechanic, and

auger and tipple operator. Director's Exhibit 9. Because claimant does not allege error with respect to the weight accorded to the opinions of Drs. Dahhan and Hussain, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987). We also affirm, as supported by substantial evidence, the administrative law judge's overall determination that claimant failed to prove total respiratory disability pursuant to Section 718.204(b).⁴

Because claimant failed to establish that he is totally disabled, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Claimant also contends that, because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's report that was provided by the Department of Labor, the Director failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 5. The Director responds that the administrative law judge's finding that Dr. Hussain's opinion diagnosing pneumoconiosis was outweighed by the contrary opinion of Dr. Dahhan, does not mean that the Director failed to satisfy his statutory obligation to provide a complete pulmonary evaluation.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). As discussed above, the administrative law judge fully credited Dr. Hussain's opinion that claimant is not totally disabled, and claimant's failure to establish this element is dispositive of his claim. Moreover, on the issue of the existence of pneumoconiosis, we

⁴ Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 7. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge's findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-6-7 (2004).

agree with the Director that the administrative law judge merely found, permissibly, that Dr. Hussain's opinion was not as well-reasoned and documented as was the contrary opinion of Dr. Dahhan. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); Decision and Order at 7-8. In sum, we agree with the Director that he met his obligation, in this case, to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

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