

BRB No. 08-0142 BLA

D.C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 ) DATE ISSUED: 09/29/2008  
 JERICOL MINING INCORPORATED )  
 )  
 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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2007-BLA-05047) of Administrative Law Judge Larry S. Merck 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).<sup>1</sup> The administrative law judge accepted the parties'

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<sup>1</sup> Claimant filed his claim for benefits on December 16, 2005. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on July 7, 2006. Director's Exhibit 23. Claimant requested a formal hearing, which was held on

stipulation to twenty years of coal mine employment as supported by the record. The administrative law judge determined that the evidence was 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)(2)(i)-(iv), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1) and 718.204(b)(2)(iv). Claimant also maintains that because "the administrative law judge concluded that the smoking history that Dr. Simpao relied upon was contradictory, and [he found] that the physician failed to adequately explain his findings" on the issue of the existence of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), has not satisfied its obligation to provide claimant with a complete pulmonary evaluation as required by 20 C.F.R. §725.406. Claimant's Brief at 4. Thus, claimant requests that the case be remanded to the district director so that he may receive a complete pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director has filed a letter brief asserting that remand for a complete pulmonary evaluation is not warranted in this case.<sup>2</sup>

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, and is in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (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, 1-112

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August 1, 2007. Thereafter, the administrative law judge issued his Decision and Order – Denial of Benefits on September 17, 2007, which is the subject of this appeal.

<sup>2</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

(1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Claimant argues that the administrative law judge erred in finding that he failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv).<sup>4</sup> Claimant specifically asserts that the administrative law judge erred in not discussing the exertional requirements of claimant's usual coal mine work as a foreman, in conjunction with the medical reports assessing total disability. Claimant's Brief at 5. This argument is without merit.

Contrary to claimant's assertion, the administrative law judge properly noted that while Dr. Simpao diagnosed a mild respiratory impairment, he specifically opined that claimant was not totally disabled from performing his usual coal mine work as a section foreman. Director's Exhibits 14, 12. Similarly, Drs. Dahhan and Broudy diagnosed that the miner had no respiratory impairment that would prevent him from returning to his usual coal mine employment. Director's Exhibits 14, 16. Because the administrative law judge properly found that "no physician of record" diagnosed claimant as being totally disabled from his usual coal mine work, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); Decision and Order at 4. We also affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant failed to satisfy his burden to establish total disability pursuant to Section 718.204(b)(2). Thus, we affirm the administrative law judge's denial of benefits.

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<sup>4</sup> The administrative law judge considered the results of the three pulmonary function and three arterial blood gas studies dated January 12, 2006, January 26, 2006, and February 8, 2006, and found that because none of the studies yielded qualifying values, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii). Decision and Order at 13. Additionally, as the administrative law judge determined that there was no evidence to support a finding that claimant had cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* We affirm the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii), as they are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As we affirm the administrative law judge's finding that claimant is not totally disabled, it is not necessary that we further address claimant's assertion of error with respect to the x-ray evidence as to the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Furthermore, we reject claimant's assertion that this case must be remanded to the district director for a complete pulmonary evaluation. Although claimant correctly points out that the administrative law judge discredited Dr. Simpao's opinion as to the existence of pneumoconiosis, the administrative law judge gave full credit to Dr. Simpao's opinion on the issue of total disability, the element of entitlement upon which he based his denial of benefits.<sup>5</sup> Because we affirm the administrative law judge's finding that claimant is not totally disabled pursuant to Section 718.204(b)(2), we consider claimant's request that we remand the case to the district director for a complete pulmonary evaluation to be moot. As noted by the Director, "[e]ven if Dr. Simpao explained his pneumoconiosis diagnosis on remand, and even if his opinion [on that issue] were then fully credited, [c]laimant would still not be entitled to benefits because the evidence . . . fails to establish total respiratory disability." Director's Letter Brief at 2. Thus, we conclude that remand for a complete pulmonary evaluation is not required under the facts of this case. 20 C.F.R. §725.406(a); *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994).

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<sup>5</sup> With respect to the issue of total disability, the administrative law judge did not find Dr. Simpao's opinion to be either incomplete or lacking in credibility. Rather, the administrative law judge rationally determined that because Dr. Simpao explicitly indicated that claimant can perform his usual coal mine work, Dr. Simpao's opinion was credible but insufficient to support claimant's burden of proof at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4.

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