BRB No. 07-0487 BLA

J.O. Claimant-Petitioner v. R & R MINING LLC. and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 02/28/2008 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.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 - Denial of Benefits (2005-BLA-5278) of Administrative Law Judge Larry S. Merck 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 twenty-four years of coal mine employment,[2] based on a stipulation by the parties and a review of the record, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). 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) and 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. Employer responds, urging affirmance of the denial of benefits. The Director also responds, asserting that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.[3]

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[1] Claimant filed a claim for benefits on June 15, 2001. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on April 16, 2003. Director's Exhibit 38. The case was initially transferred to the Office of Administrative Law Judges, but then remanded to the district director to provide claimant a complete pulmonary evaluation pursuant to 20 C.F.R §725.406. Director's Exhibit 44. A formal hearing before Administrative Law Judge Larry S. Merck was conducted on July 19, 2006.

[2] The Board will apply the law of the United States of Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3,5.

[3] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act 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 a finding of 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits. We specifically affirm the administrative law judge's finding that the evidence is insufficient to establish total disability.

20 C.F.R. §718.204(b)(2)(iv) provides for a finding of total disability "if a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. § 718.204(b)(2)(iv). In this case, the administrative law judge correctly determined that there was no medical opinion evidence from which to conclude that claimant was totally disabled. Decision and Order at 22.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions, which consisted of Dr. Baker's November 1, 2001 and September 4, 2004 reports, Dr. Broudy's September 11, 2001 report and Dr. Dahhan's October 3, 2002 report and December 9, 2002 deposition. Director's Exhibits 9, 12, 14-17, 45; Employer's Exhibits 2-3. The administrative law judge determined that Dr. Baker's opinion, that claimant's respiratory impairment was mild and that he retained the capacity to perform his regular coal mine job duties, was well-reasoned and well-documented. Decision and Order at 19; *see* Director's Exhibit 14 at 5; Employer's Exhibit 4. Drs. Broudy and Dahhan also opined that claimant could perform his coal mine employment from a respiratory standpoint, but the administrative law judge discounted these opinions because he found that they were not well-reasoned. Decision and Order at 19; *see* Director's Exhibits 9, 45 at 51.

Pursuant to 20 C.F.R. §718.204(b)(iv), claimant asserts that, in addressing the issue of total disability, the administrative law judge is required to consider the exertional

requirements of claimant's usual coal mine work in conjunction with a physician's assessment of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a roof bolter. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Moreover, the administrative law judge permissibly relied on Dr. Baker's opinion that claimant "retains the capacity to work in the coal mining industry," which he found was supported by claimant's non-qualifying pulmonary function and blood gas studies. Decision and Order at 18-19; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Employer's Exhibit 4. Consequently, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment as a roof bolter to the medical reports. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5-6. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Therefore, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Claimant next contends that because the administrative law judge did not credit Dr. Baker's opinion concerning the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act."

Claimant's Brief at 4. The Director asserts that, contrary to claimant's argument, "regardless of the probative value of Dr. Baker's diagnosis of pneumoconiosis, his opinion is ultimately unhelpful to claimant[,]" as the doctor specifically opined that claimant was not totally disabled." Director's Brief at 2-3. Thus, the Director maintains that a remand for a complete pulmonary evaluation is unnecessary under the facts of this case. We agree.

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Inasmuch as the administrative law judge credited Dr. Baker's reasoned and documented opinion, that claimant was not totally disabled, and denied the claim on that basis, the administrative law judge properly determined that it was unnecessary to remand the case for a complete and credible pulmonary evaluation on the issue of pneumoconiosis, as claimant would still be unable to establish his entitlement to benefits.[4] Decision and Order at 18-20. Since the administrative law judge properly found that claimant is not totally disabled by a respiratory or pulmonary impairment, claimant would not be entitled to benefits even if Dr. Baker's diagnosis of pneumoconiosis were given full weight.[5] Director's Exhibits 14-17, 45.

Because there is no medical evidence that supports a finding that claimant has a totally disabling pulmonary or respiratory impairment, claimant is unable to establish an

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[4] *Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

[5] The administrative law judge accorded "little weight" to Dr. Baker's clinical pneumoconiosis diagnosis because Dr. Baker "expressly relied on [c]laimant's positive x-ray results and coal dust exposure in making his diagnosis." Decision and Order at 10. Furthermore, the administrative law judge accorded "little weight" to Dr. Baker's legal pneumoconiosis diagnosis because it was "based on the results of unreliable and non-qualifying pulmonary function study, non-qualifying arterial blood gas analysis, and [c]laimant's history." Decision and Order at 11.

essential element of entitlement under 20 C.F.R Part 718. 20 C.F.R. §718.204(b)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.[6] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6] In view of our disposition of the case on the merits at 20 C.F.R. §718.204(b), we need not address claimant's contentions at 20 C.F.R. §718.202(a)(1). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).