

BRB No. 08-0770 BLA

J.B. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 MANALAPAN MINING COMPANY, )  
 INCORPORATED ) DATE ISSUED: 07/10/2009  
 )  
 and )  
 )  
 KENTUCKY EMPLOYERS MUTUAL )  
 INSURANCE COMPANY )  
 )  
 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 Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville,  
Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (07-BLA-5665) of  
Administrative Law Judge Joseph E. Kane 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).<sup>1</sup> The administrative law judge credited claimant with twenty-eight years of coal mine employment<sup>2</sup> 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 x-ray and medical opinion evidence established the existence of clinical pneumoconiosis<sup>3</sup> arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge further found, however, that the medical evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §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 medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>4</sup> Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to participate in this appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Claimant filed his claim for benefits on June 1, 2006. Director's Exhibit 2. The district director denied benefits on January 31, 2007, and claimant timely requested a hearing. Director's Exhibits 38, 40, 43.

<sup>2</sup> The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

<sup>3</sup> Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See 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).

Claimant challenges the administrative law judge's determination that Dr. Simpao's medical report did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) because it was outweighed by the contrary evidence. Claimant's Brief at 3.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Simpao, Lockey, and Dahhan.<sup>5</sup> Dr. Simpao, who holds no special qualifications, reported that claimant's pulmonary function study reflected "a mild degree of obstructive airway disease," and that his blood gas study was normal. Director's Exhibit 11 at 4. He diagnosed claimant with a "moderate degree of pulmonary impairment," and opined that claimant is "totally disabled due to his pulmonary impairment." *Id.* at 5. Dr. Lockey, who is Board-certified in Internal Medicine, Occupational Medicine, and Pulmonary Disease, reported that claimant's pulmonary function study revealed mild obstruction, and that his blood gas study was normal. Director's Exhibit 13. Dr. Lockey opined that claimant has the respiratory capacity to perform his usual coal mine job, specifying that claimant has the ability to perform arduous manual labor. Director's Exhibits 13 at 5, 17 at 12-13, 15. Dr. Dahhan, who is Board-certified in Internal Medicine and Pulmonary Disease, reported that claimant's pulmonary function study showed mild or "borderline" obstruction that was reversible with bronchodilators, and that claimant's blood gas study was normal. Employer's Exhibit 1 at 2. Dr. Dahhan opined that claimant retains the respiratory capacity to perform his previous coal mine work. *Id.*

Noting that all three opinions were well-reasoned and documented, the administrative law judge found that Dr. Simpao's opinion, that claimant is totally disabled, was outweighed by the opinions of Drs. Lockey and Dahhan, based on those physicians' superior qualifications and their reliance on objective testing. Decision and Order at 11.

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<sup>5</sup> The administrative law judge also considered medical treatment records dating from August 2005 through July 2006, finding that the records described treatment "for mild shortness of breath and coal workers' pneumoconiosis[,] without evidence of impairment." Decision and Order at 7; Claimant's Exhibit 1. On appeal, claimant does not challenge this aspect of the administrative law judge's decision.

Claimant contends 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 findings regarding the extent of any respiratory impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's specific argument is that:

It can be reasonably concluded that [claimant's coal mining] 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, as well as the medical opinion of Dr. Simpao (who did diagnose total disability), 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 4. 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, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, contrary to claimant's contention, the administrative law judge considered "claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability." Claimant's Brief at 5. Specifically, the administrative law judge explained that Dr. Simpao's opinion was well-reasoned "because he was familiar with the demands of [c]laimant's last coal mining job" as a miner helper and miner operator.<sup>6</sup> Decision and Order at 3. However, the administrative law judge, as the factfinder, chose to accord greater weight to the opinions of Drs. Lockey and Dahhan, that claimant retains the respiratory capacity to perform his usual coal mine employment, based on the doctors' superior qualifications and their reliance on objective testing. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The record reflects that, in so opining, Drs. Lockey and Dahhan indicated that they were aware of claimant's job as a miner operator. Director's Exhibits 13, 17; Employer's Exhibit 1. Because claimant does not allege error with respect to the weight accorded to the opinions of Drs. Lockey and Dahhan, we affirm the administrative law judge's finding that claimant failed to establish

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<sup>6</sup> The administrative law judge summarized claimant's testimony that his last job as a miner helper and miner operator was a "strenuous" job that "required hanging heavy cables to the mine ceiling." Decision and Order at 3.

total disability pursuant to Section 718.204(b)(2)(iv).<sup>7</sup> See *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).

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant failed to prove total respiratory disability pursuant to Section 718.204(b)(2). Because claimant failed to establish total disability, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits.

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<sup>7</sup> 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 5. 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).

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