BRB No. 05-0940 BLA

DONALD CAUSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/29/2006
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 – 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.

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5618) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed his application for benefits on September 3, 2002. Director's Exhibit 2. The administrative law judge found that employer was the responsible operator and credited claimant with twenty years of coal mine employment.[1] Decision and Order at 2, 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis under 20 C.F.R. §§718.202(a), 718.204(b), (c). Decision and Order at 5, 13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in failing to find the existence of pneumoconiosis or total disability established pursuant to 20 C.F.R. §§718.202(a)(1), 718.204(b)(2)(iv). Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.[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 supported by substantial evidence, is rational, and is 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).

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

[1] This case arises within the jurisdiction of the United States 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 Exhibit 3.

[2] The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, BLR 6 BLR 1-710 (1983).

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).

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 findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. 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 bridge carrier operator and continuous miner operator. 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 miner's inability to withstand 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, the administrative law judge gave greatest weight to the reports in which Drs. Dahhan and Rosenberg indicated that claimant does not have a respiratory or pulmonary impairment. Thus, it was unnecessary for him to compare the exertional requirements of claimant's job duties with the medical reports. *Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject claimant's argument that since pneumoconiosis is a progressive disease, it must have worsened and therefore, it has detrimentally affected his ability to perform his usual coal mine employment. An administrative law judge's findings 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). We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Finally, claimant alleges that because the administrative law judge did not credit Dr. Simpao's November 14, 2002 opinion provided by the Department of Labor, "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 responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one," and states that he met his statutory obligation in this case. Director's Brief at 2-3.

We find that there is no merit in claimant's argument. 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).

On the issue of total disability, the administrative law judge gave "less weight" to Dr. Simpao's diagnosis of total disability because he based his diagnosis on non-qualifying pulmonary function and blood gas studies and failed to explain how his physical findings and symptomatology were supportive of a finding of total disability. Decision and Order at 12. Dr. Simpao 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 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find nor does claimant allege that Dr. Simpao's report was incomplete. The administrative law judge reasonably found Dr. Simpao's diagnosis to be outweighed by the contrary opinions of Drs. Dahhan and Rosenberg because these opinions were better supported by the underlying objective medical evidence. *Id*; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). In light of the fact that Dr. Simpao's report was complete and the administrative law judge merely found it outweighed, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because claimant did not establish the existence of total disability, a necessary element of entitlement in a miner's claim under Part 718, we must affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112. Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis. Error, if any, in these findings is harmless in light of our affirmance of the denial of benefits. *Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge