

BRB No. 05-0375 BLA

BILLY R. HUBBARD)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/21/2005
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-5160) of Administrative Law Judge Rudolf L. Jansen 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). Considering the evidence, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(c), but failed to establish a totally disabling respiratory impairment, 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 5-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also argues that the Director, Office of Workers' Compensation Programs, (the Director)

failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). The Director responds, urging that the denial of benefits to be affirmed and that he did fulfill his statutory obligation of providing claimant with a complete, credible pulmonary evaluation.¹

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).

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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).

Claimant contends that the medical opinions of Drs. Baker and Simpao are sufficient to establish total disability and that the administrative law judge made no mention of claimant's usual coal mine employment in conjunction with the opinions of Drs. Baker and Simpao. Specifically, claimant contends that Dr. Baker's finding of a Class 2 breathing impairment due to coal dust exposure and coal workers' pneumoconiosis rendered claimant 100% occupationally disabled from work in coal mining or similar dusty occupations and that Dr. Simpao's opinion that claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment due to his moderate pulmonary impairment establishes total respiratory disability.²

¹ The administrative law judge's finding of seven years and seven months of coal mine employment, as well as his finding that claimant has established the existence of pneumoconiosis arising out of coal mine pursuant to 20 C.F.R. §§718.202(a), 718.203(c), and his finding that total disability has not been demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

Contrary to claimant's assertions, the administrative law judge correctly accorded little weight to the opinion of Dr. Baker, as the physician's rationale for finding that claimant could not perform his usual coal mine employment was that claimant should not return to a dusty environment which would exacerbate his pneumoconiosis. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment). The administrative law judge, therefore, permissibly found Dr. Baker's opinion insufficient to support a finding of total respiratory disability.

Further, contrary to claimant's assertion, the administrative law judge permissibly accorded little weight to Dr. Simpao's conclusion that claimant had a moderate pulmonary impairment preventing him from performing coal mine employment, Claimant's Exhibit 1, as Dr. Simpao failed to explain how his underlying documentation supported his diagnosis, *see Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge permissibly accorded Dr. Simpao's opinion little weight because he found Dr. Simpao did not incorporate claimant's extensive smoking history into his diagnosis. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge therefore, permissibly concluded that the opinions of Drs. Baker and Simpao failed to establish total respiratory disability. Additionally, the administrative law judge went on to find that the medical opinions weighed with the three non-qualifying pulmonary function studies and two non-qualifying blood gas studies of record failed to establish a total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987) *recon. en banc. aff'g* 9 BLR 1-195 (1986).

Claimant further contends that because the administrative law judge accorded less weight to the opinion of Dr. Hussain, who conducted the pulmonary evaluation of claimant at the behest of the Director, the Director has failed provide him with the complete, credible, pulmonary evaluation to which he is entitled under the Act. As the Director contends, however, inasmuch as Dr. Hussain addressed the necessary elements of entitlement, the Director has fulfilled his statutory obligation. 30 U.S.C. §923(b); *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319, 2-327 (8th Cir. 1994); *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, 7 BLR 2-25, 2-31 (8th Cir. 1984). Claimant's arguments that remand is required are rejected.

Finally, we reject claimant's argument that the administrative law judge should have considered claimant's age, education and work experience in determining whether claimant was totally disabled and claimant's assertion that a diagnosis of pneumoconiosis

necessarily leads to a finding of total disability. *White v. New White Coal Co.*, 23 BLR 1-1, 1-6, 1-7 n.8 (2004). Because claimant has failed to establish the existence of a totally disabling respiratory impairment, a requisite element of entitlement pursuant to Part 718, entitlement is precluded. 20 C.F.R. §718.204(b)(2); *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

JUDITH S. BOGGS
Administrative Appeals Judge