

BRB No. 05-0646 BLA

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| JAMES SHEPHERD |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| BLEDSON COAL CORPORATION |) | |
| |) | DATE ISSUED: 04/26/2006 |
| 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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michael S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – Rejection of Claim (03-BLA-5755) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge credited claimant with twenty-two years of coal mine employment. Based on the date of filing,

the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found, however, that the evidence is insufficient to establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence is insufficient to establish total disability. Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible, pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds, contending that he satisfied his obligation to provide claimant with a complete pulmonary evaluation, as required under the Act, by virtue of Dr. Hussain's assessment of claimant.

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).

Claimant challenges the administrative law judge's determination that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv),² and relies on Dr. Baker's report. Claimant's Brief at 3. Dr. Baker diagnosed coal workers' pneumoconiosis, category 2/1, based on an abnormal x-ray and a significant history of coal dust exposure. Director's Exhibit 15. Dr. Baker also diagnosed mild bronchitis based on history. *Id.* Dr. Baker opined that "any pulmonary impairment is caused at least in part, if not significantly so, by [claimant's] coal dust exposure." *Id.* Dr. Baker further indicated that claimant "has a Class I impairment with the FEV1 and vital

¹ Claimant filed the instant claim for benefits on July 2, 2001. Director's Exhibit 2. The district director denied benefits in a Proposed Decision and Order dated January 3, 2002. Director's Exhibit 33. Pursuant to claimant's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing, which was held on February 3, 2004.

² We affirm, as unchallenged on appeal, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 20 C.F.R. §718.204(b)(2)(i)-(iii). We also affirm the administrative law judge's finding of 22 years of coal mine employment. *Coen v. Director, OWP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

capacity both being greater than 80% of predicted”, “based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.” *Id.* Dr. Baker also indicated that claimant “has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply that claimant is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.” *Id.*

Claimant specifically asserts that “[i]n light of the opinion of Dr. Baker, it should be noted that the Board has held that a single medical opinion may be sufficient for invoking the presumption of total disability. *Meadows v. Westmoreland*, 6 BLR 1-773 (1984).” Claimant’s Brief at 3. This assertion is unavailing. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable in this instant claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed on July 2, 2001, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the instant claim. Director’s Exhibit 2.

Claimant next argues that Dr. Baker’s opinion is well reasoned and well documented and “should not have been rejected by [the administrative law judge] for the reasons he provided.” Claimant’s Brief at 3-4. However, the administrative law judge properly determined that Dr. Baker’s opinion on the issue of total disability amounted to an opinion of the inadvisability of returning to coal mine employment, which is not equivalent to a finding of total disability under the Act. Decision and Order at 8; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Claimant next asserts that, taking into consideration his condition, the exertional requirements of his usual coal mine employment, and Dr. Baker’s opinion, “it is rational to conclude that the claimant’s condition prevents him from engaging in his usual coal mine 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 adds that the administrative law judge “made no mention of the claimant’s usual coal mine work in conjunction with Dr. Baker’s opinion of disability.” *Id.* The administrative law judge found that “Claimant’s coal mining work involved varied heavy manual labor.” Decision and Order at 2. The record reflects that Dr. Baker was aware of claimant’s usual coal mine employment as a miner helper in the underground mines for nineteen and one-half years. While Dr. Baker did diagnose a Class I impairment, he failed to sufficiently address whether claimant had the respiratory capacity to perform his usual coal mine employment. Director’s Exhibit 15. Thus, the administrative law judge’s failure to match the exertional requirements of claimant’s usual coal mine employment against Dr. Baker’s assessment of impairment is harmless error, as Dr. Baker’s opinion cannot, in any event, support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Cornett v. Benham Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Larioni v. Direcotr, OWCP*, 6 BLR 1-1276 (1984).

Claimant contends that, given the administrative law judge's treatment of Dr. Hussain's opinion at 20 C.F.R. §718.204(b)(2)(iv), the Director failed to provide claimant with a credible pulmonary evaluation, as required under the Act. Dr. Hussain examined claimant and diagnosed (1) pneumoconiosis based on chest x-ray, (2) airways obstruction based on pulmonary function testing, (3) mild hypoxemia based on arterial blood gas studies, and (4) right ventricular hypertrophy based on an EKG. He opined that the etiology of claimant's pneumoconiosis and right ventricular hypertrophy were dust exposure and hypertension, respectively. He found a moderate impairment due to pneumoconiosis. Dr. Hussain also found that claimant retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment. Director's Exhibit 13. The administrative law judge specifically found that Dr. Hussain's "diagnosis of airways obstruction based on pulmonary function testing and mild hypoxemia based on arterial blood gas studies causing a moderate impairment was not satisfactorily explained", as the physician failed to explain the basis for his conclusions, and his opinion was based on normal test results and medical opinions to the contrary. Thus, the administrative law judge found Dr. Hussain's opinion "essentially unreasoned." Decision and Order at 8.

The Director argues that he has fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation based on Dr. Hussain's assessment. The Director specifically contends that,

Any flaw in Dr. Hussain's impairment finding does not implicate a section 413(b) violation, because the doctor specifically found the claimant to be able to perform coal mine employment, a conclusion apparently overlooked by the ALJ. Given the non-qualifying and indeed, normal nature of the objective studies performed by Dr. Hussain, his finding of no total disability is perfectly reasonable. In short, Dr. Hussain's report does not support entitlement, and thus, there is no basis for concluding that this case should be remanded for a new pulmonary evaluation.

Director's Brief at 2.

Pursuant to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1084 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical

examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.” 20 C.F.R. §725.406(a).

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-87; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that a remand is not warranted, based on the facts of this case. Dr. Hussain’s evaluation fulfills the requirements of Section 725.406(a), and as Director notes, his ultimate conclusion that claimant retains the respiratory capacity to perform coal mine work is supported by his underlying objective studies. Therefore we decline to remand this case for another pulmonary evaluation.

As the administrative law judge properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under Part 718, we affirm the administrative law judge’s denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge