

BRB No. 09-0642 BLA

JEFFREY BOWEN)
(o/b/o DONALD BOWEN, deceased))
)
 Claimant-Petitioner)
) DATE ISSUED: 04/29/2010
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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:

Claimant¹ appeals the Decision and Order (06-BLA-6063) of Administrative Law Judge Pamela Lakes Wood denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l))

¹ The miner died on May 3, 2002. Director's Exhibit 11. Claimant, the miner's son and administrator of the miner's estate, is pursuing the miner's claim.

(the Act).² The miner filed a claim for benefits on January 29, 2001. In a Decision and Order dated February 16, 2005, Administrative Law Judge Thomas F. Phalen, Jr. found, *inter alia*, that the evidence did not establish that the miner suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Specifically, Judge Phalen found that Dr. Hussain, the physician who conducted the Department of Labor (DOL)-sponsored pulmonary evaluation, did not provide a reasoned opinion regarding the extent of the miner's pulmonary impairment. Accordingly, Judge Phalen denied benefits.

Claimant filed an appeal with the Board. By Decision and Order dated January 19, 2006, the Board granted the request of the Director, Office of Workers' Compensation Programs (the Director), to remand the case to the district director, given the Director's concession that the DOL failed to provide the miner with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. *Bowen v. Director, OWCP*, BRB No. 05-0471 BLA (Jan. 19, 2006) (unpub.). The Board, therefore, vacated Judge Phalen's denial of benefits, and remanded the case to the district director for further development of the evidence. *Id.*

On remand, the district director provided Dr. Hussain with additional information, including the physical requirements of the miner's most recent coal mine employment. Director's Exhibit 42. After reviewing this additional information, Dr. Hussain completed a questionnaire on May 22, 2006, setting forth his opinions regarding the existence of pneumoconiosis, the extent of the miner's pulmonary impairment, and the etiology of that impairment. *Id.* Having completed the task of further developing the evidentiary evidence, the district director forwarded the case to the Office of Administrative Law Judges. *Id.* Administrative Law Judge Pamela Lakes Wood (the administrative law judge) held a hearing on April 2, 2008.

In a Decision and Order dated April 30, 2009, the administrative law judge, after crediting the miner with 6.78 years of coal mine employment,³ noted that it was undisputed that the miner suffered from pneumoconiosis arising out of his coal mine employment. However, the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the miner's claim was filed before January 1, 2005.

³ The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that Dr. Hussain's 2006 report fails to satisfy the Director's obligation to provide the miner with a complete, credible pulmonary evaluation. In response, the Director contends that Dr. Hussain's 2006 report is sufficient to satisfy the Director's obligation to provide the miner with a complete, credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),⁴ the administrative law judge noted that the only medical reports of record are Dr. Hussain's initial July 13, 2001 report and the doctor's subsequent May 22, 2006 report. Relying upon Dr. Hussain's most recent report, the administrative law judge noted that Dr. Hussain based his opinion, that the miner retained the respiratory capacity to perform the work of a coal miner, on the miner's objective test results.⁵ Decision and Order at 7. Because Dr. Hussain's opinion does not support a finding that the miner suffered from a totally disabling pulmonary impairment, the administrative law judge found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

⁴ Because claimant does not challenge the administrative law judge's findings that the evidence did not establish 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).

⁵ Although Dr. Hussain opined that the miner suffered from a moderate pulmonary impairment, he indicated that the miner retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 42. Dr. Hussain based this assessment on a pulmonary function study that revealed the miner's FEV1 value to be 69% of normal and on an arterial blood gas study that revealed normal O₂ levels. *Id.*

Claimant contends that Dr. Hussain’s report is insufficient to satisfy the Director’s obligation to provide the miner with a complete, credible pulmonary evaluation because the doctor did not acknowledge that the miner’s job as a truck driver required him, at times, to lift 150 pounds while changing tires and because the doctor did not directly compare the miner’s physical limitations with that specific lifting requirement. We disagree. When this case was remanded to the district director for further development of the evidence, the DOL specifically informed Dr. Hussain that the miner’s job as a truck driver required him to drive the truck eighteen hours a day and to change tires “when needed.”⁶ Director’s Exhibit 42. Substantial evidence, therefore, supports the administrative law judge’s finding that Dr. Hussain “took into consideration that the [m]iner worked as a truck driver.” Decision and Order at 7; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002) (physician who finds total disability need not convey precise knowledge of the exertional requirements of the miner’s job). Moreover, because the administrative law judge properly found that Dr. Hussain’s opinion does not support a finding that the miner suffered from a totally disabling respiratory impairment, we affirm the administrative law judge’s finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1984). In a recent case, the United States Court of Appeals for the Sixth Circuit set forth the standard for determining whether a pulmonary evaluation is complete:

In the end, [the] DOL’s duty to supply a “complete pulmonary evaluation” does not amount to a duty to meet the claimant’s burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of “complete[ness]” is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a “complete pulmonary evaluation” under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

⁶ The Director, Office of Workers’ Compensation Programs, correctly notes that there is no evidence that the miner was required to change 150 pound tires by himself. Claimant testified that the miner, as a truck driver, was required to “*help* change tires” weighing up to 150 pounds. Director’s Exhibit 42 at 79 (emphasis added).

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor supplied questionnaire. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 42. The administrative law judge did not find that Dr. Hussain's opinion was unreasoned or undocumented. Rather, as set forth above, the administrative law judge found that Dr. Hussain's opinion did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, we conclude that the Director fulfilled his statutory obligation to provide the miner with a complete pulmonary evaluation. We, therefore, need not remand this case to the district director for further development of the evidence.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27.

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

BETTY JEAN HALL
Administrative Appeals Judge