

BRB No. 11-0599 BLA

JIMMIE D. RAGLAND)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 04/25/2012
)	
GREEN COAL COMPANY)	
)	
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 on Remand of Daniel F. Solomon, Administrative Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (07-BLA-06091) of Administrative Law Judge Daniel F. Solomon 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)) (the Act). This case involves a living miner’s claim filed on November 20, 2006, and is before the Board for the second time.

In his initial decision, after crediting claimant with thirty years of coal mine

employment¹ the administrative law judge found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Ragland v. Green Coal Co.*, BRB No. 09-0776 BLA, slip op. at 5-6 (Aug. 26, 2010) (unpub.) The Board vacated, however, 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). Specifically, the Board held that, in concluding that Dr. Baker's opinion did not address claimant's "exertional capacity to work in reclamation or parts running," and that his opinion was simply a recommendation against further dust exposure, the administrative law judge had selectively analyzed Dr. Baker's opinion. *Id.* at 6. Therefore, the Board remanded the case to the administrative law judge to reconsider the entirety of Dr. Baker's testimony, together with the opinions of Drs. Rosenberg and Selby, who opined that claimant is not totally disabled.² *Id.* at 6.

On remand, the administrative law judge reconsidered the medical opinions of Drs. Baker, Rosenberg, and Selby, and again found that the medical opinion evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant filed a reply brief, reiterating his contentions on 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

¹ The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 7. 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).

² The Board affirmed the administrative law judge's determination to discount Dr. Simpaio's opinion. *See Ragland v. Green Coal Co.*, BRB No. 09-0776 BLA, slip op. at 5-6 (Aug. 26, 2010) (unpub.).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant argues that the administrative law judge erred in discrediting the opinion of Dr. Baker, and in crediting the opinions of Drs. Rosenberg and Selby, in finding that the medical opinion evidence does not establish that claimant is totally disabled from a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant’s contentions lack merit.

In considering, on remand, whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge evaluated the opinions of Drs. Baker, Rosenberg, and Selby, as instructed by the Board. Dr. Baker initially diagnosed claimant with a “class 3 impairment” and a “25 to 50% impairment of the whole person.” Claimant’s Exhibit 1 at 3. When later deposed, Dr. Baker opined that, with use of a bronchodilator, claimant has only a “mild” respiratory impairment, which “is still a significant impairment in terms of what you can do.” Dr. Baker’s Deposition Tr. at 26-27. Dr. Baker stated that claimant would “have difficulty” performing his prior job as a coal miner, and does not have the capacity to work in a coal mine or in a dust-free environment, and recommended that claimant should avoid further exposure to coal mine dust, which could “only worsen his condition.” *Id.* at 12, 19, 33-34. Later, however, when again asked whether claimant would still have difficulty performing his usual coal mine duties even in a dust-free environment, Dr. Baker responded: “In the mines? There are no dust-free environments in the mines.” *Id.* at 33-4. Finally, Dr. Baker agreed that based on his pulmonary function and blood gas study results, claimant could perform his usual coal mine work from a respiratory standpoint. *Id.* at 34. In contrast, Drs. Rosenberg and Selby both consistently concluded that claimant is not totally disabled. Employer’s Exhibits 2-4.

The administrative law judge again found that Dr. Baker’s medical opinion is not sufficient to meet claimant’s burden to establish the existence of a totally disabling respiratory impairment. Contrary to claimant’s contention, the administrative law judge acknowledged that portions of Dr. Baker’s testimony indicate that claimant cannot perform his usual coal mine work, even in a dust-free environment. Decision and Order on Remand at 4; Claimant’s Brief at 3-4; Dr. Baker’s Deposition Tr. at 19. However, considering the entirety of Dr. Baker’s testimony, including Dr. Baker’s comment that

claimant could not perform his work duties even in a dust-free environment because “there are no dust-free environments in the mines,” the administrative law judge acted within his discretion in finding that Dr. Baker’s opinion is “fatally flawed” and “not compelling” because Dr. Baker had improperly considered claimant’s further exposure to coal mine dust in opining that claimant is precluded from returning to his prior coal mine work. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 4. Therefore, having found that Dr. Baker’s opinion “is undermined by his comments about dust,” and noting, correctly, that an opinion that claimant should avoid further coal mine dust exposure is not a diagnosis of total disability, the administrative law judge rationally determined that Dr. Baker’s opinion is not sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order on Remand at 4-5.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Moreover, the administrative law judge is empowered to weigh the medical evidence, draw inferences and determine credibility, *Crisp*, 866 F.2d at 185, 12 BLR at 2-129, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because substantial evidence supports the administrative law judge’s determination to discredit the opinion of Dr. Baker, the only remaining medical opinion supportive of a finding that claimant has a totally disabling respiratory impairment, we affirm the administrative law judge’s finding that the medical opinion evidence does not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). In light of the foregoing, we need not address claimant’s arguments regarding the credibility of the opinions of Drs Rosenberg and Selby. Consequently, we affirm the administrative law judge’s finding that claimant did not establish that he is totally disabled.

Because claimant is unable to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order on Remand 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