

BRB No. 06-0118 BLA

LONNIE WATTS)
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 Claimant-Petitioner)
)
 v.)
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 JEEPS TRUCKING COMPANY)
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 and)
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 TRAVELERS INSURANCE COMPANY) DATE ISSUED: 08/31/2006
)
 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 Denying Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

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

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville,
Kentucky, for employer/carrier.

Michelle S. Gerdano (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 (03-BLA-6533) of Administrative Law Judge William S. Colwell 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 noted that the instant claim is a subsequent claim, and that employer had stipulated to twenty years of coal mine employment. The administrative law judge found that the newly submitted evidence establishes the existence of pneumoconiosis, one of the applicable conditions of entitlement that was not established in the prior claim. The administrative law judge found that claimant's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203. However, he found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), and based on that finding, the administrative law judge found that claimant cannot establish that pneumoconiosis contributed to his disability at 20 C.F.R. §718.204(c). The administrative law judge therefore denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, asserting that he has satisfied his statutory duty to provide 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).

We first consider claimant's challenges to the administrative law judge's findings regarding total disability. Claimant asserts that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is

¹We affirm the administrative law judge's findings that the newly submitted evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant has therefore established a change in one of the applicable elements of entitlement pursuant to 20 C.F.R. §725.309, as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not applicable. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant also asserts that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Dr. Baker opined that:

Patient has a Class I impairment with the FEV1 and FVC greater than 80% of predicted. This is based on Table 5.2, Chapter Five, Page 107, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 16. Dr. Baker also stated:

Patient 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, particularly if x-ray changes have occurred. This would suggest the patient is 100% occupationally disabled for further work in the coal mining industry.

Director's Exhibit 16.

Because Dr. Baker did not explain the severity of a Class I impairment, or address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's diagnosis of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), we hold that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability. Further, in view of our holding, that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

In addition, claimant argues that, inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 5. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further.

Because claimant does not raise any further specific allegations of error in the administrative law judge's findings regarding total disability pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant has not established total disability pursuant to Section 718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant also asserts that the Director failed to provide him with a complete, credible pulmonary evaluation. The Director responds to this argument, contending that Dr. Simpao's report satisfies his statutory obligation. The Director notes that the administrative law judge did not reject Dr. Simpao's disability diagnosis, but rather accorded Dr. Simpao's finding "less weight." The Director urges that he has therefore satisfied his burden.

The Director is statutorily mandated to provide claimant with an opportunity for a complete pulmonary evaluation in order to substantiate his claim. *See* 30 U.S.C. §923(b) ("Each miner who files a claim for benefits. . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation."); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulations provide 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 of the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90, that he has fulfilled his statutory obligation in this case. Claimant selected Dr. Simpao to perform his Department-sponsored pulmonary evaluation. Dr. Simpao conducted a physical examination, took an x-ray and obtained pulmonary function and arterial blood gas study results, and completed a report, addressing all of the relevant issues of entitlement. *See* Director's Exhibit 11. Because Dr. Simpao performed a complete pulmonary evaluation, we hold that the Director satisfied his obligation under the Act. Moreover, the Director's obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d

1162, 7 BLR 2-25 (8th Cir. 1984). Although the administrative law judge accorded Dr. Simpao's opinion less weight at Section 718.204(b)(2)(iv), he did not find this opinion devoid of probative value. Therefore, we agree with Director that Dr. Simpao's opinion satisfies the Director's obligation under Section 413(b) of the Act, and we reject claimant's contrary argument.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge