

BRB No. 07-0986 BLA

W.H.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HARLAN CUMBERLAND COAL)	DATE ISSUED: 08/20/2008
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (06-BLA-5942) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits on a subsequent 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 fourteen years of coal mine employment,¹ and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence developed since the prior denial of benefits did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).² Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer has not filed a brief in this appeal. The Director has filed a limited response, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

¹ The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Administrative Law Judge Joseph E. Kane (the administrative law judge) concluded that the issue of whether the evidence established total disability due to pneumoconiosis at 20 C.F.R. 718.204(c) was moot, in light of his finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b).

³ Because the administrative law judge's length of coal mine employment finding and his findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv) and that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. 725.309 are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant contends that because the administrative law judge concluded that Dr. Simpao's report was not well-reasoned, the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. The Director responds that the statutory obligation to provide claimant with a complete and credible pulmonary evaluation has been fulfilled.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form and a supplemental report.⁴ Director's Exhibits 10, 23; 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 718.104, 725.406. On the dispositive issue of total disability, the administrative law judge considered the reports of Drs. Simpao and Dahhan. Dr. Simpao opined that claimant has a moderate pulmonary impairment, that he does not retain the pulmonary capacity to perform his last regular coal mine job, and that coal dust exposure was a major contributing factor to his disabling lung disease. Director's Exhibit 23. By contrast, Dr. Dahhan opined that claimant does not have a pulmonary disability, and that he retains the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Employer's Exhibit 1. The administrative law judge permissibly gave less weight to Dr. Simpao's disability opinion, because "Dr. Simpao did not explain how the abnormalities listed would cause a totally disabling impairment."⁵ Decision and Order at 12; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge properly gave dispositive weight to Dr. Dahhan's disability

⁴ In his May 2, 2002 report, Dr. Simpao diagnosed coal workers' pneumoconiosis, and opined that claimant has a moderate impairment. Director's Exhibit 10. On March 27, 2006, Administrative Law Judge Rudolf L. Jansen issued an Order that remanded this case to the district director to provide claimant with a complete pulmonary evaluation, because Dr. Simpao's May 2, 2002 report did not provide an opinion regarding whether claimant was totally disabled. Director's Exhibit 23. In his April 24, 2006 supplemental report, Dr. Simpao diagnosed legal and clinical pneumoconiosis, and opined that claimant has a moderate pulmonary impairment. *Id.* Dr. Simpao also opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job and that coal dust exposure was a major contributing factor to his disabling lung disease. *Id.*

⁵ The administrative law judge also noted that "[Dr. Simpao] failed to address [c]laimant's normal arterial blood gas testing and nonqualifying pulmonary function testing." Decision and Order at 12.

opinion, because it was well-reasoned and well-documented.⁶ Decision and Order at 12; *Clark*, 12 BLR at 1-155. We agree with the Director that the administrative law judge found Dr. Simpao’s disability opinion outweighed by more persuasive evidence, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to claimant. *Cf. Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

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

⁶ The administrative law judge stated that “[Dr. Dahhan] based his opinion on normal physical examination of the chest, normal arterial blood gas testing and nonqualifying pulmonary function testing showing mild, partially reversible impairment.” Decision and Order at 11.