BRB No. 08-0107 BLA

C.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/21/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5589) of Administrative Law Judge Joseph E. Kane rendered 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). Claimant filed his first claim for benefits on November 3, 1993, which was administratively closed as abandoned on September 22, 1994. Director's Exhibit 1 at 279, 333. Claimant filed his second claim for benefits on February 5, 2001, and it was denied on July 1, 2004, because claimant did not establish the existence of pneumoconiosis and total disability. Director's Exhibit 1 at 2, 68, 272. Claimant filed his third and instant claim on August 1, 2005. Director's Exhibit 3.

The administrative law judge initially credited claimant with twenty-three years of coal mine employment, as stipulated.[1] The administrative law judge found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d) as the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), was uncontested. Addressing the merits of claimant's subsequent claim, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the opinions of Drs. Baker and Simpao did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.[2]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Baker's 2006 report did not offer an opinion as to claimant's disability, and thus he gave it no weight on the issue of total disability. The administrative law judge found that Dr. Baker's 2002 opinion, that claimant should avoid further dust exposure and has a Class 2 respiratory impairment, was not well-reasoned. Moreover, the administrative law judge

[1] The record indicates that claimant's coal mine employment was in Tennessee. Decision and Order at 3; Director's Exhibit 4. 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, 1-202 (1989)(*en banc*).

[2] The administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

found that Dr. Simpao's opinion, that claimant is not totally disabled due to his pulmonary status, was well-reasoned and well-documented.

Claimant asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 2-3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a motor operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Baker and Simpao (both of whom diagnosed pulmonary impairments), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Kane made no mention of the claimant's usual coal mine work in conjunction with Drs. Baker and Simpao's opinions of disability.

Claimant's Brief at 3. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *W.C. v. Whitaker Coal Corp.*, --- BLR ---, BRB Nos. 07-0649 BLA/A, slip op. at 11 (Apr. 30, 2008); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge permissibly found that Dr. Simpao's September 16, 2005 opinion, that the miner was not totally disabled, was well-reasoned and well-documented because it was based on normal results of claimant's pulmonary function and blood gas studies.[3] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 11; Director's Exhibit 14 at 21-22. Additionally, the administrative law judge

[3] Dr. Simpao took into account the exertional requirements of claimant's usual coal mine employment as a pump man, which required him to lift 100-150 pounds at times, to carry a tool belt weighing twenty-five pounds, and to perform "a lot of lifting and bending," in opining that claimant is not totally disabled from a respiratory standpoint. Director's Exhibit 14 at 19; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

properly gave no weight to Dr. Baker's March 2, 2006 report, with accompanying treatment notes, because Dr. Baker did not address whether claimant was totally disabled. *See Gee v. W. G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*); Decision and Order at 11; Claimant's Exhibit 1. Because claimant does not specifically challenge the administrative law judge's treatment of Dr. Baker's August 21, 2002 report, the administrative law judge's finding is affirmed.[4] *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987); Decision and Order at 11; Director's Exhibit 1 at 149. Consequently, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence.[5]

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. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[4] The administrative law judge permissibly found that Dr. Baker's 2002 opinion that claimant has a Class 2 impairment was not well-reasoned, because it was based on an invalid pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); Director's Exhibit 1 at 79, 149.

[5] We reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 3. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *W.C. v. Whitaker Coal Corp.*, --- BLR ---, BRB Nos. 07-0649 BLA/A, slip op. at 12 n.11 (Apr. 30, 2008); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge