

BRB No. 06-0637 BLA

EDGAR WHITAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/27/2007
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Jonathan L. Snare, Acting 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (03-BLA-5878) of Administrative Law Judge Rudolf L. Jansen 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). This case has previously been before the Board, and the complete procedural history is contained in the Board's prior decision addressing claimant's appeal of the denial of benefits. *Whitaker v. Director, OWCP*, BRB No. 05-0185 BLA (June 28, 2005)(unpub).

In that decision, the Board noted the concession by the Director, Office of Workers' Compensation Programs (the Director), before the administrative law judge, that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a),

and affirmed the administrative law judge's findings that claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). However, the Board vacated the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, the Board held that the administrative law judge improperly rejected the opinions of Drs. Baker and Hussain, because the administrative law judge failed to consider, pursuant to *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) and *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), whether Drs. Baker and Hussain were aware of the exertional requirements of claimant's usual coal mine work as a welder, or whether the work of a welder "has a precise meaning in the context of coal mining." *Whitaker*, slip op. at 4. Therefore, the Board remanded the case for further consideration of whether claimant has a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), and, if necessary, for consideration of whether the impairment is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

On remand, the administrative law judge found that the evidence failed to establish the existence of total disability pursuant to Section 718.204(b)(2)(iv). Alternatively, the administrative law judge found that, even if claimant had established that he is totally disabled, the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issue of total disability at Section 718.204(b)(2)(iv). Claimant further asserts that because the administrative law judge found that Dr. Hussain's report does not contain a description of claimant's former coal mine duties, and does not address whether the moderate impairment that Dr. Hussain diagnosed prevents claimant from performing the work of a coal miner, the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required by 20 C.F.R. §725.406(a). The Director responds, urging affirmance of the administrative law judge's denial of benefits. Additionally, the Director argues that because Dr. Hussain opined that claimant's pulmonary impairment was unrelated to coal mine employment on the issue of disability causation at Section 718.204(c), and the administrative law judge properly found that disability causation was not established, "a remand for further clarification" of Dr. Hussain's opinion as to the presence of total disability "would not aid Claimant because . . . [he] still would not be entitled to benefits because of the failure to prove disability-causation." Director's Brief at 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 a finding of 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).

On remand, the administrative law judge reconsidered the evidence relevant to the issue of total disability, and again found that the evidence did not establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). Decision and Order on Remand at 6-7. The administrative law judge further found that, even if the evidence were perceived as establishing the existence of a totally disabling respiratory impairment, the medical evidence did not establish that the total disability is due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order on Remand at 7. Specifically, the administrative law judge accurately noted that Dr. Hussain opined that claimant has no pulmonary impairment related to pneumoconiosis. Director’s Exhibit 9. The administrative law judge additionally considered Dr. Baker’s opinion that “any pulmonary impairment would be caused at least in part by his coal dust exposure,” and held it to be “cursory and unsupported,” and thus, “worthy of little weight.” Decision and Order on Remand at 5-7. Finally, the administrative law judge found that Dr. Wicker’s medical treatment notes did not address the issue of the cause of disability. Director’s Exhibit 8.

Claimant raises no specific arguments regarding the administrative law judge’s weighing of the medical opinion evidence relevant to the issue of disability causation at Section 718.204(c).<sup>1</sup> Consequently, we affirm, as unchallenged, the administrative law judge’s finding that total disability due to pneumoconiosis was not established pursuant to Section 718.204(c). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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<sup>1</sup> Claimant argues that the administrative law judge erred in finding that he had not established total disability due to pneumoconiosis because the administrative law judge should have credited Dr. Baker’s opinion, which, claimant asserts was well-reasoned and well-documented. Claimant’s Brief at 4. However, claimant does not address the specific reasons which the administrative law judge stated to reject Dr. Baker’s opinion.

Additionally, we reject claimant's assertion that, because the administrative law judge found that Dr. Hussain did not expressly opine whether claimant is totally disabled by a moderate impairment, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new, complete, pulmonary evaluation pursuant to 20 C.F.R. §725.406.<sup>2</sup> Claimant's Brief at 5. Contrary to claimant's argument, as the Director correctly points out, because we affirm the administrative law judge's finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c), we need not address claimant's challenge to the sufficiency of Dr. Hussain's opinion regarding total respiratory disability at Section 718.204(b)(2)(iv). As the evidence fails to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(c), an essential element of entitlement, an award of benefits is precluded in this case. *See Trent*, 11 BLR at 1-27. Thus, a remand for Dr. Hussain to clarify his opinion regarding total disability would be futile.

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<sup>2</sup> The Department of Labor has a statutory duty to provide "[e]ach miner who files a claim . . . an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge