BRB No. 06-0645 BLA

COY ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/28/2007
	)	
BLEDSOE COAL CORPORATION	)	
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5822) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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 credited claimant with twenty-four years of coal mine employment and considered the claim, filed on September 16, 2002, under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant argues further that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the Director met his obligation to provide claimant with a complete and 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).

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 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Baker, Simpao, Rosenberg, and Fino. Dr. Baker examined claimant on December 7, 2002 and obtained nonqualifying pulmonary function and blood

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has twenty-four years of coal mine employment, and did not establish the existence of pneumoconiosis or that he is totally disabled, pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

gas studies. Director's Exhibit 18. Dr. Baker diagnosed claimant with a Class 1 impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th ed.) and a second impairment based upon claimant's need to avoid further dust exposure. Dr. Baker observed that a statement in the *Guides to the Evaluation of Permanent Impairment* (5th ed.) "would imply" that claimant is "100% occupationally disabled." *Id*. Dr. Simpao performed an examination of claimant at the request of the Department of Labor on January 3, 2003. Dr. Simpao obtained nonqualifying pulmonary function and blood gas studies and stated that claimant has a mild respiratory impairment. Director's Exhibit 9. Dr. Rosenberg examined claimant on December 10, 2002. He concluded that, based upon claimant's essentially normal chest examination, the absence of significant obstruction or restriction on his pulmonary function study, and his arterial blood gas study, claimant retained the respiratory capacity to perform his last employment. Employer's Exhibits 1, 2. Dr. Fino submitted a medical evidence review dated May 2, 2005. He concluded that because the pulmonary function and blood studies were normal, claimant is able to perform his usual coal mine work. Employer's Exhibits 3, 4. The administrative law judge accorded greatest weight to the opinions of Drs. Rosenberg and Fino and determined that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 15.

Claimant initially 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 7-8, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a roof bolter, miner operator, and shuttle car 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, as well as the medical opinion of Dr. Baker, against such duties 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.

Claimant's Brief at 8. 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, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004). We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. The administrative law judge's findings must be based solely on the medical evidence of record and the administrative law judge properly found that the evidence did not establish a totally disabling respiratory impairment. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv). *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Because the administrative law judge's findings that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b), an essential element of entitlement, have been affirmed, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a), as error, if any, in the administrative law judge's findings would be harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, however, we must address claimant's contention that the Director did not provide him with a complete pulmonary evaluation as is required under the Act. Claimant contends that because the administrative law judge did not credit the diagnosis of pneumoconiosis contained in Dr. Simpao's medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5-6. The Act requires that "[e]ach miner who files a claim . . . be provided 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. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

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. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's opinion was incomplete. Moreover, the administrative law judge specifically determined that Dr. Simpao's opinion on the issue of total disability was adequately documented and based, in part, upon objective data. Decision and Order at 15. The administrative law judge acted with his discretion, however, in finding that Dr. Simpao's diagnosis of a totally disabling impairment was outweighed by the contrary opinions of Drs. Rosenberg and Fino, as they were better explained and more consistent with the objective evidence of record. *Id*.; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Because Dr. Simpao's opinion regarding total disability was complete and the administrative law judge did not find that it lacked credibility, remand to the district director for a complete pulmonary evaluation is not required. *See Hodges*, 18 BLR at 1-88 n.3.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge