

BRB No. 07-0390 BLA

P.H.)
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 Claimant-Petitioner)
)
 v.)
)
 IKERD BANDY COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 02/28/2008
 SECURITY INSURANCE OF HARTFORD)
)
 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 – Denial of Benefits of Larry S. Merck,
Administrative Law Judge, United States Department of Labor.

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

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky,
for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5401) of
Administrative Law Judge Larry S. Merck 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). Claimant filed his claim for benefits on May 15, 2001.¹ Director's Exhibit 3. The administrative law judge credited claimant with eighteen years of coal mine employment² pursuant to the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that, assuming *arguendo* that the evidence had established total disability, the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to participate in this appeal.

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'Keefe 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).

¹ Claimant's first claim, filed on February 2, 2000, was withdrawn on March 6, 2001. Director's Exhibit 2. Thus, that claim is considered not to have been filed, pursuant to 20 C.F.R. §725.306(b).

² The record indicates that claimant's coal mine employment occurred in Kentucky. 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*).

Claimant challenges the administrative law judge's determination that Dr. Baker's medical report failed to establish total disability pursuant to 20 C.F.R. §718.202(b)(2)(iv).³ Claimant's Brief at 3. We disagree.

Dr. Baker diagnosed claimant with at "Class I impairment based on the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 11. Dr. Baker also indicated that claimant "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. This would imply the patient is 100% occupationally disabled." *Id.*

Contrary to claimant's contention, the administrative law judge reasonably found that, because Dr. Baker failed to explain the severity of a Class I impairment or address whether such an impairment would prevent claimant from performing his usual coal mine employment, the diagnosis of a Class I impairment was insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*). Moreover, the administrative law judge properly determined that Dr. Baker's recommendation against further dust exposure was insufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Thus, the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability.⁴ Further, in view of our holding that the administrative law judge properly found Dr. Baker's opinion 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.

Claimant next asserts that the administrative law judge failed to consider claimant's usual coal mine work in conjunction with Dr. Hussain's opinion "of disability." Claimant's Brief at 5. As the administrative law judge found, however, Dr.

³ We affirm the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ In analyzing Dr. Baker's medical report, the administrative law judge relied on the Board's holding in *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005)(unpub.), that a nearly identical report by Dr. Baker was properly found to be insufficient to support a finding of total disability. Decision and Order 17.

Hussain's opinion was that, based on "normal" pulmonary function and blood gas studies, claimant has a "mild" impairment and he retains the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibit 11. The administrative law judge permissibly found that Dr. Hussain's opinion was "well-reasoned and well-documented in regards to the issue of total disability," and substantial evidence supports the administrative law judge's unchallenged finding. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 16. Thus, the administrative law judge did not err in failing to match the exertional requirements of claimant's usual work as a coal loader against Dr. Hussain's opinion, as Dr. Hussain's opinion cannot support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁵ *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Claimant states that pneumoconiosis is a progressive and irreversible disease, and asserts that "[i]t can therefore be concluded" that his condition has worsened, thereby affecting his ability to perform his usual coal mine work. Claimant's Brief at 5. This assertion lacks merit; the administrative law judge properly found that the medical evidence contained in the record did not establish total disability. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish total disability, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

⁵ The record reflects that the only other medical opinion was Dr. Jarboe's opinion that claimant has no impairment and is not totally disabled. Director's Exhibit 14.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge