

BRB No. 07-0448 BLA

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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 02/29/2008
)
 SHAMROCK COAL COMPANY,)
 INCORPORATED)
)
 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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2005-BLA-05919) of Administrative Law Judge Ralph A. Romano denying benefits 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

twelve years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on May 5, 2004, pursuant to the regulations contained in 20 C.F.R. Part 718.¹ The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and 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 finding the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) and total disability at Section 718.204(b)(2)(iv).² Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible 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), has also responded and urges the Board to reject claimant's allegation that he was not provided with a complete pulmonary evaluation.

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*

¹ On June 3, 2002, claimant filed an application for benefits. After claimant's written request, the district director granted withdrawal of the claim in a Proposed Decision and Order Withdrawal of Claim dated February 19, 2003 and indicated, in accordance with 20 C.F.R. §725.306(b), that the claim would be considered not to have been filed. At employer's request, and by Order Requesting District Director to Forward Prior Claim, issued on September 28, 2006, the administrative law judge ordered the district director to make the withdrawn claim part of the record in the instant claim and to forward to all the parties a copy of the withdrawn claim.

² The provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c)(2000), and discussed in claimant's brief, Claimant's Brief at 5, is now found at 20 C.F.R. §718.204(b)(2), while the provision pertaining to disability causation, previously set forth at Section 718.204(b)(2)(2000), is now found at Section 718.204(c).

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 the issue of total disability under Section 718.204(b)(2)(iv), the administrative law judge credited the medical opinions of Drs. Broudy, Dahhan and Baker, that claimant is not totally disabled, over the contrary opinion of Dr. Simpao. Decision and Order at 13; Director's Exhibits 11, 28; Employer's Exhibit 1. The administrative law judge found that the opinions of Drs. Broudy and Dahhan are well-documented and reasoned because they are supported by their clinical findings, including physical examinations and non-qualifying pulmonary function and blood gas studies.³ *Id.* The administrative law judge concluded that because Dr. Simpao "relied on test results that the regulations say do no[t] prove total disability, and opined that the results somehow support a finding of total disability anyway," this opinion was not as well-reasoned as the opinions of Drs. Broudy and Dahhan. Decision and Order at 13. The administrative law judge also considered that the only reference to claimant's respiratory condition in claimant's treatment records is that his lungs are clear upon examination and that the x-ray readings noted that there was no evidence of acute pulmonary disease. Decision and Order at 7-8.

We reject claimant's argument that the administrative law judge erred in finding that claimant was not totally disabled without comparing the physicians' assessments with the exertional requirements of claimant's work as a dozer operator. Dr. Simpao examined claimant at the request of the Department of Labor on July 6, 2004 and obtained a non-qualifying pulmonary function study and a non-qualifying blood gas study. The administrative law judge acknowledged that Dr. Simpao diagnosed a mild pulmonary impairment due to coal dust exposure and indicated that claimant does not have the respiratory capacity to perform the work of a coal miner. Decision and Order at 12; Director's Exhibit 11. The administrative law judge however reasonably concluded that Dr. Simpao's opinion lacks sufficient reasoning and documentation. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-113 (6th Cir. 1995); Decision and Order at 13. Because the administrative law judge provided a valid rationale for discrediting the opinion of Dr. Simpao, the only medical opinion of record that finds that claimant does not have the respiratory capacity to perform the work of a coal miner, he was not required to compare the physicians' assessments with the exertional requirements of claimant's last coal mine job. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988); Decision and

³ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set forth in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

Order at 13.⁴ We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability under Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence.⁵ Because claimant does not challenge the administrative law judge's findings that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).⁶

Claimant also contends that because the administrative law judge found that Dr. Simpao's opinion regarding total disability 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. Claimant's Brief at 4. Claimant requests, therefore, that the Board reverse the administrative law judge's denial

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

⁵ We also reject claimant's suggestion 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 6. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

⁶ We agree with the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge incorrectly considered the evidence from the June 3, 2002 withdrawn claim, consisting of two conflicting x-ray readings and the medical opinion in which Dr. Baker stated that claimant was not totally disabled as "other medical evidence" pursuant to 20 C.F.R. §718.107. Decision and Order at 8-9, 13. Although the administrative law judge correctly noted that those reports were in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414, he erred in determining that excess evidence can be admitted under Section 718.107. To the contrary, Section 718.107 concerns the admissibility of evidence "other than" the x-ray readings and report of physical examination described in 20 C.F.R. §§718.102 and 718.204, and contained in the record of the withdrawn claim. *See* 20 C.F.R. §718.107(a). Nevertheless, we agree with the Director that because this evidence did not influence the outcome of the decision, the administrative law judge's error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

of benefits or that this case be remanded for further administrative proceedings. The Director maintains that Dr. Simpao's opinion constituted a complete pulmonary evaluation, which included Dr. Simpao's examination of claimant on July 6, 2004, a chest x-ray, a pulmonary function study, a blood gas study, an EKG, and claimant's work and medical histories. Director's Brief at 2; Director's Exhibit 11.

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 administrative law judge did not find, nor does claimant allege, that Dr. Simpao's examination was incomplete. To the contrary, the administrative law judge gave some weight to Dr. Simpao's opinion, but found his opinion not "as well-reasoned" as the contrary opinions of Drs. Broudy and Dahhan, and, as the Director observes, rationally found Dr. Simpao's disability finding outweighed by the contrary opinions of Drs. Broudy and Dahhan. Decision and Order at 13. Because Dr. Simpao's report included the requisite testing, addressed the necessary elements of entitlement, and was accorded some weight by the administrative law judge, the Director has provided claimant with a complete evaluation on the issue of total disability, the dispositive issue in this case. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Cf. Hodges*, 18 BLR at 1-93; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). We decline, therefore, to remand this case as requested by claimant.⁷ *Id.*

Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits.⁸ *Anderson*, 12 BLR at 1-112.

⁷ See *Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.)(a report in which the physician addresses the essential elements of entitlement may satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation).

⁸ In light of our affirmance of the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and the denial of benefits, we need not address claimant's arguments concerning the administrative law

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

judge's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a).