

BRB No. 05-0943 BLA

EPHIE HENSLEY)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 07/18/2006
 UNICORN MINING, INCORPORATED)
)
 and)
)
 AMERICAN INTERNATIONAL)
 COMPANY, c/o AIG CLAIMS SERVICES)
)
 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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, 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 (03-BLA-6646) of Administrative Law Judge Daniel J. Roketenetz 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 found that employer was the proper responsible operator and that the parties stipulated to thirty years of qualifying coal mine employment.¹ Decision and Order at 2-5; Hearing Transcript at 9-10, 12. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 5-6. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 7-13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts, with respect to the medical opinion evidence, that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter asserting that the denial of benefits is supported by substantial evidence and that claimant has been provided with a complete pulmonary examination.³

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

¹ The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 5. 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 (1989)(*en banc*).

² Claimant filed his claim for benefits on November 20, 2001, which was denied by the district director on June 27, 2003. Director's Exhibits 2, 20. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 21.

³ The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.304 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge rationally found that the evidence of record was insufficient to establish total disability. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), 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 6-7, citing *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 miner 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 opinion of Dr. Baker (who did diagnose a minimal pulmonary impairment), 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 7. 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 Gambrel Co.*, 12 BLR 1-83 (1988). Moreover, claimant ignores that the administrative law judge found that Dr. Baker diagnosed no impairment and fully credited this opinion in finding total disability not established. Decision and Order at 12; Director’s Exhibit 11.

Because an administrative law judge's findings must be based solely on the medical evidence of record, 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. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Consequently, as claimant makes no other specific challenge to the administrative law judge's treatment of Dr. Baker's opinion, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant contends that because the administrative law judge did not fully credit Dr. Baker's January 14, 2002 opinion, diagnosing pneumoconiosis, provided by the Department of Labor, "the Director has failed to provide claimant with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that Section 413(b) has been satisfied as the Director is "only required to provide each miner-claimant with a complete and credible examination, not a dispositive one," and he states that claimant has been provided the medical examination required by the Act and regulations. Director's Brief at 2-3.

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 Director fails to meet this duty 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, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Baker 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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 11. The administrative law judge did not find nor does claimant allege that Dr. Baker's report was incomplete. Rather, at Section 718.202(a)(4), the administrative law judge found that Dr. Baker's report was not well-

reasoned. Decision and Order at 9-10. Moreover, at Section 718.204(b)(2)(iv), the administrative law judge fully credited Dr. Baker's opinion that claimant is not totally disabled. Decision and Order at 12. Thus, the administrative law judge did not reject Dr. Baker's opinion. Dr. Baker's report was credited in part and was complete. The administrative law judge did not find that it completely lacked credibility. We reject, therefore, claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-84; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162, 7 BLR 2-25. Consequently, we affirm the denial of benefits as claimant has failed to establish total disability, an essential element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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