

BRB No. 07-0952 BLA

R.C.S. )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 WHITAKER COAL CORPORATION ) DATE ISSUED: 07/25/2008  
 )  
 and )  
 )  
 SUN COAL COMPANY, INCORPORATED )  
 )  
 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 Joseph E. Kane, 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/carrier.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5610) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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 fifteen years of coal mine employment,<sup>1</sup> and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).<sup>2</sup> The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).<sup>3</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges 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). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director has filed a limited response, urging the Board to reject claimant's contention that the case should be remanded to the district director for the Director to provide claimant with a complete and credible pulmonary evaluation.<sup>4</sup>

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<sup>1</sup> The record indicates that claimant was employed in the coal mine industry in Kentucky. Director's Exhibits 3, 14. 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*).

<sup>2</sup> The administrative law judge concluded that the issue of whether the evidence established that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203 was moot, in light of his finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

<sup>3</sup> The administrative law judge also concluded that the issue of whether the evidence established total disability due to pneumoconiosis was moot, in light of his findings that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b).

<sup>4</sup> Because the administrative law judge's length of coal mine employment finding and his finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 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 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 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Baker, Broudy, and Dahhan. The administrative law judge stated that "all three of these physicians concluded that [c]laimant does not suffer from any type of pulmonary impairment."<sup>5</sup> Decision and Order at 11. Because Drs. Baker, Broudy, and Dahhan did not definitively diagnose a respiratory or pulmonary impairment, Director's Exhibits 11, 24, 32, the administrative law judge was not required to make a comparison of their opinions with the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the disability assessments of the physicians.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

Because the administrative law judge properly found that the medical opinion evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.<sup>6</sup> *Anderson*, 12 BLR at 1-112.

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<sup>5</sup> Drs. Baker and Dahhan opined that claimant does not have a pulmonary impairment. Director's Exhibits 11, 34. Dr. Broudy opined that claimant does not have any disabling respiratory impairment, based on the results of objective tests that were within normal limits. Director's Exhibit 24.

<sup>6</sup> In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to

Finally, claimant contends that because Dr. Baker's opinion was unreasoned with regard to the issue of legal pneumoconiosis,<sup>7</sup> the Director failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act. The Director responds that a remand to the district director to provide claimant with a complete and credible pulmonary evaluation with regard to the issue of pneumoconiosis is unnecessary, because it would not change the outcome of the case. *See* Director's Letter at 3. The Director maintains that a clarified diagnosis of pneumoconiosis by Dr. Baker would still fail to prove the necessary element of total disability.

The administrative law judge found that Dr. Baker's analysis regarding the issue of legal pneumoconiosis was flawed. Decision and Order at 12. Nonetheless, the administrative law judge found that Dr. Baker's analysis regarding the issue of total disability was reasoned and documented and, thus, a sufficient basis to deny benefits. *Id.* The administrative law judge therefore concluded that a remand of the case to the district director to provide claimant with a reasoned and documented opinion with regard to the issue of pneumoconiosis would be futile, because claimant could not prevail. *Id.*

Claimant does not assert any defect with respect to Dr. Baker's opinion regarding total disability. On the issue of total disability, the administrative law judge credited Dr. Baker's opinion that claimant retained the respiratory capacity to perform the work of a coal miner.<sup>8</sup> Director's Exhibit 11. The administrative law judge then found that claimant failed to establish total disability. Based on the administrative law judge's consideration of Dr. Baker's disability opinion, claimant was provided a complete and credible pulmonary evaluation regarding total disability at 20 C.F.R. §718.204(b)(2)(iv). *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-93 (1994). Further, because the administrative law judge's finding that the evidence did not establish total disability was sufficient to support his denial of benefits, we agree with both the Director and the

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address claimant's contentions at 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>7</sup> Claimant notes that "the [administrative law judge] concluded that Dr. Baker's report was inconsistent as said physician at one point diagnosed a pulmonary impairment (bronchitis) which was caused by coal dust exposure but then inexplicably later stated that the claimant suffered from no disease that was caused by coal mine employment (Decision, page 9)." Claimant's Brief at 4.

<sup>8</sup> The administrative law judge also credited the opinions of Drs. Broudy and Dahhan that claimant does not have a disabling pulmonary or respiratory impairment, and retained the respiratory capacity to perform the work of a coal miner. Director's Exhibits 24, 32.

administrative law judge that a remand of the case to the district director to provide claimant with a complete and credible pulmonary evaluation with regard to the issue of pneumoconiosis is unnecessary. *Hodges*, 18 BLR at 1-88 n.3; *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).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge