

BRB No. 05-0158 BLA

FRED HOSKINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STRAIGHT CREEK COAL COMPANY)	DATE ISSUED: 06/13/2005
)	
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 – Denying Benefits of Mollie W. Neal,
Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
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: McGRANERY, HALL, and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5439) of
Administrative Law Judge Mollie W. Neal 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 March 14, 2001.
Director's Exhibit 1. The district director issued a Proposed Decision and Order Denying
Benefits on November 6, 2002. Director's Exhibit 20. Claimant timely requested a
hearing, which was held on September 9, 2003. In her September 22, 2004 Decision and
Order, the administrative law judge noted employer's stipulation that claimant worked as

a miner for eleven years in coal mine employment.¹ The administrative law judge, however, denied benefits because she found that claimant failed to establish the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in admitting rebuttal x-ray readings proffered by employer in excess of the evidentiary limitations, and that the administrative law judge selectively analyzed the x-ray evidence in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 2-4. Claimant asserts that while he underwent, on August 22, 2001, an examination sponsored by the Department of Labor, which was conducted by Dr. Baker, he was not provided a complete pulmonary evaluation, as required by 20 C.F.R. §725.406, because the administrative law judge discredited Dr. Baker's August 22, 2001 diagnosis that claimant had legal pneumoconiosis, finding it contradicted by a later statement by Dr. Baker that claimant did not have an occupational lung disease. Claimant's Brief at 4; Decision and Order at 5. Claimant further argues that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work prior to concluding that he was not totally disabled. Claimant's Brief at 4-6. Employer has not filed a response brief.² The Director, Office of Workers' Compensation Programs, (the Director) has filed a brief, arguing that claimant received a complete and credible pulmonary evaluation because the administrative law judge essentially found Dr. Baker's diagnosis of pneumoconiosis to be outweighed by the opinions of Drs. Dahhan and Fino. The Director points out that remand of the case for further development of the medical evidence, including a clarified opinion from Dr. Baker is unnecessary: "In other words, a clarified diagnosis of pneumoconiosis would not convert the denial into an award. Instead, claimant would obtain, at best, a more credible opinion from Dr. Baker that would still fail to prove the necessary element of total respiratory impairment." Director's Brief at 2.

¹ Claimant's coal mine employment was in the Commonwealth of Kentucky; therefore, 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*); Director's Exhibit 2.

² On November 3 and December 23, 2004, Bonnie Hoskins filed a request to withdraw as employer's legal counsel, noting that Horizon Natural Resources, Inc. was liquidated in bankruptcy, and that liability for the claim would transfer to the Black Lung Disability Trust Fund. Counsel's request to withdraw was granted by the Board by Order dated March 28, 2005.

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).

After consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically, we affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment, and thus that claimant failed to establish a requisite element of entitlement.³

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered three medical opinions, those from Drs. Baker, Dahhan, and Fino, and found that all of the physicians who rendered assessments on disability had determined that claimant was not totally disabled. Decision and Order at 6. The administrative law judge noted that Dr. Baker's opinion was insufficient to establish total disability because Dr. Baker stated that claimant did not have a pulmonary impairment and that claimant had the respiratory capacity to perform the work of a coal miner. *Id.* The administrative law judge further noted that Drs. Dahhan and Fino opined that claimant had no respiratory or pulmonary impairment, and that claimant was not totally disabled from returning to his last coal miner job.⁴ *Id.* Based on these three medical opinions, the administrative law judge thus

³ The administrative law judge found that there was no qualifying pulmonary function study or arterial blood gas study evidence for total disability, and that the record was devoid of evidence that claimant suffered from cor pulmonale with right-sided congestive heart failure, which would entitle him to a presumption of total disability. Thus, the administrative law judge determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 4. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ In the Department of Labor examination report of August 22 2001, Dr. Baker noted that claimant worked thirteen years in surface mining. Dr. Baker reported that pulmonary function and an arterial blood gas studies performed in conjunction with his examination were normal. Director's Exhibit 8. In response to the question of whether claimant had an impairment due to chronic respiratory or pulmonary disease, Dr. Baker first wrote "minimal impairment with bronchitis," which he attributed to smoking and coal dust exposure. *Id.* Dr. Baker later check-marked a box in the same report, indicating that claimant had no respiratory impairment. *Id.*

concluded that claimant failed to carry his burden of proof to establish a totally disabling respiratory or pulmonary impairment.

Claimant argues that the administrative law judge erred in failing to consider the medical opinions in light of the exertional requirements of his usual coal mine employment. *See generally Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*). This argument is without merit. Drs. Dahhan and Fino specifically found that claimant had no respiratory impairment whatsoever; therefore, it was not necessary for the administrative law judge to consider claimant's exertional work requirements. *See Cornet v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Furthermore, since Dr. Baker diagnosed, at most, a "minimal [respiratory impairment] with bronchitis," and when given a choice of: no impairment, mild impairment, moderate impairment, severe impairment or totally disabled, the doctor chose no impairment, the administrative law judge reasonably credited his finding of no impairment, and therefore properly found Dr. Baker's opinion insufficient to satisfy claimant's burden of proof. Director's Exhibit 8; *see Cornett*, 227 F.3d at 569, 22 BLR at 2-107.

Consequently, as there is no medical opinion evidence from which to conclude that claimant has a totally disabling respiratory or pulmonary impairment, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁵ Because claimant failed to establish total disability, a requisite element of entitlement, *see Trent v. Director, OWCP*,

In his report of examination on July 31, 2001, Dr. Dahhan noted that claimant operated a dozer on a strip mine for fourteen years. Dr. Dahhan diagnosed that claimant had no respiratory impairment and that he could return to his usual coal mine employment. Director's Exhibit 10.

Dr. Fino similarly diagnosed in his consultative report dated April 30, 2002 that there was no evidence of any respiratory impairment that would preclude claimant from returning to work in the coal mines. *Id.*

⁵ Since we affirm the administrative law judge's finding that claimant is not totally disabled, we decline to address claimant's contention that he did not receive a complete pulmonary evaluation because the administrative law judge did not credit Dr. Baker's diagnosis of pneumoconiosis. Even if claimant had been able to establish the existence of pneumoconiosis relying on Dr. Baker's opinion, he still would be unable to establish his entitlement to benefits as the administrative law judge properly found that he was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

9 BLR 1-1 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), benefits are precluded.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge