BRB No. 06-0760 BLA

JAMES CAUSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/27/2007
	)	
BLEDSOE COAL COMPANY	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6275) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a claim filed on December 12, 2001, 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 nineteen years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to 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), has 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 denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[1]

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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-

[1] The administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in failing to find that he established total disability based on Dr. Baker's opinion.[2] Claimant's Brief at 7. Specifically, claimant argues that Dr. Baker's opinion that "claimant is 100% occupationally disabled" is reasoned and documented, and therefore, sufficient to satisfy his burden of proof.[3] *Id*. Claimant also asserts that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work, in conjunction with Dr. Baker's findings regarding the extent of any respiratory impairment, prior to finding that claimant was not totally disabled. Claimant's Brief at 8.

Claimant's assertions of error lack merit. Dr. Baker examined claimant on February 22, 2003 and completed a Form 108-CWP medical report for the Kentucky Department of Workers Claims. Claimant's Exhibit 1. Relying on Table 5-12, Page 107, Chapter Five of the *American Medical Association, Guides to the Evaluation of Permanent Impairment,* (A.M.A. *Guides*) (5th ed.), Dr. Baker

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[2] We reject claimant's assertion that Dr. Baker's opinion is sufficient to invoke the presumption of total disability. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

[3] Claimant generally contends that "it is error to reject a medical opinion solely because it is based on nonconforming pulmonary function studies" and that "nonqualifying test results, standing alone, do not establish the absence of respiratory impairment." Claimant's Brief at 7. Contrary to claimant's suggestion, the administrative law judge did not reject Dr. Baker's opinion because it was based on a "non-qualifying" pulmonary function test. Claimant's Brief at 7. Rather, the administrative law judge merely noted that Dr. Baker based his diagnosis of a Class I impairment on the results of claimant's February 22, 2003 pulmonary function test. Decision and Order at 7, 15.

stated that claimant has a "Class I impairment with the FEV1 and the vital capacity greater than 80 [percent] of predicted." *Id*. Dr. Baker also stated that claimant "has a second impairment based on the presence of severe pneumoconiosis" based on Section 5.8, Page 106, Chapter Five of the A.M.A. *Guides*, "which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id*.

Because Dr. Baker did not explain the severity of his diagnosis or address whether such impairment would prevent claimant from performing his usual coal mine employment, the administrative law judge properly found that Dr. Baker's diagnosis of a Class I impairment was insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd* 9 BLR 1-104 (1986)(*en banc*). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), the administrative law judge properly found that the portion of Dr. Baker's opinion advising that claimant was 100% disabled because he should no longer be exposed to coal dust, was also insufficient to establish total disability under Section 718.204(b)(2)(iv). Thus, we affirm the administrative law judge's determination that claimant was unable to establish total disability in reliance on Dr. Baker's opinion.

In contrast to his findings regarding Dr. Baker, the administrative law judge determined that the documented and reasoned opinions of Drs. Hussain, Repsher and Rosenberg were sufficient to establish that claimant was *not* totally disabled.[4] Decision and Order at 15. Because claimant has not alleged any error with respect to the weight accorded the opinions of Drs. Hussain, Repsher and Rosenberg, we affirm the administrative law judge's credibility findings as they pertain to these doctors. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm as supported by substantial evidence, the finding that the medical opinion evidence is insufficient to establish

[4] Dr. Hussain opined that claimant has a mild impairment, but that he retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 9. Dr. Repsher opined that claimant is "fully fit to perform any job in a coal mine that would require continuous, heavy exertion. Employer's Exhibit 3. Dr. Rosenberg opined that claimant does not have a significant impairment and that, from a respiratory perspective, claimant could perform his previous coal mining job or similar arduous types of labor. Employer's Exhibit 11. During an August 27, 2004 deposition, Dr. Rosenberg opined that claimant does not have a respiratory impairment. Employer's Exhibit 5.

total respiratory disability pursuant to Section 718.204(b)(2)(iv).[5] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant's final contention is that, insofar as the administrative law judge discredited Dr. Hussain's opinion regarding the existence of pneumoconiosis, the Board must conclude that the Director has failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); Claimant's Brief at 5-6. We disagree. In this case, the administrative law judge specifically found that Dr. Hussain's diagnosis of legal pneumoconiosis was internally inconsistent with his negative x-ray interpretation, and that he failed to explain the basis of his diagnosis of clinical pneumoconiosis beyond his reliance on claimant's history of coal dust exposure. Because the administrative law judge found that Dr. Hussain's "pneumoconiosis analysis is insufficient to constitute an opportunity to substantiate [claimant's] claim," the administrative law judge specifically considered whether claimant had received a complete pulmonary evaluation as required by Section 725.406(a). Decision and Order at 12, 16. Inasmuch as the administrative law judge gave determinative weight to Dr. Hussain's reasoned opinion that claimant was not totally disabled, and denied the claim on this basis, the administrative law judge concluded that it was unnecessary to remand this case for a complete and credible pulmonary evaluation concerning the issue of pneumoconiosis, as claimant would still be unable to establish his

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[5] We reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant's Brief at 8. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young*, 11 BLR 1-147; *Oggero*, 7 BLR 1-860.

entitlement to benefits based on his finding that claimant was not totally disabled. Decision and Order at 16.

The Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), takes the position that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). The Director notes that the administrative law judge credited Dr. Hussain's opinion as documented and reasoned in his analysis of the evidence at Section 718.204(b)(2)(iv). Moreover, since the administrative law judge properly found that claimant failed to establish total disability, claimant could not prevail in his claim even if Dr. Hussain's diagnosis of pneumoconiosis were given full weight.

As discussed *supra*, the evidence in this case is insufficient to establish total disability on the merits. Dr. Hussain credibly opined that claimant has the respiratory capacity to perform the work of a coal miner. Director's Exhibit 9. Therefore, because the Director provided claimant with a credible evaluation on the issue of total disability, the dispositive issue in this case, we decline to remand this case for another pulmonary examination.[6] *Hodges*, 18 BLR at 1-89-90.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[7] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[6] *See Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

[7] In view of our disposition of this case on the merits at 20 C.F.R. §718.204(b), we decline to address claimant's arguments pertaining to whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (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