BRB No. 04-0687 BLA

CARL MCINTOSH, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/24/2005
METEC, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-6228) of Administrative Law Judge Rudolf L. Jansen 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 application for benefits on February 27, 2001. Director's Exhibit 1. Initially, the administrative law judge found that Metec, Incorporated is an operator pursuant to 20 C.F.R. §725.491(a) and that it is the properly named responsible operator in this claim. Decision and Order at 4-5. The administrative law judge next credited claimant with twelve and one-half years of coal mine employment.[1] Decision and Order at 5. Addressing the merits of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 10-11. He further found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 12-13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits, arguing that he did not properly weigh the x-ray evidence and the medical opinion evidence of record. In addition, claimant contends that the administrative law judge erred in failing to consider Dr. Baker's status as claimant's treating physician pursuant to 20 C.F.R. §718.104(d). Claimant also contends that remand to the district director is required, as the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, responds that a remand for a complete pulmonary evaluation is not warranted in this case.[2]

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

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 2, 4; Hearing Transcript at 33, 42. 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, 1-202 (1989)(*en banc*).

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twelve and one-half years of coal mine employment, his finding that Metec, Incorporated is the responsible operator, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii). We therefore affirm these findings as unchallenged on appeal. *See 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(iv), claimant argues that Dr. Baker's opinion, that claimant was "100% occupationally disabled," is well reasoned and documented, and is sufficient for "invoking the presumption of total disability."[3] Claimant's Brief at 8-9. Claimant asserts that in addition to claimant's work history, Dr. Baker, claimant's treating physician, based his opinion on claimant's medical history, x-rays, physical examination, pulmonary function and blood gas studies. Claimant's Brief at 9. Claimant also contends that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Dr. Baker's opinion of total disability. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant notes that the administrative law judge did not mention claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled. Claimant's Brief at 10-11. Claimant suggests further that the administrative law judge erred in according less weight to the opinion of Dr. Baker because he relied upon nonconforming and/or nonqualifying objective studies. Claimant's Brief at 9-10. These contentions lack merit.

In considering the medical opinion evidence, the administrative law judge acknowledged Dr. Baker's status as claimant's treating physician, and that his report included claimant's occupational and smoking histories and the results of claimant's

[3] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant initially contends that the Board has held that a single medical opinion may be sufficient to invoke a 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 Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) 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.

physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order at 9; Director's Exhibit 14. The administrative law judge's finding that Dr. Baker's opinion is insufficient to establish total disability is rational and supported by substantial evidence, however, as Dr. Baker did not state that claimant is incapable, from a respiratory or pulmonary standpoint, of performing coal mine work. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*). Rather, the administrative law judge rationally found Dr. Baker's statement that claimant "should limit further exposure" to coal dust and that such a limitation "would 'imply'" total disability, is not equivalent to a finding of total disability.[4] Decision and Order at 12-13; Director's Exhibit 14; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

Furthermore, contrary to claimant's contention, the administrative law judge did not err in failing to accord greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade and that administrative law judges must evaluate treating physicians just as they consider other experts. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). The administrative law judge permissibly determined that the opinion of Dr. Baker did not constitute a finding of total disability, but rather was poorly reasoned as the physician's diagnosis of total disability was based upon the need to limit further coal dust exposure. Decision and Order at 12-13; Director's Exhibit 14; *see Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649; *Napier*, 301 F.3d 703, 22 BLR 2-537; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Taylor*, 12 BLR 1-83. Consequently, claimant's reliance upon Section 718.104(d) is misplaced in this instance.[5]

[4] Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis with a "Class I" impairment (FEV1 and FVC greater than 80%) and noted that the "Guides to the Evaluation of Permanent Impairment … states that persons who develop pneumoconiosis should limit further exposure to the offending agent." Director's Exhibit 14. He then went on to observe "[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.*

[5] Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit court has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

With regard to the remaining medical opinions of record, the administrative law judge reasonably found that the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, is insufficient to establish total disability. Dr. Hussain diagnosed a mild pulmonary impairment, but further indicated that claimant retains the respiratory capacity to perform his usual coal mine work. Decision and at 8-9, 13; Director's Exhibit 13; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Likewise, the administrative law judge reasonably found that the opinions of Drs. Broudy and Westerfield are insufficient to establish total disability as Dr. Broudy also opined that claimant was capable of performing his usual coal mine employment and Dr. Westerfield did not address the issue of disability. Decision and Order at 12-13; Employer's Exhibits 3, 4; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4.

Therefore, we find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. The administrative law judge is not required to engage in this analysis where a physician details a claimant's physical limitations, but does not provide an opinion regarding the extent of any disability from which the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc); see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Herein, the administrative law judge rationally found that the medical opinions of record do not contain a reasoned and documented diagnosis of total respiratory disability.

Additionally, claimant's assertion of vocational disability based on his age and limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act.[6] *See* 20 C.F.R. §718.204; *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). The Board is not empowered to reweigh the evidence nor substitute its

[6] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1)(i), (ii).

inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence.[7] Decision and Order at 12-13; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

In light of this determination, we also reject claimant's assertion that this case must be remanded to the district director because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge pursuant to Section 718.202(a)(4). With respect to the issue of total disability, the administrative law judge did not find that Dr. Hussain's opinion was incomplete or lacking credibility. Rather, he rationally determined that because Dr. Hussain explicitly indicated that claimant is able to perform coal mine work, his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 13. Thus, Dr. Hussain's opinion on the element of entitlement upon which the administrative law judge based the denial of benefits was complete and credible and remand to the district director is not required. 20 C.F.R. §725.406(a); *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).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] We reject claimant's argument that because "pneumoconiosis is proven to be a progressive and irreversible disease" it can be concluded that his condition has worsened and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected, Claimant's Brief at 11, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge