BRB No. 05-0639 BLA

MARCUS R. SIZEMORE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
Employer-Respondent	)	DATE ISSUED: 03/08/2006
	)	
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.

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5019) 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).[1] The administrative law judge credited claimant with twelve years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found the record evidence insufficient to establish the

[1]Claimant filed the instant claim on February 4, 2002. Director's Exhibit 2.

existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in finding the x-ray evidence and medical opinion evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), respectively. Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence of record does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging the Board to affirm the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).[2] The administrative law judge found that the opinions of Drs. Baker and Simpao, upon which claimant relies, are outweighed by the contrary opinions of Drs. Rosenberg and Repsher. By report dated February 9, 2002, Dr. Baker diagnosed coal workers' pneumoconiosis on the basis of a positive x-ray and "a significant history of coal dust exposure." Director's Exhibit 9. Dr. Baker also diagnosed chronic bronchitis "based on history." *Id.* Dr. Baker opined that claimant has a Class I impairment "with the FEV 1 and vital capacity both being greater than 80% of predicted," which he indicated was based on "Table 5-12, Page 107, Chapter Five,

[2] We affirm the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Guides to the Evaluation of Permanent Impairment, Fifth Edition." *Id.* Dr. Baker also indicated that claimant has a second impairment "based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition," which, the physician explained, "states that persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id.* Dr. Baker added, "This would imply that the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.* By report dated April 5, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis 1/0 based on a positive x-ray, and added, "Multiple years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 10. Dr. Simpao opined that claimant has a mild impairment due to his coal workers' pneumoconiosis. *Id.* In a supplemental report also dated April 5, 2002, Dr. Simpao indicated that claimant does not retain the respiratory capacity to perform the work of a coal miner or to perform comparable and gainful work in a dust-free environment. *Id.* Dr. Simpao stated that this opinion regarding claimant's disability is based on "objective findings on the chest x-ray along with symptomatology and physical findings as noted in the report." *Id.* The record also contains the March 9, 2004 report and May 14, 2004 deposition testimony of Dr. Rosenberg, Employer's Exhibits 3, 5, as well as the August 30, 2004 report and October 15, 2004 deposition testimony of Dr. Repsher, Employer's Exhibits 6, 13. Both Drs. Rosenberg and Repsher opined that claimant does not have coal workers' pneumoconiosis or any respiratory impairment and retains the respiratory capacity to perform his previous coal mine work or comparable work. Employer's Exhibits 3, 5, 6, 13.

Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant argues that a finding of total disability is a determination to be made by an administrative law judge through consideration of the exertional requirements of claimant's usual coal mine employment in conjunction with a medical opinion assessing claimant's level of impairment. Claimant's Brief at 9. Claimant argues that, taking into consideration his condition, the exertional requirements of his usual coal mine employment as a rock truck driver, and the medical opinions of Drs. Baker and Simpao, "it is rational to conclude that the claimant's condition prevents him from engaging in his usual coal mine employment."[3] *Id.* at 10. Considering the relevant medical opinions of

[3] The administrative law judge found that both Drs. Baker and Simpao considered an accurate coal mine employment history. Decision and Order at 12. Dr. Baker noted that claimant worked twelve years in surface mines "where he drove a truck, stockpiled coal, swept, cleaned and uncovered coal." Director's Exhibit 9. Dr. Simpao noted that claimant worked for twelve years in surface mines, indicating "rock truck driver, cleaned and swept coal." Director's Exhibit 10. Substantial evidence in the record thus supports the administrative law judge's finding that Drs. Baker and Simpao considered the physical demands of claimant's usual coal mine employment.

record at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly found that the opinions of Drs. Rosenberg and Repsher, that claimant does not have a respiratory impairment and retains the respiratory capacity to perform his previous coal mine work or comparable work, Employer's Exhibits 3, 5, 6, 13, outweigh the contrary opinions of Drs. Baker and Simpao, upon which claimant relies. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). Specifically, the administrative law judge indicated that Dr. Rosenberg based his opinion on the non-qualifying results of the pulmonary function studies and blood gas studies underlying his opinion and Dr. Repsher based his opinion on his "record medical evidence review." Decision and Order at 19. The administrative law judge permissibly determined that the opinions of Drs. Rosenberg and Repsher are "well-documented and reasoned and entitled to full weight." *Id.*; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Further, the administrative law judge referred to Dr. Baker's statement that "persons who develop pneumoconiosis should limit further exposure to the offending agent" and that claimant's impairment would "imply" that claimant is "occupationally disabled for work in the coal mining industry or similar dusty occupations," *see* Director's Exhibit 9. Decision and Order at 19. The administrative law judge properly determined that Dr. Baker's rationale, recommending against further exposure to coal dust, is not a finding of total disability under the Act.[4] *Zimmerman v. Director, OWCP*,

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Likewise, the administrative law judge found that both Drs. Rosenberg and Repsher considered the exertional requirements of claimant's previous coal mine employment while rendering their opinions. Decision and Order at 18. Dr. Rosenberg noted that claimant worked in surface mines for twelve years "driving a tractor-trailer, transporting rock." Employer's Exhibit 3. Dr. Rosenberg noted, "The only manual labor was when a piece of heavy equipment broke down he would have to help the mechanic. At that time, he would have to lift tires or other mechanical parts, but this would happen only on occasion." *Id.* Dr. Rosenberg added, "He last worked driving a rock truck… When opening the rock truck he would have to lift a 5-gallon drum of oil in order to lubricate equipment… He never did any drilling over the years and at times he would have to stock pile coal." *Id.* Dr. Repsher indicated that claimant worked for twelve years in surface mining "mostly as a truck driver, but at times stock piled coal, swept, cleaned and uncovered coal." Employer's Exhibit 6. Substantial evidence in the record thus supports the administrative law judge's finding that Drs. Rosenberg and Repsher considered the physical demands of claimant's usual coal mine employment.

[4] Dr. Baker also opined that:

> [Claimant] has a Class 1 impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-

871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge further determined that while Dr. Simpao indicated that his opinion that claimant is totally disabled is based on "objective findings on the chest x-ray along with symptomatology and physical findings as noted in the report," Director's Exhibit 10, Dr. Simpao "did not explain how a mild pulmonary impairment diagnosis with normal or 'non-qualifying' pulmonary function and arterial blood gas results are consistent with his diagnosis of total disability." Decision and Order at 19; *Cornett*, 227 F.3d at 569, 22 BLR at 2-107. The administrative law judge thus properly accorded less probative weight to Dr. Simpao's opinion. *Id.* Considering the totality of the medical opinion evidence, the administrative law judge properly accorded greater weight to the opinions of Drs. Rosenberg and Repsher because he found them to be better supported by the objective medical data of record.[5] *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991). Based on the foregoing, we hold that substantial evidence supports the administrative law judge's finding that the weight of the medical opinions of record does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant also asserts that "pneumoconiosis is proven to be a progressive and irreversible disease," and because a considerable amount of time has passed since he was first diagnosed with pneumoconiosis, it can be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 10. Claimant's assertion lacks merit. 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Because the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence, we affirm that finding. Since claimant did not establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2), an

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> 12, Page 107, Chapter Five, Guide to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 9. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 1 impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

[5] The administrative law judge correctly noted that the pulmonary function studies and blood gas studies of record resulted in non-qualifying values. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 18.

essential element of entitlement, we affirm the administrative law judge's denial of benefits in the instant case. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. We, therefore, need not address claimant's arguments regarding the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(4), as any error therein could not change the outcome of the case. *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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge