

BRB No. 05-0707 BLA

VIRGIL D. HAMLIN)
)
 Claimant-Petitioner)
)
 v.)
)
 ABM COAL COMPANY) DATE ISSUED: 03/31/2006
)
 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Michael F. Blair and Anne Musgrove (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (03-BLA-5915) of Administrative Law Judge Edward Terhune Miller in a miner’s 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 the miner with twelve and one-half years of coal mine employment. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to

¹Claimant is Virgil D. Hamlin, the miner, who filed his claim for benefits on November 13, 2001. Director's Exhibit 2.

20 C.F.R. §718.202(a)(1)-(4). *Id.* at 11-14. The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id.* at 14-16. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 6-8. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 5-6. Employer responds, urging affirmance of the administrative law judge's denial of benefits.² The Director has not responded to claimant's 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Citing Dr. Baker's opinion, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ In a December 15, 2001 report, Dr. Baker opined that:

²We affirm the administrative law judge's finding of twelve and one-half years of coal mine employment and his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant 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 the instant 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 applicable. 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.

Patient has a Class 2 impairment with the FEV1 and vital capacity both being between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 15. The administrative law judge found that 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 2 impairment is insufficient to support a finding of total disability. Decision and Order at 15-16; see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Specifically, the administrative law judge stated that he considered claimant's testimony regarding his usual coal mine work, but he found that "there is no direct proof" of whether the impairment described by Dr. Baker would have prevented claimant from performing that work. Decision and Order at 16. The administrative law judge further noted that Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was "100% occupationally disabled for work in the coal mining industry." Director's Exhibit 18. The administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability because a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), Decision and Order at 15. Thus, we reject claimant's assertion that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability.

Additionally, the administrative law judge noted that Drs. Hussain and Dahhan found no pulmonary impairment and that claimant retains the respiratory capacity to perform the work of a coal miner. Decision and Order at 5. The administrative law judge found the opinions of Drs. Hussain and Dahhan to be "more persuasive" than the contrary opinion of Dr. Baker. *Id.* at 16. In doing so, the administrative law judge stated that "Dr. Dahhan's analysis is more extensive, and is better supported by the clinical testing in the record as a whole [than Dr. Baker's opinion⁴], and his assessment is corroborated by that of Dr. Hussain." *Id.* As claimant has not raised any additional assertions of error by the administrative law judge with respect to his weighing of the

⁴In his discussion regarding Dr. Baker's opinion, the administrative law judge noted that the objective clinical studies of record do not yield qualifying values and that these tests form "the basis of Dr. Baker's assessment of a Class 2 impairment." Decision and Order at 15.

conflicting medical opinions of record, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).⁵ See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions of error regarding the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).⁶ See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵We 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 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 v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

⁶Claimant contends that the Director, Office of Workers' Compensation Programs, failed to provide him with a complete and 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); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Employer opposes a remand of this case for a pulmonary evaluation of claimant. Claimant notes that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis because it was insufficient to constitute a reasoned and documented medical opinion pursuant to 20 C.F.R. §718.202(a)(4). See Decision and Order at 13, 14. However, the administrative law judge did not discredit Dr. Hussain's opinion regarding the issue of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Because our affirmance of the administrative law judge's denial of benefits in this case is based upon our affirmance of his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant could not prevail even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of pneumoconiosis. Accordingly, under the facts of this case, remand is not required.

Regarding the x-ray evidence, claimant states in his brief that “[p]ursuant to

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

§725.414, there are limitations to the amount of evidence that each party can submit.” Claimant's Brief at 3. Since claimant has not alleged any error in the administrative law judge's findings pursuant to 20 C.F.R §725.414, the Board has no basis for review of his determinations thereunder. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).