BRB Nos. 06-0831 BLA
and 06-0831 BLA-A

BOBBY JOE HALL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY,	)	
INCORPORATED	)	DATE ISSUED: 03/27/2007
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (05-BLA-5789) of Administrative Law Judge Paul H. Teitler 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). In light of employer's stipulation, the administrative law judge credited claimant with nineteen years of coal mine employment.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on the March 16, 2004 filing date, the administrative law judge found that the medical evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, he found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not be responding in this appeal.[2]

In its cross-appeal, employer contends that the administrative law judge erred in excluding the medical opinion of Dr. Kendall, based on his determination that this report exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer maintains that the limitations on the admission of evidence are invalid. Employer, however, states that this issue need not be reached if the Board affirms the administrative law judge's Decision and Order denying benefits. The Director responds, urging the Board to reject employer's arguments concerning the validity of the evidentiary limitations. Claimant

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. 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] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with nineteen years of coal mine employment, and his findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

has not submitted a response to employer's cross-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 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*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinion of Dr. Baker, who stated that claimant had a minimal impairment, but did not otherwise discuss whether this minimal impairment would prevent claimant from performing his usual coal mine employment. Decision and Order at 7-8; Director's Exhibit 12. The administrative law judge also addressed the contrary medical opinions in which Drs. Rasmussen, Jarboe and Repsher stated that claimant is not impaired by his pulmonary condition and retains the pulmonary capacity to perform his last coal mine employment.[3] Decision and Order at 8; Director's Exhibit 10; Employer's Exhibits 1, 3, 5, 6. The administrative law judge found that Dr. Baker's opinion was outweighed by the opinions of Drs. Rasmussen, Jarboe and Repsher, which he found to be well supported by the objective testing of record. Decision and Order at 8. Consequently, the administrative law judge found that the medical evidence of record was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Claimant initially asserts that in addressing the issue of total disability, the

[3] Following a physical examination and accompanying objective testing, Dr. Jarboe opined that there is no evidence that the miner has any pulmonary or respiratory impairment and, therefore, that the miner is not totally and permanently disabled to such an extent that he would be unable to perform his regular coal mine employment, which Dr. Jarboe noted to be that of an underground miner for twenty years as a roof-bolter. Employer's Exhibits 1, 6. Similarly, following a physical examination of the miner and review of other medical evidence, Dr. Repsher opined that the miner "has no respiratory impairment whatsoever, let alone a totally disabling one." Employer's Exhibits 3, 5 at p. 16.

administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 6-7, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant specifically argues that:

> The claimant's usual coal mine work included being a roof bolter. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Baker and Rasmussen (both of whom diagnosed a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 7. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, contrary to claimant's contention, Dr. Rasmussen's opinion does not support a finding of total disability. Dr. Rasmussen noted a slight impairment in claimant's oxygen transfer during exercise, but stated that claimant has no significant loss of lung function and that he retains the pulmonary capacity to perform his last regular coal mine employment. Director's Exhibit 10; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

With regard to Dr. Baker's opinion, the administrative law judge noted that while Dr. Baker found a minimal impairment, he did not otherwise discuss whether this impairment prevented claimant from performing his usual coal mine employment.[4] Decision and Order at 7-8; Director's Exhibit 12. The administrative law judge therefore found this opinion outweighed by the opinions of Drs. Rasmussen, Jarboe and Repsher, that claimant retains the respiratory capacity to perform his usual coal mine employment, because these opinions were well supported by the objective testing. Decision and Order at 8. Because the administrative law judge permissibly accorded greater weight to the medical opinions he found to be better documented and reasoned, which stated that

[4] With respect to the existence of an impairment, Dr. Baker stated "minimal with decreased PO_2, chronic bronchitis and CWP ½." Director's Exhibit 12. He provided no further description of any impairment.

claimant's pulmonary function is normal and he is not totally disabled, we affirm his finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because the Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled Section 718.204(b)(2).

Because we have affirmed the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2), a necessary element of entitlement pursuant to Part 718, we must also affirm the denial of benefits. *See Hill*, 123 F.3d at 415-416, 21 BLR at 2-196-197; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a). Further, because employer made consideration of its cross-appeal contingent on the Board's vacating the administrative law judge's denial of benefits, in light of our affirmance the denial, we need not address employer's arguments regarding the validity of Section 725.414 and the administrative law judge's exclusion of evidence thereunder.

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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BETTY JEAN HALL
Administrative Appeals Judge