

BRB No. 07-0603 BLA

W.B.)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 03/26/2008
)
 PEABODY 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 – Denial of Benefits of Donald W. Mosser, 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.

Emily Goldberg-Kraft (Gregory F. Jacob, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2005-BLA-06213) of Administrative Law Judge Donald W. Mosser rendered 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 claim for benefits on

December 17, 2001.¹ Director's Exhibit 2. The administrative law judge credited claimant with twenty-nine years of coal mine employment based upon the evidence of record and employer's stipulation. Decision and Order at 3. Applying the regulations set forth in 20 C.F.R. Part 718, the administrative law judge determined that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding he did not establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), or total disability pursuant to Section 718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director also responds, asserting that the Board should reject claimant's argument that the case must be remanded to the district director for a complete pulmonary evaluation.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.³ 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, 363 (1965).

¹ The district director denied benefits on April 29, 2003. Director's Exhibit 21. Claimant requested a formal hearing and the case was transferred to the Office of Administrative Law Judges (OALJ). Director's Exhibit 22. On August 24, 2004, the claim was remanded to the district director to provide claimant with a complete pulmonary evaluation. Director's Exhibit 29. After the district director complied with the order, the claim was sent back to the OALJ for a hearing before Administrative Law Judge Donald W. Mosser. Director's Exhibit 30.

² Claimant does not challenge the administrative law judge's findings that the evidence was insufficient to establish either the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

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 opinions of Drs. Simpao, Repsher, and Baker. Dr. Simpao examined claimant at the request of the Department of Labor and indicated in his report that claimant did not have the respiratory capacity to perform the work of a coal miner or comparable employment in a dust-free environment. Director's Exhibit 10. In a supplemental report, Dr. Simpao stated that claimant is totally disabled due to a "combination of problems, his pulmonary impairment, and heart problems." Director's Exhibit 29. At his deposition, however, Dr. Simpao agreed that claimant would have the ability to perform his last coal mine job if he sat eight to ten hours a day with no further exertion. Employer's Exhibit 2 at 18.

Dr. Repsher examined claimant and diagnosed coronary artery disease and hypertension. Dr. Repsher indicated that claimant's pulmonary function study was invalid due to poor effort, but his lung volumes, diffusion capacity, and arterial blood gas results were normal. Dr. Repsher concluded that there was no evidence of any respiratory or pulmonary disease related to coal mine employment. Employer's Exhibit 3.

Dr. Baker examined claimant and diagnosed a "Class I impairment based on the FEV1 and Vital Capacity being between 60% and 79% of predicted." Claimant's Exhibit 1. Dr. Baker also stated that claimant was totally disabled from working in the coal mining industry "based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id.* In his deposition testimony, Dr. Baker discussed claimant's impairment in relation to the duties of his last coal mine work as a ram car driver, a position claimant held from 1985 until he quit in 1994. Employer's Exhibit 4 at 10. When asked to consider claimant's statement that this job required him to sit for eight to ten hours per day, required no lifting, and no carrying of heavy weight, Dr. Baker opined that claimant retained the respiratory ability and physical capacity to perform the duties of his last coal mine employment. Director's Exhibit 4; Employer's Exhibit 4 at 10-11.

The administrative law judge determined that the medical opinions of Drs. Simpao, Repsher, and Baker did not support a finding of total disability under Section 718.204(b)(2)(iv), as none of the physicians indicated that claimant lacks the respiratory or pulmonary capacity to perform his usual coal mine employment. Decision and Order

at 8. Claimant contends that the administrative law judge's finding must be vacated, as the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Baker's assessment of claimant's respiratory impairment. This contention is without merit.

The administrative law judge rationally determined that in light of Dr. Baker's statement that claimant can perform his usual coal mine employment, which was based upon Dr. Baker's comparison of the objective test results to the exertional requirements of claimant's last job in the mines, Dr. Baker's opinion did not establish total disability at Section 718.204(b)(2)(iv). *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* 9 BLR 1-104 (1986) (*en banc*); Decision and Order at 8; Employer's Exhibit 4 at 10-11. In addition, the administrative law judge properly found that Dr. Baker's statement that claimant should not work in a dusty environment was not a diagnosis of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *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); Decision and Order at 8; Claimant's Exhibit 1. Because claimant has raised no other allegations of error with respect to the administrative law judge's finding that total disability was not established under Section 718.204(b)(2)(iv), this finding is affirmed.⁴

In light of claimant's failure to establish that he is totally disabled pursuant to Section 718.204(b)(2), an essential element of entitlement, we also affirm the denial of benefits under 20 C.F.R. Part 718. *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's arguments regarding the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(1), (4).

We must address, however, claimant's contention that remand is required in this case, based upon the administrative law judge's discrediting of the diagnosis of pneumoconiosis made by Dr. Simpaio, the physician who examined claimant at the request of the Department of Labor. Claimant's Brief at 5. The Director responds, maintaining that he met his statutory obligation to provide claimant with a complete pulmonary evaluation. Director's Brief at 4.

⁴ We also reject claimant's argument that because pneumoconiosis is a progressive disease, it must have worsened to the point of total disability since it was first diagnosed. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based on the medical evidence of record, rather than an assumption regarding the progressivity of pneumoconiosis. *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-7 n.8 (2003).

Under the terms of the Act, “[e]ach miner who files a claim shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where “the administrative law judge finds a medical opinion incomplete,” or where “the administrative law judge finds that the opinion, although complete, lacks credibility.” *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

A review of the record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director’s Exhibit 10. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge acted within his discretion as fact-finder in determining that Dr. Simpao provided a documented and reasoned opinion in which he stated that claimant is capable of performing his usual coal mine employment. *Cornett*, 227 F.3d at 576, 22 BLR at 2-120; Decision and Order at 8; Employer’s Exhibit 2 at 18. The administrative law judge also rationally found that Dr. Simpao’s statement that claimant should not work in a dusty environment did not constitute a diagnosis of a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2)(iv). *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258; *Taylor*, 12 BLR at 1-88; Decision and Order at 8; Director’s Exhibit 10. Claimant’s Exhibit 1. Because the administrative law judge credited Dr. Simpao’s opinion regarding the issue of total disability, the element that defeated entitlement in this case, the Director fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation.⁵ *Cf. Hodges*, 18 BLR at 1-93.

⁵ With respect to the issue of the existence of pneumoconiosis, we note that contrary to claimant’s argument, the administrative law judge did not find Dr. Simpao’s diagnosis of pneumoconiosis unreasoned or undocumented. Rather, the administrative law judge permissibly determined that Dr. Simpao’s diagnosis was outweighed by the contrary opinion of Dr. Repsher, based upon his qualifications as a pulmonary specialist, and the fact that his opinion was better supported by the objective evidence of record. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); Decision and Order at 6-7. Thus, the Director, Office of Workers’ Compensation Programs, also fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation with respect to this element of entitlement. *Cf. Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge