

BRB No. 10-0432 BLA

THEODORE MULLINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WAGON FORK COAL COMPANY)	
)	DATE ISSUED: 03/15/2011
and)	
)	
KENTUCKY COAL PRODUCERS)	
SELF-INSURANCE FUND)	
)	
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 Living Miner's Benefits on Remand of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits on Remand (06-BLA-5269) of Chief Administrative Law Judge John M. Vittone rendered on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(I)) (the Act). This case involves a claim filed on January 14, 2005, and is before the Board for the second time. Director's Exhibit 5. In the initial decision, the administrative law judge credited claimant with eleven years of coal mine employment,² and found that the medical evidence developed since the denial of claimant's last claim established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).³ Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits because, in considering the merits of the claim, he did not consider whether all of the relevant evidence, including that submitted with claimant's prior claims, established total disability pursuant to Section 718.204(b)(2).⁴ *T.M. [Mullins] v. Wagon Fork Coal Co.*, BRB No. 07-1009 BLA (Aug. 29, 2008)(unpub.). Since the evidence that was previously submitted included evidence supportive of a finding of total

¹ Claimant filed five previous claims for benefits, all of which were finally denied. The Board discussed the history of claimant's prior claims in its previous decision. *T.M. [Mullins] v. Wagon Fork Coal Co.*, BRB No. 07-1009 BLA, slip op. at 2 n.1 (Aug. 29, 2008)(unpub.).

² The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, the Board will apply the law 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*).

³ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ The Board affirmed, as unchallenged, the administrative law judge's finding that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Mullins*, slip op. at 4.

disability, the Board instructed the administrative law judge, on remand, to consider all of the relevant evidence of record to determine whether claimant established total disability, on the merits, pursuant to 20 C.F.R. §718.204(b)(2). *Mullins*, slip op. at 4-5.

On remand, the administrative law judge considered the previously submitted evidence, as instructed, and found that the previously submitted evidence, considered in conjunction with the new evidence, did not establish total disability pursuant to Section 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not consider all of the relevant medical opinion evidence when he found that it did not establish total disability pursuant to Section 718.204(b)(2)(iv).⁵ Employer responds, urging affirmance of the administrative law judge's denial of benefits. Additionally, employer asserts that, because claimant was credited with fewer than fifteen years of coal mine employment and did not establish that he has a totally disabling respiratory or pulmonary impairment, the Board need not remand this case to the administrative law judge for consideration under a recent amendment to the Act that was enacted by Section 1556 of Public Law No. 111-148.⁶ The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief addressing the merits of this case. The Director states that this claim need not be remanded for consideration under the recent amendment to the Act, because claimant was credited with fewer than fifteen years of coal mine employment.

We agree that Section 1556 does not affect the outcome of this case. As will be discussed below, we affirm the administrative law judge's finding that the evidence does

⁵ The administrative law judge's findings, that the previously submitted pulmonary function and blood gas studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii), are unchallenged on appeal. Decision and Order at 2 n.1, 4-6. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ For claims filed after January 1, 2005 that were pending on or after March 23, 2010, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

not establish total disability pursuant to Section 718.204(b)(2). As the evidence does not demonstrate total respiratory disability, and claimant does not contest the administrative law judge's finding of eleven years of coal mine employment, Section 1556 does not affect this case.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the previously submitted medical opinions, in light of the exertional requirements of claimant's usual coal mine employment.⁷ Drs. Bushey, Clarke, and Rader opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 1 at 204, 286, 486-87, 525. Dr. Baker initially stated that claimant was totally disabled by a mild respiratory impairment, Director's Exhibit 1 at 276, but, after a second examination of claimant, he declined to give an opinion on total disability because the objective testing he obtained was unreliable. Director's Exhibit 2 at 201. Dr. Myers initially opined that claimant has a totally disabling respiratory impairment, Director's Exhibit 1 at 210, but upon further review of his examination results, he retracted that opinion, and indicated that claimant is not totally disabled from a respiratory standpoint. Director's Exhibit 1 at 159. Drs. Anderson, Broudy, Dahhan, Fino, Jackson, and Wright all opined that claimant does not have a totally disabling respiratory impairment. Director's Exhibit 1 at 91, 129, 184, 305, 314, 384, 411, 518, 565, 567.

The administrative law judge discounted the opinions of Drs. Baker, Bushey, Clarke, and Rader because he found that they were inadequately explained, when viewed in light of the objective evidence, and the mild to moderate exertion required by claimant's job as a jeep driver. Decision and Order at 11-12. Additionally, he found that,

⁷ The administrative law judge found that claimant's job as a jeep driver required a "light to slightly moderate level of manual labor." Decision and Order on Remand at 11. As this determination is unchallenged, it is affirmed. *Skrack*, 6 BLR at 1-711.

to the extent Drs. Bushey and Rader advised claimant to avoid further dust exposure, their opinions were insufficient to establish total disability. *Id.* In contrast, the administrative law judge found that the opinions of Drs. Anderson, Broudy, Dahhan, Fino, Jackson, Myers, and Wright, that claimant does not have a totally disabling respiratory impairment, were better supported by the objective evidence. Decision and Order at 12. Noting that the new medical opinion evidence did not establish total disability, the administrative law judge found that all of the relevant medical opinion evidence did not establish total disability.

Claimant argues that the administrative law judge failed to consider all of the relevant medical opinion evidence, in determining whether claimant has a totally disabling respiratory impairment. Claimant's Brief at 14-16. Claimant's argument lacks merit.

The administrative law judge considered the previously submitted opinions of Drs. Baker, Bushey, Clarke, and Rader, and permissibly found that the doctors failed to adequately explain their opinions that claimant was totally disabled. *See Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 11-12. Moreover, the administrative law judge properly found that the statements of Drs. Bushey and Rader, advising against further dust exposure, were insufficient to establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *W.C. [Cornett] v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-30 (2008); Decision and Order at 11, 12. Further, the administrative law judge considered the previously submitted opinion of Dr. Myers, and acted within his discretion when he found that the doctor's subsequent opinion, that claimant is not totally disabled, was better supported by the objective evidence underlying the doctor's opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 12. As the administrative law judge considered all of the previously submitted medical opinions stating that claimant is totally disabled, and provided valid reasons for discounting those opinions, we affirm the administrative law judge's finding that the previously submitted medical opinions, considered in conjunction with the new medical opinions, did not establish total disability pursuant to Section 718.204(b)(2)(iv).

The administrative law judge further found that, based on a review of all the evidence of record, claimant did not establish that he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(b)(2). As substantial evidence supports that finding, it is affirmed. Because we have affirmed the administrative law judge's finding that the evidence did not establish total respiratory disability, an essential element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge