

BRB No. 06-0448 BLA

RICKY A. BELCHER)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 11/29/2006
)
 LONE MOUNTAIN PROCESSING,)
 INCORPORATED)
)
 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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6086) of Administrative Law Judge Linda S. Chapman denying benefits 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). The administrative law judge accepted the parties' stipulation to twenty-two years of qualifying coal mine employment¹ and to employer being the responsible operator. Decision and Order at 2; Hearing Transcript at 11-12, 28. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 6. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 6-11. Accordingly, administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts, with respect to the medical opinion evidence, that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter asserting that claimant has been provided with a complete pulmonary examination.³

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).

¹ The record indicates that claimant was last employed in the coal mine industry 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 (1989)(*en banc*).

² Claimant filed his claim for benefits on March 31, 2004, which was denied by the district director on November 30, 2004. Director's Exhibits 2, 22. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 23.

³ The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge rationally found that the evidence of record was insufficient to establish total disability. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant initially asserts that in addressing the issue of total disability, the 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 5, 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). The only specific argument claimant sets forth, however, is that:

The claimant's usual coal mine work included being a miner operator, shuttle car driver and coal driller. 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, 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 5. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that 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, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1889); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Further, we also reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby

affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5-6. An administrative law judge's findings cannot be based on assumptions; they 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). Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *White*, 23 BLR 1-1; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the denial of benefits as claimant has failed to establish total disability, an essential element of entitlement. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Finally, claimant contends that he is entitled to a remand of the case for the Department of Labor to provide him with a complete pulmonary evaluation because of alleged deficiencies in Dr. Simpao's opinion regarding the existence of pneumoconiosis. Claimant's Brief at 4; see 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406. However, claimant does not allege that Dr. Simpao's opinion on the issue of total disability is deficient warranting remand for a complete pulmonary examination. Since we have rejected the arguments raised regarding that issue, the outcome would not change if the case were remanded for Dr. Simpao to supplement his opinion on the existence of pneumoconiosis. Hence, we deny claimant's request for a remand, as the Act does not require the Director to perform a futile exercise.

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

BETTY JEAN HALL
Administrative Appeals Judge