

BRB No. 06-0458 BLA

CHARLES CHILDERS)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 11/27/2006
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel K. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6649) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a subsequent 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).¹ The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment

¹ Claimant filed his first claim with the Department of Labor (DOL) December 14, 1993. Director's Exhibit 1. That claim was denied by the district director on May 17, 1994 because the evidence failed to establish any element of entitlement. *Id.* That denial was not appealed and it became final. Thereafter, claimant filed the instant, subsequent claim with DOL on April 17, 2003. Director's Exhibit 3.

established, 20 C.F.R. §§718.202(a) and 718.203, as these elements were uncontested, and, therefore, found that a change in an applicable condition of entitlement was established in this subsequent claim. *See* 20 C.F.R. §725.309(d). Considering all of the evidence of record, however, the administrative law judge concluded that it failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). Accordingly, benefits on the subsequent claim were denied.

On appeal, claimant challenges the administrative law judge's findings that the medical opinion evidence fails to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).² Claimant also contends that inasmuch as the administrative law judge found Dr. Simpao's opinion on disability to be unreasoned, the Department of Labor (DOL) has failed to provide claimant with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b). Claimant argues, therefore, that the administrative law judge's Decision and Order denying benefits be reversed as the evidence establishes total disability due to pneumoconiosis or that, in the alternative, the case be remanded to the district director for further development of the evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order. The Director asserts that the administrative law judge's findings on the merits are supported by substantial evidence. Moreover, the Director asserts that the administrative law judge properly recognized that even though Dr. Simpao's opinion was incomplete, remand of the case would be futile because the administrative law judge credited the more recent opinion of Dr. Broudy, which he found to be better reasoned and documented, that claimant was not totally disabled.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that it can be reasonably concluded that claimant's coal mine work as a drill operator and coal hauler involved duties that required exposure to heavy

² Claimant does not challenge the administrative law judge's findings that the evidence fails to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iii). 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed. *See Hix v. Director, OWCP*, 824 F.2d 526, 10 BLR 2-191 (6th Cir. 1987); *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

concentrations of dust on a daily basis and that, taking into consideration “claimant’s condition [sic] against such duties, as well as the medical opinion of Dr. Baker (who diagnose[d] a pulmonary impairment), it [would be] rational to conclude that claimant’s condition prevented 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 3. Claimant also contends that inasmuch as total disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of claimant’s usual coal mine employment with a doctor’s opinion regarding claimant’s physical abilities, the administrative law judge should have considered the exertional requirements of claimant’s usual coal mine employment in conjunction with Dr. Baker’s opinion on disability and that the failure of the administrative law judge to do so necessitates remand of this case.

In finding that claimant failed to establish total disability, the administrative law judge determined that the new pulmonary function study and blood gas study evidence was non-qualifying and that it did not therefore establish total disability. This was proper. 20 C.F.R. §718.204(b)(2)(i)(ii). The administrative law judge further properly found that total disability could not be established under Section 718.204(b)(2)(iii) because there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the medical opinion evidence, the administrative law judge first noted that most of claimant’s usual coal mine employment was as a drill operator and that claimant testified that he was constantly exposed to significant amounts of coal dust. Decision and Order at 3; Hearing Transcript at 13-20. Regarding the opinion of Dr. Simpao, the administrative law judge noted that although Dr. Simpao diagnosed claimant with a moderate impairment, the doctor failed to state whether claimant’s moderate impairment was totally disabling and his report lacked findings relating the impairment to the exertional requirements of claimant’s coal mine employment. Director’s Exhibit 14. Likewise, the administrative law judge noted that Dr. Baker also failed to indicate if claimant’s moderate impairment made him totally disabled and his report lacked findings relating the impairment to the exertional requirements of claimant’s usual coal mine employment. Director’s Exhibit 16.³ In addition, the administrative law judge noted that both opinions were based in part on non-qualifying pulmonary function and blood gas study results.⁴ Turning to the opinion of

³ Dr. Baker characterized claimant’s respiratory impairment as mild. Director’s Exhibit 16 at 9.

⁴ Although non-qualifying, the administrative law judge recognized that Dr. Simpao found that the pulmonary function study showed a “mild degree of obstructive airway

Dr. Broudy, the administrative law judge found that that doctor stated that claimant could perform his prior work or similarly arduous labor, expressly stating that claimant did not have any disabling respiratory impairment. Director's Exhibit 47. The administrative law judge found that Dr. Broudy relied on a non-qualifying pulmonary function study and blood gas study and concluded that his opinion was well-reasoned and well-documented. In conclusion, the administrative law judge found that total disability was not established at Section 718.204(b)(2)(iv) based on Dr. Broudy's opinion and the non-qualifying pulmonary function and blood gas study evidence.

Contrary to claimant's argument, contraindication to further coal dust exposure is not sufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Moreover, claimant's mere recitation of Dr. Baker's opinion as supportive of his claim is not sufficient to establish total disability. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). In this case, the administrative law judge found that total disability was not established based on the opinion of Dr. Broudy, which he found to be reasoned and documented, in conjunction with the non-qualifying pulmonary function and blood gas study evidence. This was permissible. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Accordingly, we affirm the administrative law judge's finding that claimant has failed to establish total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Claimant also contends because the administrative law judge did not credit Dr. Simpao's August 1, 2003 medical opinion which was provided by the DOL, "the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that even though Dr. Simpao's opinion was incomplete as it lacked an opinion as to whether claimant was totally disabled, the administrative law judge properly found that remand of the case would be futile, because the administrative law judge credited the more reasoned and documented opinion of Dr. Broudy regarding total disability.

Although the administrative law judge found that Dr. Simpao's opinion, which was provided by the Director, was incomplete as it failed to address whether claimant was totally

disease," and that the non-qualifying blood gas study showed "wide Aa gradient" indicating a ventilatory mismatch. Director's Exhibit 14. Likewise, while the pulmonary function study and blood gas study of Dr. Baker were non-qualifying, Dr. Baker stated that they showed "decreased FEV₁, decreased PO₂." Director's Exhibit 16.

disabled by pneumoconiosis, the administrative law judge went on to find that “even if the report contained a reasoned finding of total disability, the [c]laimant would not be able to prove total disability by a preponderance of the evidence[,]” and “remand of the case would be futile.” Decision and Order at 8-9, n.7 (citations omitted).

We agree with the Director that inasmuch as the administrative law judge found that total disability was not established based on the better reasoned and documented opinion of Dr. Broudy in conjunction with the non-qualifying pulmonary function and blood gas study evidence, remand of this case is not required. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In light of the Director’s concession, therefore, we see no need to remand this case. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b), 725.406(a); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 746 F.2d 1161, 7 BLR 2-25 (8th Cir. 1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

BETTY JEAN HALL
Administrative Appeals Judge