

BRB No. 09-0384 BLA

TERRY COOTS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIAMOND MAY MINING COMPANY)	
)	
and)	
)	
AMERICAN INTERNATIONAL SOUTH)	DATE ISSUED: 11/09/2009
INSURANCE)	
)	
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 Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5999) of Administrative Law Judge Janice K. Bullard 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). This case involves a claim filed on September 28, 2006.

After crediting claimant with at least twenty years of coal mine employment,¹ the administrative law judge accepted the parties' stipulation that claimant suffers from pneumoconiosis. 20 C.F.R. §718.202(a). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, 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*).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).² In considering whether the medical opinion evidence established total disability, the administrative law judge addressed the opinions of Drs. Rasmussen, Jarboe, Vuskovich, and Saha. Drs. Rasmussen and Jarboe diagnosed a non-disabling, mild pulmonary impairment. Director's Exhibit 10; Employer's Exhibit 4. Dr. Vuskovich stated that claimant does not have a pulmonary impairment and is not totally disabled. Employer's Exhibit 2. Dr. Saha did not diagnose a pulmonary impairment, but

¹ The record reflects that the miner's coal mine employment was 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 Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

stated that he is “terribly concerned about [claimant’s] overall condition and his response to coal dust,” and that he “would recommend that [claimant] avoid exposure to any additional coal dust.” Claimant’s Exhibit 2. The administrative law judge found that there was no medical opinion evidence supportive of a finding of total disability. Decision and Order at 8-12. The administrative law judge, therefore, found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant initially asserts that the administrative law judge erred in her consideration of Dr. Saha’s opinion. Specifically, claimant asserts that Dr. Saha’s opinion constitutes a well-reasoned and well-documented diagnosis of a totally disabling pulmonary impairment. Claimant’s Brief at 4-5. We disagree. The record does not reflect that Dr. Saha diagnosed a pulmonary impairment of any kind. Director’s Exhibit 13; Claimant’s Exhibit 2. Moreover, as accurately noted by the administrative law judge, a physician’s 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 & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 12. We therefore, affirm the administrative law judge’s finding that Dr. Saha’s opinion does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Claimant additionally asserts that the administrative law judge erred in failing to consider the physical requirements of claimant’s previous coal mine work in conjunction with the medical opinion evidence under Section 718.204(b)(2)(iv). We disagree. The administrative law judge rationally determined that the opinions of Drs. Rasmussen, Jarboe, and Vuskovich do not support a finding of total disability, where each physician explicitly stated that claimant is capable of performing his usual coal mine employment. Decision and Order at 8-11; Director’s Exhibit 10; Employer’s Exhibits 2, 4. Moreover, the record reflects that Dr. Saha did not diagnose a pulmonary impairment. Contrary to claimant’s assertion, therefore, it was unnecessary for the administrative law judge to compare these physicians’ opinions with the exertional requirements of claimant’s usual coal mine work. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

We also reject claimant’s argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant’s Brief at 5. 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). As claimant does not otherwise challenge the administrative law judge’s findings at Section 718.204(b)(2)(iv),

we affirm the determination that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge