

BRB No. 10-0119 BLA

WADE R. BAKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 10/07/2010
STANCO EQUIPMENT, 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 – Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (08-BLA-5838) of Administrative Law Judge Robert B. Rae rendered on a claim 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(l)) (the Act).¹ This case is before the Board for the second time. Initially, Administrative Law Judge Janice K. Bullard credited claimant with seventeen years of coal mine employment,² and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Bullard, however, further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). In so finding, Judge Bullard noted that Dr. Simpao, who examined claimant on behalf of the Department of Labor, diagnosed claimant with a moderate impairment but did not indicate whether claimant was totally disabled. Accordingly, Judge Bullard denied benefits.

Upon review of claimant's appeal, the Board noted the concession by the Director, Office of Workers' Compensation Programs (the Director), that Dr. Simpao's medical report, as forwarded to Judge Bullard, was missing a questionnaire in which Dr. Simpao stated that claimant was totally disabled. *W.B. [Baker] v. Stanco Equip., Inc.*, BRB No. 07-0198 BLA, slip op. at 3 (Sept. 24, 2007)(unpub.). Therefore, the Board vacated the denial of benefits, and remanded the case to the district director to provide a complete copy of Dr. Simpao's medical report for consideration.³ *Id.*

On remand, the questionnaire was associated with Dr. Simpao's report and the claim was referred to the Office of Administrative Law Judges, where it was assigned to Administrative Law Judge Robert B. Rae (the administrative law judge). Following the development of additional evidence by the parties, the administrative law judge held a hearing. Thereafter, in a Decision and Order issued on September 15, 2009, the

¹ By Order dated June 16, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director, Office of Workers' Compensation Programs, responded, and agree that the recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 12. 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 The Board affirmed, as unchallenged, the findings as to the length of coal mine employment, and that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *W.B. [Baker] v. Stanco Equip., Inc.*, BRB No. 07-0198 BLA, slip op. at 2 n.1 (Sept. 24, 2007)(unpub.).

administrative law judge found that the medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, he denied benefits.

On appeal, 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).⁴ Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to claimant's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker, Castle, Dahhan, and Simpao. Drs. Baker, Castle, and Dahhan opined that claimant retains the respiratory capacity to perform his usual coal mine duties. Director's Exhibits 20, 27, 39; Employer's Exhibits 2, 6. In his report, Dr. Simpao opined that claimant lacks the respiratory capacity to perform the work of a coal miner. Director's Exhibit 18; Director's Exhibit 39 at 5. When deposed, Dr. Simpao initially stated that he believed that claimant worked underground, loading coal. Director's Exhibit 39 at 44. When informed that claimant's last coal mine employment was as a truck driver, Dr. Simpao opined that, based on the pulmonary function study values that he obtained when he examined claimant, he believed that claimant could not perform the work of a truck driver. Director's Exhibit 39 at 44-45. Dr. Simpao further opined, however, that based on the higher pulmonary function study values that were obtained by Drs. Baker and Dahhan in their respective examinations, it appeared that claimant could perform the work of a truck driver. *Id.*

The administrative law judge accorded "some weight" to Dr. Simpao's opinion, but found that Dr. Simpao "did not persuasively articulate the rationale for his opinions,"

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and he determined that Dr. Simpao's opinion was not as well-reasoned or documented as were the opinions of Drs. Baker, Castle, and Dahhan. Decision and Order at 5. The administrative law judge therefore concluded that the medical opinion evidence did not establish total disability.

Claimant contends that Dr. Simpao's opinion was well reasoned and documented and should not have been rejected.⁵ Claimant's Brief at 4. The determination of whether a medical opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In this case, substantial evidence supports the administrative law judge's permissible determination that Dr. Simpao did not "persuasively articulate the rationale" for his opinion, and that his opinion was not as well-reasoned or documented when compared to the other medical opinions of record. See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we reject claimant's allegation of error.

Claimant argues further 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 respiratory impairment. Claimant's Brief at 4-5, citing *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's specific argument is that:

The claimant's usual coal mine work included being a truck driver. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentration of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Baker and Simpao, 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 lacks merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability.

⁵ Claimant also alleges that Dr. Baker's opinion was improperly rejected. Claimant's Brief at 4. Contrary to claimant's characterization of the decision below, the administrative law judge credited, as well-reasoned and documented, Dr. Baker's opinion that claimant is not totally disabled. Decision and Order at 5.

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).

Moreover, we reject claimant's contention that the administrative law judge "failed to mention the claimant's usual coal mine work in conjunction with" Dr. Simpao's opinion. Claimant's Brief at 5. When analyzing the medical opinions, the administrative law judge specifically considered that claimant worked as a truck driver.⁶ Decision and Order at 5. In so doing, the administrative law judge noted that Dr. Simpao initially stated an unqualified opinion that claimant is totally disabled, but that, when informed that claimant last worked as a truck driver, "Dr. Simpao . . . opined that the 'figures' from his pulmonary testing would not allow the [c]laimant the ability to work but that the figures from the other doctors would allow him to work at his last job." *Id.* As discussed above, the administrative law judge found, within his discretion, that Dr. Simpao's opinion was not as well-reasoned or documented as were the opinions of Drs. Baker, Castle, and Dahhan, that claimant retains the respiratory capacity to perform his usual coal mine work. The record reflects that, in so opining, Drs. Baker, Castle, and Dahhan indicated that they were aware of claimant's job as a truck driver. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; Director's Exhibits 20, 39 at 203; Employer's Exhibits 2, 6. Therefore, we reject claimant's argument, and affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁷

Thus, we affirm the administrative law judge's determination that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish total disability, a necessary element of entitlement in a miner's claim

⁶ The record contains claimant's statement that, as a truck driver, he had to sit for eight to twelve hours per day. Director's Exhibit 4. Claimant testified at the initial hearing that he loaded his truck with coal using a front-end loader, and that he did not have to place a tarp on the truck. Director's Exhibit 39 at 140. Claimant testified further that, once a week, he would help a mechanic service the truck by assisting with greasing, with changing the oil, and with checking the tires. *Id.* at 140-41.

⁷ Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work" Claimant's Brief at 5. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge's findings as to total disability must be based solely on the medical evidence contained in the record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

under 20 C.F.R. Part 718, we affirm the denial of benefits.⁸ *Anderson*, 12 BLR at 1-112.

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

⁸ In his brief, claimant lists as an issue “[w]hether the Director failed to provide the claimant with a credible pulmonary examination, as required by the Act,” but his brief contains no argument on this issue. Claimant’s Brief at 2. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); 20 C.F.R. §802.211(b).