BRB No. 05-0165 BLA

DAVID ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/15/2005
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6086) of Administrative Law Judge Daniel J. Roketenetz 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). Based on the parties' stipulations, the administrative law judge found twenty-three years of qualifying coal mine employment[1] and that employer was the responsible operator. Decision and Order at 2, 4; Hearing Transcript at 9. 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 5. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Decision and Order at 6-13. Accordingly, the 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 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. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond on the merits of the appeal but asserting that claimant has been provided with a complete pulmonary examination.[3]

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).

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[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 6, 7. 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 November 6, 2001, which was denied by the district director on February 28, 2003. Director's Exhibits 2, 28. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 29.

[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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Pursuant to Section 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 track layer, shuttle car operator, scoop operator, and miner helper. 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. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability.[4] *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co.*, 12 BLR 1-83 (1988).

Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education, and work experience in determining

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[4] Moreover, the administrative law judge credited the opinions of Drs. Repsher and Dahhan that claimant has no pulmonary impairment and would be able to perform his last coal mining job. Director's Exhibit 26; Employer's Exhibits 1, 2, 6. In this context, the administrative law judge also found "supported by the objective evidence" Dr. Hussain's opinion that, based on normal pulmonary function and blood gas studies, claimant has a mild impairment that leaves him with the respiratory capacity to perform the work of a coal miner. Decision and Order at 12-13; Director's Exhibit 9.

whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004). We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, 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).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's January 11, 2002 opinion provided by the Department of Labor, "the Director has failed to provide the 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 claimant has been provided the medical examination required by the Act and regulations. Director's Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 9. The administrative law judge did not find nor does claimant allege that Dr. Hussain's report was incomplete. With respect to the issue of total disability, the administrative law judge accepted, as supported by the objective evidence, Dr. Hussain's opinion that claimant retains the respiratory capacity to perform the work of a coal miner. Because Dr. Hussain's opinion regarding total disability--the element of entitlement upon which the administrative law judge based the denial of benefits--was complete and the administrative law judge did not find that it lacked credibility, a remand to the district director is not required. *See Hodges*, 18 BLR at 1-88 n.3.

Because claimant has failed to establish the presence of a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement in a miner's

claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We therefore affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge