

BRB No. 05-0306 BLA

EARL LEWIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED: 09/30/2005
)	
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 Thomas F. Phalen, Jr., 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.

Jeffrey S. Goldberg (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5766) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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 credited claimant with at least twenty-five years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to 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 evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Further, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Lastly, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.¹

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 18. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 14.

Dr. Baker also opined that:

[Claimant] has a Class 2 impairment with the FEV1 and vital capacity being between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 18.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 2 impairment is insufficient to support a finding of total disability.² *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

The administrative law judge also found that the opinions of Drs. Hussain,³ Dahhan⁴

²In view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

³In a report dated October 31, 2001, Dr. Hussain opined that claimant had a moderate impairment but retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 17.

⁴In a report dated August 9, 2002, Dr. Dahhan opined that:

and Rosenberg⁵ support a finding that claimant is not totally disabled from a pulmonary standpoint. Decision and Order at 14. Claimant alleges no error in regard to the administrative law judge's consideration of the opinions of Drs. Hussain, Dahhan, and Rosenberg. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁶

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the

From a respiratory standpoint, [claimant] retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

Director's Exhibit 20.

During a November 14, 2003 deposition, Dr. Dahhan opined that claimant retained the respiratory capacity to perform his past coal mine employment. Employer's Exhibit 9.

⁵In a report dated September 26, 2003, Dr. Rosenberg opined that claimant is not disabled and that, from a respiratory perspective, claimant could perform his previous coal mining job or similar arduous types of labor. Employer's Exhibit 3.

⁶Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4).⁷ See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁷Claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Claimant argues that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis on the grounds that it is based solely upon an x-ray interpretation. Claimant's Brief at 5. However, the administrative law judge did not discredit Dr. Hussain's opinion regarding the extent of claimant's pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14. Because our affirmance of the administrative law judge's denial of benefits in this case is based upon our affirmance of his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant could not prevail even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of pneumoconiosis. Thus, since the administrative law judge did not find that Dr. Hussain's opinion regarding the extent of claimant's respiratory impairment lacked credibility, we agree with the Director that, under the facts of this case, remand is not required.

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