BRB No. 88-4129 BLA

JAMES FERGUSON)
)
Claimant-Petitioner)
)
v.)
)
H. H. AND B. COAL COMPANY)
)
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John C. Dixon, Barbourville, Kentucky, for claimant.

Laura Montgomery (Arter & Hadden), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (87-BLA-2124) of Administrative Law Judge Robert L. Hillyard 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 *Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

with twenty-one years of qualifying coal mine employment, and found that claimant's original claim, which was filed on July 16, 1980, had been finally denied on October 23, 1980, and had not been pursued within the one year period for modification pursuant to 20 C.F.R. §725.310(a). Consequently, the administrative law judge determined that claimant's second claim, which was filed on August 22, 1984, was a duplicate claim which must be denied on the basis of the prior denial under 20 C.F.R. §725.309(d) inasmuch as claimant failed to establish a material change in conditions. The administrative law judge alternatively considered the merits of the claim pursuant to 20 C.F.R. Part 718, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the evidence is sufficient to establish a material change in conditions under Section 725.309(d), and is sufficient to establish total disability under 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this

appeal.[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. §932(a); O'Keefe 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, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

[1] The administrative law judge's findings under Sections 718.202(a)(1), 718.203(b), his finding that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1) - (c)(3), and his findings with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding that claimant failed to establish total disability by a preponderance of the evidence under Section 718.204(c)(4), as only three physicians rendered opinions on this issue, and the opinions of Drs. Moore and Baker, who determined that claimant was totally disabled due to pneumoconiosis, constitute a majority. However, the administrative law judge, as the trier-of-fact, need not accept the opinion of any particular medical expert, even where it is uncontradicted by other medical opinions, but must weigh all the evidence and draw his own conclusions and inferences therefrom. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); Knizer v. Bethlehem Mines Corp., 8 BLR 1-196 (1985). In the instant case, the administrative law judge acted within his discretion in according less weight to the opinion of Dr. Moore because the physician failed to explain how his finding of a mild obstructive and restrictive airway defect combination supported his assessment of total respiratory disability. See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Oggero v. Director, OWCP, 7 BLR 1-860 (1985); Duke v. Director, OWCP, 6 BLR 1-673 (1983). The administrative law judge also permissibly gave less weight to the opinion of Dr. Baker because the physician failed to explain the objective evidence upon which he based his determination of total disability in a questionnaire unaccompanied by supporting

documentation, in light of his finding of a mild obstructive defect in his most recent medical report.[2] Decision and Order at 12, 13; Director's Exhibits 32, 38. See Lucostic, supra; Oggero, supra; Cooper v. United States Steel Corp., 7 BLR 1-842 (1985); Duke, supra; Kendrick v. Kentland-Elkhorn Coal Corp., 5 BLR 1-730 (1983). The administrative law judge reasonably accorded greater weight to the opinion of Dr. Dahhan, who determined that claimant has the capacity to perform his usual coal mine employment, as the physician's conclusions were supported by the objective medical evidence. See Lucostic, supra; Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's findings under Section 718.204(c)(4) as they are based on substantial evidence. Inasmuch as claimant has failed to establish a requisite element of entitlement, i.e. total disability, claimant is precluded from entitlement to benefits under Part 718, and we need not address the remaining issue of whether claimant established a material change of conditions pursuant to Section 725.309(d). See Trent, supra.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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[2] Further, the administrative law judge acted within his discretion in determining that the limitations listed in Dr. Baker's earlier reports were insufficient to enable the administrative law judge to infer total disability. Decision and Order at 12; Director's Exhibits 10, 41. See Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge