BRB No. 04-0609 BLA

WILLIE CAUSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 04/15/2005
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 of Rudolf L. Jansen, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5899) of Administrative Law Judge Rudolf L. Jansen 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 twenty-two 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 findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in failing to enforce the evidentiary limitations set forth at 20 C.F.R. §725.414. However, the Director asserts that the administrative law judge's error in admitting evidence in excess of the evidentiary limitations is harmless because the administrative law judge based his denial of benefits on findings that there is no credible evidence of the existence of pneumoconiosis and total disability.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Dahhan, Fino, Hussain and Repsher. The administrative law judge stated that "[t]he record contains no

[1]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

physician opinion making a determination that [c]laimant has a totally disabling respiratory impairment." Decision and Order at 13. In a report dated May 16, 2001, Dr. Baker opined:

> With the FEV1 and vital capacity being greater than 80% of predicted, the patient has a Class I impairment. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.
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> ***
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> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupation.

Director's Exhibit 16. In a report dated July 20, 2001, Dr. Hussain opined that claimant suffers from a mild impairment. Director's Exhibit 11. However, Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In a report dated September 4, 2001, Dr. Dahhan opined that claimant does not suffer from a pulmonary impairment or disability. Director's Exhibit 20. Dr. Dahhan further opined that, from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id.* In a subsequent report dated August 14, 2002, Dr. Dahhan stated, "I continue to reiterate my statement that this patient has the respiratory capacity to return to his previous coal mining work or job of comparable physical demand even if he was found to have radiographic evidence of simple coal workers' pneumoconiosis." Director's Exhibit 33. Similarly, in a report dated September 24, 2003, Dr. Fino opined that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 4. Lastly, in a report dated October 20, 2003, Dr. Repsher opined that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 5. Dr. Repsher additionally opined that claimant retains the respiratory ability to perform the work of an underground coal miner or to do work requiring a similar degree of physical labor. *Id*.

Claimant initially asserts that the administrative law judge erred in finding that the opinions of Drs. Baker and Hussain are insufficient to establish total disability. Utilizing the reference provided by Dr. Baker in his report, the administrative law judge found that the "Class I" impairment diagnosed by Dr. Baker corresponded to a 0% impairment of the whole person. Decision and Order at 8, 13. The administrative law judge specifically stated, "[u]sing the American Medical Association's *Guide to the Evaluation of Permanent Impairment* as directed by the Kentucky standard form, Dr. Baker assessed

[c]laimant's impairment as 0% impairment of the whole person, but recommended that he avoid further dust exposure." *Id*. at 8. Thus, the administrative law judge reasonably found that Dr. Baker's diagnosis of a "Class I" impairment is insufficient to support a finding of total disability. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Dr. Baker also 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 16. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion is also insufficient to support a finding of total disability. Further, as previously noted, Dr. Hussain opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 11. Thus, we reject claimant's assertion that the administrative law judge erred in finding that the opinions of Drs. Baker and Hussain are insufficient to establish total disability.

Next, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's and Dr. Hussain's assessments of claimant's impairment.[2] The administrative law judge reasonably found that "Dr. Baker opined that [c]laimant has no respiratory impairment, but should avoid further coal dust exposure." Decision and Order at 13; *see Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR at 1-37. Although Dr. Hussain opined that claimant suffers from a mild impairment, he also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 11. Thus, the opinions of Drs. Baker and Hussain are insufficient to establish total disability. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

As claimant asserts, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge

[2]Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 8. However, claimant has not identified any presumption of total disability that is applicable in this case, nor does one exist, given the facts and evidence in this Part 718 case.

should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of claimant's last coal mine employment before crediting that physician's opinion. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. However, because these opinions and the other medical opinions of record do not support a finding of total disability, the administrative law judge's failure to make such findings constitutes harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also asserts that the administrative law judge erred in discounting the opinions of Drs. Baker and Hussain because they are based on non-qualifying pulmonary function studies. Contrary to claimant's assertion, the administrative law judge did not discount the opinions of Drs. Baker and Hussain with respect to the issue of total disability. Rather, the administrative law judge reasonably found that the opinions of Drs. Baker and Hussain are insufficient to establish a totally disabling respiratory impairment. Decision and Order at 13. Thus, we reject claimant's assertion that the administrative law judge erred in discounting the opinions of Drs. Baker and Hussain because they are based on non-qualifying pulmonary function studies.

We additionally hold that, contrary to claimant's suggestion, 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 work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Further, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[3]

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[3]Since there is no credible medical opinion evidence that claimant is totally disabled at 20 C.F.R. §718.204(b), we hold that any error by the administrative law judge in admitting medical opinion evidence pertinent to the issue of total disability in violation of the evidentiary limitations set forth at 20 C.F.R. §725.414 is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]In view of our disposition of the case at 20 C.F.R. §718.204(b), we need not address claimant's contentions regarding the administrative law judge's findings that the

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). *Larioni*, 6 BLR at 1-1278.