BRB No. 04-0676 BLA

EDDIE BRUCE SLUSHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO INCORPORATED	)	DATE ISSUED: 04/15/2005
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employer/Carrier-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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy, Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (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 – Denying Benefits (2002-BLA-5342) of Administrative Law Judge Joseph E. Kane rendered 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). This case is before the Board for the second time.[1] Based on the date of filing, March 1, 2001, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge found the newly submitted evidence of record insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and therefore insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[2] Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding total disability established based on the reports of Drs. Baker and Hussain. Alternatively, claimant contends, in light of the administrative law judge's failure to credit the opinion of Dr. Hussain, who provided an evaluation of claimant on behalf of the Director, Office of Workers' Compensation Programs (the Director), that the Director has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim and that the case must accordingly be remanded so that he can be provided one as required under the Act. 30 U.S.C. §923(b). Employer responds, urging affirmance of the decision denying benefits. Employer contends that the evidence failed to establish total disability and that claimant was provided a complete, credible pulmonary evaluation. The Director responds, also arguing that claimant was afforded a complete, credible pulmonary evaluation as required by the Act, pursuant to Section 413(b), 30 U.S.C. §923(b). Specifically, the Director contends that claimant misconstrues the Director's obligation under the Act, arguing that he is only required to provide claimant with a complete, credible evaluation, not a dispositive one. Thus, the Director contends that since the administrative law judge did not find Dr. Hussain's opinion to be incredible, but only entitled to less weight than other medical opinions, the Director has met his statutory obligation.

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[1] Claimant filed his first claim for benefits on July 9, 1993. That claim was denied on October 30, 1996 by Administrative Law Judge J. Michael O'Neill because, although claimant established the existence of pneumoconiosis, he failed to establish total disability and total disability due to pneumoconiosis. Director's Exhibit 1. The denial of that claim was affirmed by the Benefits Review Board on April 29, 1997. *Slusher v. Leeco, Inc.*, BRB No. 97-0341 BLA (April 29, 1997)(unpub.).

[2] Since the administrative law judge found that claimant failed to establish total disability, he did not, necessarily, reach the issue of disability causation. 20 C.F.R. §718.204(b), (c).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precluded entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error.[3] The Director's obligation, pursuant to Section 413(b), is to provide claimant with a complete, credible, pulmonary evaluation which addresses each required element of entitlement, thereby, affording claimant the opportunity to substantiate his claim. As Dr. Hussain's opinion addresses each requisite element of entitlement and was not rejected by the administrative law judge as incredible, but only accorded less weight than other medical opinions, the Director's obligation to provide claimant with a complete, credible pulmonary evaluation has been discharged. 30 U.S.C. §923(b); Director's Exhibit 13; Decision and Order at 12; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *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); *Pettry v. Director, OWCP*, 14 BLR 1-998 (1990).

Further, contrary to claimant's contention, the administrative law judge permissibly accorded little weight to Dr. Hussain's diagnosis of total respiratory disability and Dr. Baker's finding that claimant was occupationally disabled because he should limit further dust exposure, as these physicians failed to provide an adequate rationale for their determinations, Decision and Order at 12; Director's Exhibits 13, 14; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Tackett *v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Hopton v. U.S. Steel Corp.*, 7

[3] The administrative law judge's findings that the newly submitted evidence of record failed to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-12 (1984), and Dr. Baker's opinion that claimant should limit further dust exposure is insufficient to establish total disability, Decision and Order at 12; Director's Exhibit 14; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Clark*, 12 BLR 1-149 (1989); *Tackett*, 12 BLR 1-11.[4] Instead, the administrative law judge permissibly accorded determinative weight to the opinions of Drs. Lockey and Rosenberg, that claimant did not have a totally disabling respiratory impairment, as he found them to be better supported by the objective evidence of record and the results of physical examination. Decision and Order at 12; Employer's Exhibit 3; Director's Exhibit 17; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Because it is within the discretion of the administrative law judge, as the trier of fact, to determine whether a medical report is adequately documented and reasoned and the administrative law judge has properly exercised that discretion in this case, we find no error in the administrative law judge's weighing of the medical opinion evidence. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-8 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark*, 12 BLR 1-149, 1-155; *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Claimant's contention that the administrative law judge was required to consider the requirements of claimant's usual coal mine employment in conjunction with the medical reports of record is rejected as none of the medical reports provided specific limitations which could be compared to claimant's work requirements. *See Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). Likewise, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant to determining the miner's ability to perform comparable and gainful work, not to establishing total disability from claimant's usual coal mine work. *See* 20 C.F.R. §718.204(b)(2)(iv); *Fields*, 10 BLR 1-19. Accordingly, substantial evidence supports the administrative law judge's finding that the reports of Drs. Lockey and Rosenberg outweighed the contrary opinions of Drs. Baker and Hussain. Additionally, the administrative law judge found that the newly submitted pulmonary function and blood gas study evidence, which was non-qualifying, weighed against a finding of total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). We, therefore, affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish the presence of a totally disabling respiratory impairment, and, thereby, a change in an applicable condition of entitlement. Decision and Order at 12; Employer's Exhibit 3; Director's Exhibits 13, 14,

[4] Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

17; 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge