BRB No. 04-0827 BLA

SHAFTER HACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL	)	DATE ISSUED: 04/28/2005
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, 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 – Denial of Benefits (03-BLA-6183) of Administrative Law Judge Robert L. Hillyard 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 eighteen years of coal mine employment, based on the evidence of record and a stipulation by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to Section 718.202(a)(1) and in finding that the medical opinions are insufficient to establish total disability at Section 718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to comply with its statutory duty to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the decision. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.

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).

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 precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (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 of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge properly denied benefits based on a finding that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the administrative law judge erred by failing to "identify the exertional requirements of the claimant's usual coal mine employment and compare said requirements to the medical reports assessing a disability." Claimant's Brief at 5. We disagree. The record before the administrative law judge contained opinions from Drs. Baker, Broudy, Fino, and Vuskovich agreeing that claimant has minimal or no respiratory impairment at all, and thus is not totally disabled from performing the work of a coal miner. Director's Exhibit 11 at 4, 5; Employer's Exhibits 2, 4, 6, 8. Contrary to claimant's suggestion, the administrative law judge was not required to compare these assessments of minimal to no impairment with the exertional requirements of claimant's usual coal mine work. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We therefore reject claimant's allegation of error.

Claimant next argues that the administrative law judge was required to consider claimant's age, education and work experience in determining whether claimant established that he is totally disabled, *citing Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). The test for total disability in claims under Part C of the Act is solely a medical test. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 488-90, 7 BLR 2-124, 2-129-32 (6th Cir. 1995). Therefore, claimant's contention that the administrative law judge had to consider vocational evidence is without merit.

Lastly, claimant argues that, because pneumoconiosis is a progressive and irreversible disease, "[i]t can therefore be concluded that . . . claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 6. With this argument, claimant identifies no error in the administrative law judge's determination that claimant did not prove that he is totally disabled. 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). For the reasons discussed above, we affirm the administrative law judge's finding that the medical opinion evidence of record did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, because claimant does not challenge the administrative law judge's findings that the evidence of record did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12 - 13. Claimant's failure to establish total disability precludes his entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant argues that because the administrative law judge found a diagnosis of pneumoconiosis rendered by the Department of Labor (DOL) physician, Dr. Baker, not well reasoned or documented, the Director "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 disagrees. Director's Brief at 2-3.

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*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. Director's Exhibit 11 at 4-8; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge accepted and relied on Dr. Baker's opinion that claimant is not totally disabled, finding it to be "a reasoned opinion" meriting "some weight against total disability." Decision and Order at 14. Because Dr. Baker's report was complete and the administrative law judge did not find that it lacked any credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93. Additionally, because claimant's failure to establish that he is totally disabled precludes his entitlement to benefits, we need not address claimant's arguments concerning the administrative law judge's analysis of the medical evidence regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits 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

_____
BETTY JEAN HALL
Administrative Appeals Judge