BRB No. 04-0830 BLA

JIMMIE LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 04/29/2005
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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 - Denial of Benefits (2003-BLA-5938) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed his application for benefits on July 23, 2001. Director's Exhibit 2. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with at least thirty years of coal mine employment.[1] Decision and Order at 4; Hearing Transcript at 11. Addressing the merits of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 5-13. He further found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 14-15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits, arguing that he erred in weighing the x-ray evidence and the medical opinion evidence of record. In addition, claimant contends that the administrative law judge erred in failing to consider Dr. Baker's status as claimant's treating physician pursuant to 20 C.F.R. §725.104(d). Claimant also contends that remand to the district director is required, as the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation (the Director), also responds and contends that remand for a complete pulmonary evaluation is not warranted in this case.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least thirty years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii). We therefore affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 establish 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total respiratory disability. In particular, claimant asserts that the administrative law judge erred by not comparing the exertional requirements of claimant's usual coal mine employment with the medical opinions assessing disability. Claimant further contends that the administrative law judge should have considered claimant's age, education and work experience in determining claimant's ability to perform comparable and gainful employment. Finally, claimant contends that since pneumoconiosis is a progressive and irreversible disease, claimant's pneumoconiosis has worsened, and that such worsening would adversely affect his ability to perform his usual coal mine employment.

In considering the medical opinion evidence, the administrative law judge acknowledged Dr. Baker's status as claimant's treating physician, and that the record contains multiple treatment notes from Dr. Baker, as well as a "Multi-System Examination" form. Decision and Order at 8; Director's Exhibits 10, 11. The administrative law judge's finding that Dr. Baker's opinion is insufficient to establish total disability is rational and supported by substantial evidence, however, as Dr. Baker did not state that claimant is incapable, from a respiratory or pulmonary standpoint, of performing coal mine work. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Rather, the administrative law judge found that Dr. Baker did not provide an assessment regarding the presence, if any, of a respiratory or pulmonary impairment.[3]

[3] In addition to the treatment notes, the record contains a one page letter from Dr. Baker to claimant's counsel, in which Dr. Baker states that claimant was seen for coal workers' pneumoconiosis and chronic bronchitis. Director's Exhibit 11. Dr. Baker further states that claimant is a non-smoker and that his chest x-ray was read as showing coal workers' pneumoconiosis, category 1/0, and that claimant's pO2 and pulmonary function study were normal. *Id*. Dr. Baker does not otherwise address the existence of any respiratory or pulmonary impairment.

Decision and Order at 8, 15; Director's Exhibits 10, 11; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

Furthermore, contrary to claimant's contention, the administrative law judge did not err in failing to accord greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[4] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade and that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* Consequently, claimant's reliance upon Section 718.104(d) is misplaced in this instance. The administrative law judge permissibly determined that the opinion of Dr. Baker did not provide an assessment of total disability. Decision and Order at 15; Director's Exhibits 10, 11; *see Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649; *Napier*, 301 F.3d 703, 22 BLR 2-537.

With regard to the remaining medical opinions of record, the administrative law judge reasonably found that the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, is insufficient to establish total disability. Dr. Hussain diagnosed a moderate pulmonary impairment, but further indicated that claimant retains the respiratory capacity to perform his usual coal mine work. Decision and Order at 9, 15; Director's Exhibit 9; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee*, 9 BLR 1-4. Likewise, the administrative law judge reasonably found that the opinions of Drs. Broudy, Rosenberg, and Vuskovich are insufficient to establish total disability as each of these physicians also opined that claimant was capable of performing his usual coal mine employment. Decision and Order at 9-11, 15; Employer's Exhibits 3, 5, 6, 8, 9, 11, 12; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4.

[4] Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Therefore, we find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. The administrative law judge permissibly relied on the opinions of physicians who were familiar with claimant's job duties and opined that he is not totally disabled. *See Gee,* 9 BLR 1-4*; see also Onderko v. Director, OWCP,* 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.,* 9 BLR 1-201 (1986).

Additionally, claimant's assertion of vocational disability based on his age and limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act.[5] *See* 20 C.F.R. §718.204; *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence.[6] Decision and Order at 15; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

In light of this determination, we also reject claimant's assertion that this case must be remanded to the district director because Dr. Hussain's opinion was discredited by the administrative law judge pursuant to Section 718.202(a)(4). With respect to the issue of total disability, the administrative law judge did not find that Dr. Hussain's

[5] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1)(i), (ii).

[6] We reject claimant's argument that "because pneumoconiosis is proven to be a progressive and irreversible disease" it can be concluded that his condition has worsened and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

opinion was incomplete or lacking credibility. Rather, he rationally determined that because Dr. Hussain explicitly indicated that claimant is able to perform his usual coal mine work, Dr. Hussain's opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 15; Director's Exhibit 9. Thus, Dr. Hussain's opinion on the element of entitlement upon which the administrative law judge based the denial of benefits was complete and credible and remand to the district director is not required. 20 C.F.R. §725.406(a); *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).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

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BETTY JEAN HALL
Administrative Appeals Judge