BRB No. 04-0832 BLA

CARSON JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	DATE ISSUED: 04/27/2005
	)	
and	)	
	)	
AIG CLAIM SERVICES, 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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2003-BLA-6226) 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). Claimant filed his application for benefits on July 16, 2001. Director's Exhibit 1. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with seventeen years of coal mine employment.[1] Decision and Order at 3. 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 6-9. 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 10-11. 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 finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. In addition, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total respiratory disability. 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Decision and Order at 4; Director's Exhibit 7. 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 seventeen years of coal mine employment, his finding that Nally & Hamilton Enterprises is the responsible operator, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(1)-(3). We, therefore, affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.

We reject 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. This analysis is required in situations where a physician details a claimant's physical limitations but does not provide an opinion regarding the extent of any disability from which the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Herein, the administrative law judge rationally found that the lone medical opinion of record addressed the issue of disability and did not conclude that claimant was totally disabled, or state that claimant was unable to return to his usual coal mine employment. Decision and Order at 10-11; Director's Exhibit 7.

In particular, Dr. Baker, under the heading "Impairment" on his examination form stated "minimal with bronchitis and Coal Workers' Pneumoconiosis 1/0." Director's Exhibit 7. However, on an additional medical form accompanying his report, he concluded that there was no respiratory impairment and that claimant had the respiratory capacity to perform his usual coal mine employment. *Id*. Since Dr. Baker, in rendering his opinion that claimant was capable, from a respiratory standpoint, of performing his usual coal mine employment, was aware of claimant's last coal mine employment, we affirm the administrative law judge's weighing of this evidence. Decision and Order at 5, 10-11; Director's Exhibit 7; 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal*,

Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Budash*, 9 BLR 1-48.

Furthermore, 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.[3] 20 C.F.R. §718.204(b)(2)(iv); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987). 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.[4] Decision and Order at 9-11; *see Fields*,10 BLR 1-19; *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. Baker's opinion was discredited by the administrative law judge pursuant to Section 718.202(a). With respect to the issue of total disability, the administrative law judge did not find that Dr. Baker's opinion was incomplete or lacking credibility. Rather, he rationally determined that because Dr. Baker explicitly indicated that claimant is able to perform coal mine work, his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 10-11. Thus, Dr. Baker'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,*

[3] 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).

[4] 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).

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).

Since claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 20 C.F.R. §718.204(b)(2),[5] a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits in this miner's claim is precluded. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[5] In light of our affirmance of the administrative law judge's finding that the medical evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement, we decline to address claimant's contentions regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §718.202(a). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).