BRB No. 04-0837 BLA

FRANKLIN FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN-CUMBERLAND COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	DATE ISSUED: 04/29/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 (2003-BLA-5481) of Administrative Law Judge Mollie W. Neal on a claim filed on March 21, 2001 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). Director's Exhibit 2. The administrative law judge noted that at the hearing claimant testified that he worked for thirty years in the coal mine industry. Decision and Order-Denying Benefits at 6; Hearing Transcript 22. Employer stipulated to claimant's testimony to that effect. Hearing Transcript at 7. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R §§718.202(a) and 718.203(b), but failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding the medical opinions of Drs. Baker, Veazy, and Simpao sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). Claimant further argues that the Director, Office of Worker's Compensation Programs (the Director), failed to satisfy his obligation under Section 413(b) of the Act, 30 U.S.C. §923(b), and 20 C.F.R. §725.406(a), to provide claimant with a complete and credible pulmonary evaluation. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director has filed a limited response stating that he discharged his obligation to provide claimant with a complete and credible pulmonary evaluation.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

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[1] Claimant also contends that the administrative law judge erred in finding the x-ray and medical opinion evidence of record insufficient to establish the existence of pneumoconiosis. Claimant's Brief at 7. Contrary to claimant assertion, the administrative law judge in fact found that claimant established the existence of pneumoconiosis by a preponderance of the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Decision and Order-Denying Benefits at 9. We therefore affirm as nonprejudicial to claimant and unchallenged by employer, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.203(b).

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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Under Section 718.204(b)(2)(iv), claimant argues that the opinions of Drs. Baker, Veazy, and Simpao are well reasoned and sufficient to establish total disability. Dr. Baker opined that claimant was "100% occupationally disabled," Drs. Vaezy and Simpao opined that claimant had a mild pulmonary impairment, and Dr. Simpao also opined that claimant was unable to perform his coal mine job. Decision and Order-Denying Benefits at 4, 5; Director's Exhibits 9, 11; Claimant's Exhibit 3. Claimant asserts that in addition to claimant's work history and the results of the pulmonary function studies, Drs. Baker, Veazy, and Simpao based their opinions on claimant's medical history, x-rays, physical examination and blood gas studies. *Id.* Claimant also argues that the administrative law judge erred in finding claimant able to perform his usual coal mine work without considering the exertional requirements of such work. Claimant's Brief at 5. Claimant argues that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Drs. Baker, Vaezy, and Simpao's opinions of total disability. *Id.* Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant argues that the administrative law judge did not consider claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled.

The administrative law judge acknowledged that Dr. Baker's opinion recorded claimant's occupational and smoking histories and the results of claimant's examination, x-ray, pulmonary function, and blood gas studies. Decision and Order-Denying Benefits at 5. The administrative law judge reasonably found that Dr. Baker's opinion that claimant's "Class II impairment with the vital capacity and the FEVI being between 60% and 80% of predicted" was insufficient to establish total disability because the doctor did not address the exertional demands of claimant's last coal mine employment, nor explain how the non-qualifying objective test results and mild impairment would render the miner functionally unable to perform his usual coal mine employment. Decision and Order Denying Benefits at 11; *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149 (1989) (*en banc*). The administrative law judge rationally found Dr. Baker's opinion "problematic" because it was partially based on a pulmonary function study that "he interpreted as manifesting a 'mild' restrictive defect" without a specific rationale upon which he based his opinion. *Id;* Decision and Order-Denying Benefits at 11; Director's Exhibit 11.

Contrary to claimant's assertion, the administrative law judge considered claimant's usual coal mine employment in determining disability. The administrative law

judge noted claimant's hearing testimony that he worked more as an equipment operator than as a repairman, and that claimant did not testify relating to the physical demands of his job. Decision and Order-Denying Benefits at 11; Hearing Transcript at 22, 23. Consequently, the administrative law judge took official notice that the work of a repairman and an equipment operator in the coal mining industry requires medium to heavy physical demands. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); Decision and Order-Denying Benefits at 11. The administrative law judge, however, was unable to discern from Dr. Baker's opinion whether the doctor took into consideration the physical demands of claimant's coal mine employment in determining that his mild pulmonary condition precluded him from performing the duties of that job. *Id.* Therefore, the administrative law judge reasonably found Dr. Baker's diagnosis of a mild impairment to be insufficient to support a finding that claimant lacked the functional respiratory capacity to perform his job as an equipment operator or repairman. *Clark*, 12 BLR at 1-155. Furthermore, the administrative law judge rationally found that Dr. Baker's alternative diagnosis, that claimant should not return to a dusty environment to avoid exacerbating his pneumoconiosis, was not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP,* 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.* 12 BLR 1-83 (1988); Decision and Order-Denying Benefits at11.; Director's Exhibit 11.

Similarly, the administrative law judge noted that Dr. Vaezy based his diagnosis that claimant has a mild restrictive impairment on an April 7, 1997 pulmonary function study that yielded non-qualifying values and on a March 1, 2001 pulmonary function study that was found unreliable because of its nonconformance with the quality standards of the regulations. Decision and Order-Denying Benefits at 12; Claimant Exhibit 3. The administrative law judge further noted that the "bulk of the medical records relating to Dr. Vaezy's care and treatment of claimant are illegible," and found that Dr. Vaezy did not state in any report of record whether claimant's mild restrictive impairment would prevent him from performing his last coal mine employment. *Id.* Accordingly, the administrative law judge reasonably found Dr. Vaezy's diagnosis entitled to less probative weight and insufficient to support an inference of total disability. *Mc Math v. Director, OWCP,* 12 BLR 1-6 (1988); *Fields v. Island Coal Co.* 10 BLR 1-19 (1987).

Likewise, the administrative law judge acknowledged that Dr. Simpao based his disability assessment on claimant's symptoms and the results of claimant's examination, x-ray, pulmonary function study, and electrocardiogram. Decision and Order-Denying Benefits at 5. The administrative law judge, however, properly accorded diminished weight to the opinion of Dr. Simpao that claimant's mild respiratory impairment would not allow him to perform his last coal mine employment because it was based in part on a non-qualifying pulmonary function study and a normal blood gas test. *Fields,* 10 BLR 1-19*;* Decision and Order-Denying Benefits at 12.

Claimant contends that because the administrative law concluded that Dr. Simpao's "findings were undermined by the pulmonary function study he performed" and that "his opinion was diminished by his finding of mild respiratory impairment based on non-qualifying pulmonary function studies," the Director has failed to provide the claimant with complete and credible pulmonary evaluation under Section 725.406(a). Claimant's Brief at 6. The Director responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one." Director's Brief at 2.

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. §§7718.101(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. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did find Dr. Simpao's report outweighed by Dr. Dahhan's more persuasive medical opinion, but that is not the same as finding the report not credible. The administrative law judge found "highly credible" Dr. Dahhan's December 17, 2001 opinion that claimant's "mild" respiratory impairment was not totally disabling. Decision and Order-Denying Benefits at 11, 12; Director's Exhibit 19. Specifically, the administrative law judge permissibly accorded "greatest weight" to Dr. Dahhan's opinion because it was "well-reasoned and documented by the objective medical evidence of record." Decision and Order-Denying Benefits at 11, 12; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge regarded Dr. Simpao's opinion as believable, but found it outweighed. *See, e.g., Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting the physicians' opinions and choose to credit one…over the other"). Because Dr. Simpao's report was complete and the administrative law judge did not find that it was not credible, 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 B LR at 1-93.[2]

Additionally, claimant argues that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work of comparable gainful work." Claimant's Brief at 6. Contrary to claimant's contention, there is no evidence in the record to support this allegation. Moreover, 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]

Because claimant failed to establish the existence of a totally disabling respiratory impairment, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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[2] Claimant contends that the administrative law judge placed considerable weight upon the opinion of Dr. Dahhan and erroneously stated that Dr. Dahhan was claimant's treating physician. Claimant's Brief at 5. The administrative law judge acknowledged that Dr. Vaezy was claimant's treating physician, and that claimant was "seen" by Dr. Dahhan on June 19, 1998 for his hemidiaphragm paralysis and was referred to the Pulmonary Department at Vanderbilt University for further evaluation according to the physician's progress notes from Appalachian Regional Health Care. Decision and Order at 5, 6; Director's Exhibit 12. The administrative law judge based his finding that claimant's "mild" respiratory impairment was insufficient to establish total disability on Dr. Dahhan's December 12, 2001 opinion, not on the progress notes of 1998. Decision and Order-Denying Benefits at 11. Further, the administrative law judge accorded greatest weight to Dr. Dahhan's 2001 opinion because it was well-reasoned and documented, not because he accorded Dr. Dahhan the status of a treating physician. Decision and Order-Denying Benefits at 12.

[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 relevant only 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).

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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BETTY JEAN HALL
Administrative Appeals Judge