BRB No. 05-0662 BLA

GLENN HACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAMES RIVER COAL SERVICE COMPANY	)	DATE ISSUED: 04/26/2006
	)	
Employer-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 (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5817) 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). The parties stipulated to 21 years of coal mine employment. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law

judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), or a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(iv)[1] because, claimant argues, Dr. Baker's opinion is well reasoned and well documented, and supportive of claimant's position that he is totally disabled. Moreover, claimant contends that the administrative law judge erred in not taking into account the exertional requirements of his usual coal mine employment, and the fact that he should avoid further dust exposure. Lastly, claimant argues that the administrative law judge erred in finding him not totally disabled since pneumoconiosis is a progressive and irreversible disease.

Drs. Baker, Hussain, Broudy, and Fino each rendered an opinion regarding claimant's pulmonary disability. Dr. Baker stated that claimant

> has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. This is based on vital capacity and FEV1 each being greater than 80% of predicted."

Director's Exhibit 7 at 4. Dr. Baker also stated that claimant

> has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or any similar dusty occupation.

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[1] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(1)-(iii), these findings are affirmed. *Skrack v. Creek Coal Co.*, 6 BLR 1-710 (1983).

Director's Exhibit 7 at 4. Dr. Hussain categorized the extent of claimant's pulmonary impairment due to pneumoconiosis as mild, and checked the "yes" box indicating that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 8 at 5. Dr. Broudy did not believe that claimant has any significant pulmonary disease or respiratory impairment that has arisen from his occupation as a coal worker, and opined that claimant retains the respiratory capacity to perform his past coal mine employment. Employer's Exhibits 2 at 3; 12 at 10. Dr. Fino concluded that claimant did not have a significant respiratory impairment, and that claimant is neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort from a respiratory standpoint. Employer's Exhibits 9 (Dr. Fino's report at 6); 13 at 8-9, 11-12.

We affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant has a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(iv). The administrative law judge rationally found that Dr. Baker's opinion did not clearly conclude whether or not claimant could perform his usual coal mine employment from a respiratory standpoint.[2] The administrative law judge therefore properly found Dr. Baker's opinion insufficient to meet claimant's burden at Section 718.204(b)(2)(iv). Decision and Order at 9; Director's Exhibit 7 at 4. An administrative law judge may decline to credit a medical opinion that is equivocal. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, Dr. Baker's finding of a class I impairment is insufficient to support a finding of total disability because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd* 9 BLR 1-104 (1986)(*en banc*). Additionally, Dr. Baker's opinion that persons who develop pneumoconiosis should limit further exposure to the offending agent implies that claimant is 100 percent occupationally disabled for work in the coal mining industry or any similar dusty occupation is, contrary to claimant's contention, insufficient to establish total disability. A doctor's opinion, such as this one, recommending against further

[2] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

coal dust exposure is insufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

As the administrative law judge has properly determined that Dr. Baker's opinion, the only medical opinion of record that arguably supports claimant's burden to establish total disability pursuant to Section 718.204(b)(2)(iv), is insufficient to carry claimant's burden,[3] we need not address the administrative law judge's weighing of the opinions of Drs. Hussain, Broudy, or Fino, as any error therein would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983); Decision and Order at 9; Director's Exhibit 8; Employer's Exhibits 2, 9, 12, 13.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-54 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, we need not address claimant's remaining contentions regarding the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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[3] Since Dr. Baker's opinion is insufficient to establish total disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. 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).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge