BRB No. 07-0736 BLA

N.Y.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOK & SON MINING, INCORPORATED	)	DATE ISSUED: 04/22/2008
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
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 of Adele Higgins Odegard, 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.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; 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 (05-BLA-5791) of Administrative Law Judge Adele Higgins Odegard 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).[1] The administrative law judge credited claimant with twenty-four years of coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Lastly, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant challenges the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[3]

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

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[1] Claimant states that "the [administrative law judge] failed to make a finding concerning whether there was a mistake in the determination of fact in any of the claimant's previous decisions." Claimant's Brief at 5. However, no party filed a request for modification in this case.

[2] The record indicates that claimant was last employed in the coal mine industry 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*).

[3] Because the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in discrediting Dr. Mettu's opinion that "the claimant could not perform his regular mining duties."[4] Claimant's Brief at 3. The administrative law judge considered the reports of Drs. Dahhan and Mettu. The administrative law judge stated that "[n]either of the two physicians who rendered opinions regarding the [c]laimant's pulmonary condition concluded that the [c]laimant is totally disabled." Decision and Order at 12. Dr. Dahhan opined that claimant retained the respiratory capacity to perform the work of a coal miner or to perform comparable work. Employer's Exhibits 1, 2. Dr. Mettu declined to render an opinion regarding whether claimant has the respiratory capacity to work as a coal miner, because no pulmonary function study was performed on claimant due to cardiac arrhythmia. Director's Exhibit 27. Dr. Mettu nevertheless opined that "[claimant] would not be able to work in and around coal mines due to abnormal category 2/2 chest [x]-ray [p]neumoconiosis." *Id*. Because a doctor's recommendation against further 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), the administrative law judge permissibly found that this aspect of Dr. Mettu's opinion did not support a finding of total disability. Decision and Order at 12 n.19.

[4] We reject claimant's assertion that Dr. Mettu's opinion entitles him to a presumption of total disability. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that "the Board has held that a single medical opinion may be sufficient for invoking the presumption of total disability." Claimant's Brief at 3. 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 Va. 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.

Thus, we reject claimant's assertion that the administrative law judge erred in his consideration of Dr. Mettu's opinion.

We also 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 the physicians' assessments of claimant's impairment. Contrary to claimant's assertion, because Dr. Dahhan opined that claimant has the respiratory capacity to perform the work of a coal miner and Dr. Mettu did not render an opinion regarding claimant's pulmonary impairment, the administrative law judge was not required to make a comparison of their opinions with the exertional requirements of claimant's usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant was totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish total disability at 718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.[5] *Anderson*, 12 BLR at 1-112.

Finally, claimant contends that because Dr. Mettu's report did not definitively diagnose a pulmonary impairment, the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. The Director responds that there was no violation of his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

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

[5] In view of our disposition of the case at 20 C.F.R. § 718.204(b), we decline to address claimant's contention at 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Mettu examined claimant and performed the following objective tests: a chest x-ray, an arterial blood gas study, and an electrocardiogram.[6] Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). In a report dated May 13, 2004, Dr. Mettu diagnosed chronic bronchitis related to working in coal mines and smoking. Director's Exhibit 10. Dr. Mettu did not render an opinion regarding the presence and severity of a chronic pulmonary or respiratory impairment, but noted that "PFT [was] not done due to cardiac arrythmias."[7] *Id.*

By Order dated November 16, 2006, the administrative law judge directed the parties to show cause why the claim should not have been remanded to the district director for a pulmonary evaluation that included a medical assessment of whether claimant had a respiratory or pulmonary impairment, the severity of the impairment, and the extent that coal dust exposure contributed to the impairment. In a November 21, 2006 letter, claimant stated that the case should have been remanded to the district director to give the Director an opportunity to provide claimant with a complete pulmonary evaluation. However, in a January 16, 2007 letter, the Director requested permission to submit to the administrative law judge a supplemental opinion from Dr. Mettu that addressed the issues of concern that were noted by the administrative law judge.

By Order dated January 25, 2007, the administrative law judge granted the Director's request to submit Dr. Mettu's supplemental opinion. In the supplemental report, Dr. Mettu noted that claimant's pulmonary function examination was normal, an arterial blood gas study yielded normal values at rest, and no pulmonary function study was administered to claimant because of his cardiac arrhythmia. Director's Exhibit 27. Dr. Mettu then stated:

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[6] Section 725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

[7] In a report dated June 2, 2004, Dr. Alam, claimant's treating physician, noted that "[s]ince the last 3-4 months [claimant] has been having persistent pleuritic pain and is unable to really do any kind of breathing test because he just really chokes and at times when attempted he nearly had [a] syncopal episode." Director's Exhibit 12A. Dr. Alam opined that "[c]linically it seems that doing a breathing test will be risky at this period of time." *Id.*

> I can not determine [the] severity of [claimant's] pulmonary impairment with out objective evidence such as [a] pulmonary function study. I can not say whether he has [the] respiratory [or] pulmonary capacity to work as [a] coal miner, but I can say he would not be able to work in and around coal mines due to [his] abnormal category 2/2 chest [x]-ray [of] [p]neumoconiosis. He would not be able to work in [a] coal mine. Coal dust exposure has given him pneumoconiosis.

Id.

In considering Dr. Mettu's opinion, the administrative law judge acknowledged that a miner with a severe pulmonary impairment may find it difficult or impossible to satisfactorily complete a pulmonary function test. Decision and Order at 12 n.20. Nonetheless, the administrative law judge determined that "in this case the evidence is that the [c]laimant's heart condition, not a pulmonary disability, prevented his completion of the pulmonary function test." *Id*. The administrative law judge additionally noted that "[t]he record also reflects that the arterial blood gas test results obtained during the [c]laimant's pulmonary evaluation did not show significant pulmonary impairment." *Id*.

As noted above, although Dr. Mettu performed a physical examination, a chest x-ray, an arterial blood gas study, and an electrocardiogram, he did not perform a pulmonary function study because of claimant's cardiac arrhythmia. Director's Exhibits 10, 27. In his supplemental report, Dr. Mettu stated that he was not able to render an opinion regarding the severity of a pulmonary impairment without a pulmonary function study. Director's Exhibit 27. Claimant does not contest Dr. Mettu's finding that no pulmonary function test was performed because of claimant's cardiac arrhythmia. Director's Exhibits 10, 27. Based on the circumstances in this case, we agree with the Director that Dr. Mettu performed the most comprehensive pulmonary evaluation that the Director could provide to claimant. *See* Director's Response Brief at 3. Consequently, 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.

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