

BRB No. 09-0586 BLA

RICKY L. SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 04/15/2010
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	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.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 – Denying Benefits (2007-BLA-5222) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act (the Act), 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).¹ The administrative law judge credited claimant with twenty years of qualifying coal mine employment, and adjudicated this subsequent claim, filed on August 21, 2003, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed prior to January 1, 2005.

725. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was insufficient to establish any element of entitlement,² and that the Director, Office of Workers' Compensation Programs (the Director), did not contest the issue of the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. Consequently, the administrative law judge found that claimant had established a change in an applicable condition of entitlement since the date upon which the denial of claimant's prior claim became final. The administrative law judge further found, however, that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ The Director responds, urging affirmance of the denial of benefits.⁴

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² Claimant's initial claim was filed on August 21, 1996, and was denied by the district director on December 11, 1996, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on May 7, 2001, but subsequently withdrew the application. Director's Exhibit 22.

³ Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. Claimant's Brief at 3. The Department of Labor, however, has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, and the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

Claimant maintains that the opinion of Dr. Stoltzfus constitutes substantial evidence upon which the administrative law judge could rely to support a finding of total disability. Claimant's Brief at 2. In this regard, claimant asserts that the opinion of Dr. Stoltzfus is well reasoned and documented, and that the administrative law judge should not have rejected his opinion for the reasons provided, but instead should have compared the exertional requirements of claimant's usual coal mine employment with Dr. Stoltzfus's assessment of disability. Claimant's Brief at 3-4. Claimant further contends that, since pneumoconiosis has been proven to be a progressive and irreversible disease, and a considerable amount of time has passed since claimant's initial diagnosis of pneumoconiosis, it can be concluded that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 4. Claimant's arguments are without merit.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In assessing the conflicting medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge summarized Dr. Stoltzfus's opinion and acknowledged his status as claimant's treating physician, but declined to accord his opinion determinative weight pursuant to 20 C.F.R. §718.104(d). The administrative law judge determined that Dr. Stoltzfus's opinion, that claimant "continues to be totally disabled and unable to perform his previous coal mine employment," was conclusory because the physician failed to explain the basis for his opinion, other than listing claimant's symptoms. Decision and Order at 9; Director's Exhibit 26. Since Dr. Stoltzfus did not provide any rationale to support his assessment of disability, the administrative law judge properly found that Dr. Stoltzfus's opinion was insufficient to sustain claimant's burden of proof. Moreover, as Dr. Stoltzfus diagnosed multiple respiratory and non-respiratory conditions, but failed to discuss the effects of each condition upon claimant's ability to perform his usual coal mine employment, the administrative law judge acted within his discretion in concluding that Dr. Stoltzfus's finding of total disability was insufficiently explained, and thus unreasoned. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Conversely, the administrative law judge permissibly credited the opinion of Dr. Simpao,

who determined that claimant was not totally disabled from a respiratory standpoint, Director's Exhibits 13, 26, and the opinion of Dr. Mettu, who stated that claimant has normal pulmonary function study results and retains the respiratory capacity to perform his usual coal mine work, Director's Exhibit 31, over the opinion of Dr. Stoltzfus, who did not specify that claimant was disabled from a respiratory or pulmonary standpoint. Decision and Order at 9-10; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As we have found no reversible error in the administrative law judge's weighing of the conflicting evidence of record, we affirm his finding that claimant failed to meet his burden of establishing a totally disabling respiratory impairment under Section 718.204(b)(2)(iv), as supported by substantial evidence, and we affirm his denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge