BRB No. 09-0625 BLA

EUGENE GROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 04/26/2010
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2008-BLA-5442) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), on a claim filed on May 21, 2007, pursuant to the provisions of the Black Lung Benefits 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*)). The administrative law judge

found, as employer stipulated, that the miner had twenty-four years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found the x-ray evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends generally that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability under Section 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,[2] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence failed to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant asserts generally that the administrative law judge must compare the exertional requirements of claimant's usual coal mine employment with the

[1] The administrative law judge's findings that claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4) and total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

medical opinion evidence assessing disability, in order to determine whether claimant is totally disabled. Claimant contends further that, considering the heavy concentrations of coal dust that he was exposed to on a daily basis, it would be rational to conclude that his respiratory condition would preclude him from engaging in his usual employment, which required exposure to dust on a daily basis. Finally, claimant contends that, because pneumoconiosis is an irreversible disease, it can be concluded that claimant's respiratory condition has worsened to the extent he can no longer perform the duties of his usual coal mine employment.

In finding that the medical opinion evidence failed to establish total disability at Section 718.204(b)(2)(iv), the administrative law judge noted that all of the physicians agreed that claimant retained the respiratory capacity to perform his usual coal mine employment. The administrative law judge observed: Dr. Rasmussen diagnosed clinical pneumoconiosis with minimal, non-disabling loss of lung function, and opined that claimant retained the respiratory capacity to perform his usual coal mine employment; Dr. Broudy, while diagnosing a mild restrictive ventilatory defect due to a combination of obesity and interstitial lung disease, opined that claimant retained the respiratory capacity to do the work of an underground coal miner or similar manual labor; and Dr. Dahhan opined that, from a functional respiratory standpoint, claimant retained the physiological capacity to do his usual coal mine employment or comparable work. The administrative law judge also observed that the doctors' opinions were supported by their underlying documentation, which included non-qualifying pulmonary function and blood gas studies, and that the doctors were aware of the exertional requirements of claimant's usual coal mine employment. *See* Director's Exhibits 12, 16; Employer's Exhibit 2. Consequently, the administrative law judge concluded that the medical opinion evidence did not establish total respiratory disability. Decision and Order at 16.

The administrative law judge correctly found that the doctors considered the exertional requirements of claimant's usual coal mine employment and opined that claimant retained the respiratory capacity to perform that coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge also found that the opinions were reasoned, as they were supported by their underlying documentation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, contrary to claimant's argument, a medical opinion advising claimant against further coal dust exposure cannot establish the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Moreover, contrary to claimant's argument, a finding of pneumoconiosis does not provide claimant with a presumption of total respiratory disability at Section 718.204(b). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). In sum, therefore, the administrative law judge properly found that the medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv), and that finding is affirmed. Further, on

considering all of the evidence at Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that total respiratory disability was not established thereunder.[3] 20 C.F.R. §718.204(b)(2)(i)-(iv).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[3] Because we affirm the administrative law judge's finding that total disability was not established at Section 718.204(b), we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).