

BRB No. 04-0945 BLA

PERRY NORTH, JR.)
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 Claimant-Petitioner)
)
 v.)
)
 PERRY COUNTY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 08/12/2005
)
 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Benefits (03-BLA-6075) of Administrative Law Judge Daniel J. Roketenetz in a miner’s 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 administrative law judge credited the miner with twenty-seven years of coal mine employment pursuant to the parties’ stipulation, Hearing Transcript at 10. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* at 5-11. The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 11-14. 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). Claimant’s Brief at 3-6. Additionally, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 6-9. Claimant further asserts that the Director, Office of Workers’ Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 6. Lastly, claimant asserts that the administrative law judge erred in allowing employer to submit x-ray evidence in excess of the evidentiary limitations set out at 20 C.F.R. §725.414. *Id.* at 3-4. Employer and the Director respond, urging affirmance of the administrative law judge’s denial of benefits.²

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. 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).

¹Claimant is Perry North, Jr., the miner, who filed his claim for benefits on October 29, 2001. Director's Exhibit 2.

²We affirm the administrative law judge’s finding of twenty-seven years of coal mine employment and his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ Claimant argues that the administrative law judge erred in finding the opinions of Drs. Baker and Chaney insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In a June 15, 2002 report, Dr. Baker opined that:

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

Director's Exhibit 10.

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, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 10. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see 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. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 13.

Dr. Chaney indicated that claimant did not have the respiratory capacity to perform the work of a coal miner. Claimant's Exhibit 1. However, the administrative

³Citing *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.

law judge properly discredited Dr. Chaney's opinion because he found that it was not sufficiently reasoned.⁴ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12.

The administrative law judge properly found that Drs. Jarboe and Hussain, the only other physicians to address the extent of claimant's respiratory impairment, opined that claimant retained the respiratory capacity to perform his usual coal mine employment.⁵ Decision and Order at 13. Claimant does not contend that either of these opinions is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because it is based upon substantial evidence,⁶ the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

⁴Dr. Chaney checked a box indicating that claimant did not have the respiratory capacity to perform the work of a coal miner. Claimant's Exhibit 1. Although Dr. Chaney indicated that this finding was based upon claimant's x-ray, symptomatology and the results of a December 30, 2002 pulmonary function study, the doctor failed to explain how this information supported his opinion that claimant was totally disabled from a pulmonary standpoint.

⁵In a report dated March 26, 2002, Dr. Jarboe opined that claimant had at most a mild respiratory impairment that was not disabling. Employer's Exhibit 4. Dr. Jarboe further opined that claimant retained the functional respiratory capacity to perform his last coal mining job. *Id.* Dr. Jarboe reiterated his opinions during an April 24, 2003 deposition. Employer's Exhibit 5 at 19.

In a report dated January 9, 2002, Dr. Hussain opined that claimant suffered from a mild impairment. Director's Exhibit 11. However, Dr. Hussain opined that claimant retained the respiratory capacity to perform the work of a coal miner. *Id.*

⁶Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). 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).

In light of our affirmance of 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)(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 *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions of error regarding the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4).⁷ See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁷Claimant contends that the Director, Office of Workers' Compensation (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. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Claimant accurately notes that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis because it was not sufficiently reasoned or documented. See Decision and Order at 10. However, the Director notes that the administrative law judge did not discredit Dr. Hussain's opinion regarding the extent of claimant's pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Director's Brief at 3. Because our affirmance of the administrative law judge's denial of benefits in this case is based upon our affirmance of his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant could not prevail even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of pneumoconiosis. Thus, since the administrative law judge did not find that Dr. Hussain's opinion regarding the extent of claimant's respiratory impairment lacked credibility, we hold that the Director, under the facts of this case, provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim.

Claimant also argues that the administrative law judge erred by admitting x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. We hold that any error committed by the administrative law judge in this regard is harmless since the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) was not affected by his consideration of the x-ray evidence. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge