BRB No. 04-0971 BLA

LARRY JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 08/31/2005
	)	
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 – 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.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6079) of Administrative Law Judge Daniel J. Roketenetz 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 administrative law judge credited

claimant with twenty years of coal mine employment. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant alleges error in the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1) and (a)(4), and 718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to meet his statutory obligation to provide claimant with a complete and credible pulmonary evaluation as required under Section 413(b) of the Act. 30 U.S.C. §923(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, contending that he has satisfied his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, by virtue of Dr. Hussain's October 12, 2001 assessment of claimant.

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 applicable law, 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 & 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 establish 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 challenges the administrative law judge's determination that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv),[2] and relies on Dr. Baker's report from the physician's August 25,

[1]Claimant filed the instant claim for benefits on July 13, 2001. Director's Exhibit 2. The district director last denied benefits on March 26, 2003. Director's Exhibit 41. Pursuant to claimant's request, the case was transferred to the Office of Administrative Law Judges for a hearing, which was held on March 17, 2004.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings of no total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

2001 examination of claimant.[3] Claimant's Brief at 6. Dr. Baker diagnosed coal workers' pneumoconiosis category 1/0 by x-ray and chronic bronchitis "based on history of cough, sputum production and wheezing." Director's Exhibit 35. Dr. Baker also opined that claimant's pneumoconiosis is related to his exposure to coal dust. *Id.* Dr. Baker further indicated that claimant has a Class I impairment on the basis of Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, and a second impairment based on Section 5.8, Page 106, Chapter 5, Guides to the Evaluation of Permanent Impairment, Fifth Edition "which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." *Id.* Dr. Baker also stated, "It is felt that any pulmonary impairment would be caused, at least in part, if not significantly so, by [claimant's] coal dust exposure." *Id.* Claimant asserts that Dr. Baker's opinion "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 6. Claimant's assertion is unavailing. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the instant claim, filed on July 13, 2001. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 1.

Claimant next argues that Dr. Baker's opinion is well reasoned and well documented and "should not have been rejected by [the administrative law judge] for the reasons he provided." Claimant's Brief at 7. Claimant's contention lacks merit. The administrative law judge properly determined that Dr. Baker's opinion on the issue of total disability amounted to an opinion of the inadvisability of returning to coal mine employment, which is not equivalent to a finding of total disability under the Act.

[3]Dr. Baker wrote two reports based on his August 25, 2001 examination of claimant, dated August 25, 2001 and September 24, 2002. *Compare* Director's Exhibit 14 with Director's Exhibit 35. The report dated September 24, 2002 includes Dr. Baker's positive reading of an x-ray dated September 24, 2002 that is not of record. Director's Exhibit 35. At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's September 24, 2002 report, which includes the Class I impairment diagnosed by Dr. Baker in the August 25, 2001 report, in addition to a second impairment. Decision and Order at 14; *see also* Decision and Order at 8-9; Director's Exhibits 14, 35. The administrative law judge specifically weighed Dr. Baker's finding of a second impairment at 20 C.F.R. §718.204(b)(2)(iv). Because Dr. Baker failed to explain the severity of the Class I impairment 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. *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 (1986)(*en banc*), *aff'd,* 9 BLR 1-104 (1986)(*en banc*). We, therefore, hold harmless the fact that the administrative law judge did not specifically weigh Dr. Baker's diagnosis of a Class I impairment, as it cannot affect the outcome of the case. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Decision and Order at 14; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge thus permissibly assigned Dr. Baker's opinion little weight at 20 C.F.R. §718.204(b)(2)(iv) on this basis. Decision and Order at 15; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Claimant, citing, *inter alia, Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), asserts that taking into consideration his condition, the exertional requirements of his usual coal mine employment, and Dr. Baker's opinion, "it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 8. Claimant adds that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." *Id.*

In the instant case, the administrative law judge properly found that Dr. Baker's opinion is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See* discussion, *supra.* The administrative law judge was not required to further consider Dr. Baker's opinion at 20 C.F.R. §718.204(b)(2)(iv), *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc), aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see also Rowe*, 710 F.2d at 251, 5 BLR at 2-99. We, therefore, reject claimant's assertion of error in this regard.

Claimant next asserts that the administrative law judge "made no mention of the claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled." Claimant's Brief at 8. Claimant's assertion is unavailing. These factors have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant states that pneumoconiosis is a progressive and irreversible disease, and asserts that "[i]t can therefore be concluded" that his condition has worsened because a "considerable amount of time" has passed since he was initially diagnosed with pneumoconiosis. Claimant's Brief at 8-9. This assertion by claimant is likewise unavailing; an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant contends that, given the administrative law judge's findings with regard to the weight and credibility of the opinion of Dr. Hussain, the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary

evaluation.[4] The administrative law judge noted Dr. Hussain's opinion that claimant has a mild impairment and retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Decision and Order at 15; Director's Exhibit 15. The administrative law judge found that the opinion of Dr. Hussain, as well as the opinions of Drs. Repsher, Dahhan, and Vuskovich that claimant is not disabled, "are supported by the objective laboratory data of record and [I] find them to be well-reasoned and well-documented." Decision and Order at 15. The Director and employer argue that the Director has fulfilled his statutory obligation to provide claimant with a complete, credible pulmonary evaluation based on Dr. Hussain's assessment of claimant. The Director argues, *inter alia*, that even if fully credited, Dr. Hussain's opinion, on its face, does not support claimant's burden at 20 C.F.R. §718.204(b)(2)(iv) or 20 C.F.R. §718.202(a)(4), as the administrative law judge determined. Because the Director is only required to provide claimant with a complete and credible pulmonary evaluation, not a dispositive one, *see Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984), the Director argues that Dr. Hussain's report fulfills the Director's statutory obligation in this case. The Director thus asserts that there is no need to remand the case for another pulmonary evaluation.

Pursuant to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §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).

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-87; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case is not warranted based on the facts of this case. The record shows that Dr. Hussain indicated that claimant has no lung disease caused by his coal mine employment and that claimant retains the respiratory capacity to perform the work of a coal miner or to

[4]On behalf of the Director, Office of Workers' Compensation Programs (the Director), Dr. Hussain examined claimant on October 12, 2001 and conducted objective testing, including an x-ray, pulmonary function study, arterial blood gas study and electrocardiogram. Director's Exhibit 15. By report dated October 12, 2001, Dr. Hussain diagnosed chronic obstructive pulmonary disease that he attributed to "? tobacco abuse." *Id.* Dr. Hussain further indicated that claimant has a mild impairment due to chronic obstructive pulmonary disease and retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.*

perform comparable work in a dust-free environment.[5] Director's Exhibit 15. Thus, as the Director correctly argues, Dr. Hussain's report, even if fully credited, does not support claimant's burden at 20 C.F.R. §718.204(b)(2)(iv) and thus cannot support a finding of entitlement in this case. *Newman,* 745 F.2d at 1162, 7 BLR at 2-25; *Pettry v. Director, OWCP,* 14 BLR 1-98 (1990) (*en banc*).

Because we affirm the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability, an essential element of entitlement, we need not address claimant's arguments regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Trent,* 11 BLR at 1-26; *Perry,* 9 BLR at 1-1.

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

BETTY JEAN HALL
Administrative Appeals Judge

[5]Dr. Hussain's report reflects his consideration of claimant's usual coal mine employment as a coal loader at a surface strip mine from 1974 to 1995. Director's Exhibit 15; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).