

BRB No. 05-0138 BLA

DARRELL G. SLUSHER)
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 Claimant-Petitioner)
)
 v.)
)
 ASHER BROTHERS TRUCKING) DATE ISSUED: 08/17/2005
)
 and)
)
 KENTUCKY COAL PRODUCERS' SELF-)
 INSURANCE FUND)
)
 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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Rejection of Claim (2003-BLA-5211) of Administrative Law Judge Edward Terhune Miller 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 fourteen years of coal mine employment and considered the claim, filed on February 10, 2001, under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that although claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, he did not prove that he is totally disabled under 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the opinions of Drs. Baker and Hussain pursuant to Section 718.204(b)(2)(iv). Claimant also maintains that remand to the district director is required, as he did not receive a complete pulmonary evaluation as is required by 20 C.F.R. §725.406. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation, has also responded and contends that remand for a complete pulmonary evaluation is not warranted in this case.¹

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'Keefe 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Regarding the issue of total disability pursuant to Section 718.204(b)(iv), claimant argues that the administrative law judge erred in rejecting the documented and reasoned

¹ We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

medical opinion of Dr. Baker, claimant's treating physician. Claimant also contends that the administrative law judge erred in according less weight to Dr. Baker's diagnoses because he relied upon nonconforming and/or nonqualifying objective studies. Claimant further alleges that the administrative law judge erred in failing to compare the exertional requirements of his usual coal mine work to the finding of impairment set forth in the opinions of Drs. Baker and Hussain. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant also maintains that the administrative law judge erred in failing to address claimant's age and work experience in determining that claimant is not totally disabled.

Claimant's contentions are without merit. The administrative law judge rationally found that Dr. Baker did not opine that claimant is totally disabled because Dr. Baker merely made a recommendation that claimant avoid further coal dust exposure.² Decision and Order at 7; Director's Exhibit 9; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). In addition, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Hussain's opinion did not support a finding of total disability.³ The administrative law judge rationally found that Dr. Hussain's "reasoning was not persuasive," as Dr. Hussain referred only to claimant's symptoms of dyspnea, wheezing, and impaired effort tolerance in support of his diagnosis and did not explain how the documentation underlying his opinion supported his conclusions. Decision and Order at 7; Director's Exhibit 8; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002).

² Dr. Baker diagnosed a Class I impairment and a second impairment based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, which provides that persons who have pneumoconiosis should avoid further coal dust exposure. Director's Exhibit 9. Dr. Baker reported that this second impairment suggests that claimant "is 100% occupationally disabled for work in [the] coal mining industry or other similar dusty occupations." *Id.* The publication to which Dr. Baker referred indicates that a Class I impairment corresponds to a 0% impairment of the whole person. *American Medical Association Guides to the Evaluation of Permanent Impairment* 107, Table 5-12 (5th ed. 2000).

³ Dr. Hussain examined claimant on May 2, 2001 at the request of the Department of Labor. Dr. Hussain obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. On the Report of Physical Examination, Dr. Hussain recorded diagnoses of pneumoconiosis and a moderate respiratory impairment. Director's Exhibit 8. On a separate form, Dr. Hussain checked a box indicating that claimant does not have the respiratory capacity to perform the work of a coal miner. *Id.*

We also find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment to the opinions of Drs. Baker and Hussain. In light of the administrative law judge's permissible determination that neither physician rendered a persuasive diagnosis of a respiratory or pulmonary impairment, the administrative law judge was not required to make this comparison. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-124; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

Additionally, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act. See 20 C.F.R. §718.204; *White v. New White Coal Co.*, 23 BLR 1-1, 1-6-7 (2004).

Finally, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened to the point of total disability since it was first diagnosed, has no merit. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Because claimant has not raised any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we must affirm both the administrative law judge's finding and the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We must also reject claimant's assertion that remand to the district director is required because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge under Section 718.204(b)(2)(iv).

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 evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. Director's Exhibit 8; 20 C.F.R. §§718.101(a), 718.104,

725.406(a). The administrative law judge did not find, nor does claimant allege, that Dr. Hussain's report was incomplete. The administrative law judge determined that Dr. Hussain's opinion regarding the presence of pneumoconiosis was well-documented and gave it full weight under Section 718.202(a)(4). Decision and Order at 6. With respect to the issue of total disability, the administrative law judge did not reject Dr. Hussain's opinion. Rather, he found Dr. Hussain's reasoning "unpersuasive." Decision and Order at 7. Under these circumstances, we hold that there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge