BRB No. 05-0139 BLA

FRANKLIN HOSKINS)
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Claimant-Petitioner)
)
v.)
)
STRAIGHT CREEK COAL RESOURCES)
) DATE ISSUED: 08/12/2005
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-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.

Bonnie Hoskins (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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:

Claimant appeals the Decision and Order – Rejection of Claim (03-BLA-5916) of Administrative Law Judge Edward Terhune Miller denying benefits 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 thirteen years of coal mine employment and found that the evidence establishes pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, but found that claimant did not establish that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinions pursuant to Section 718.204(b)(2)(iv).[1] Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to comply with its statutory duty to provide claimant with a complete and credible pulmonary evaluation. Employer has not responded. The Director responds, urging affirmance of the denial of benefits and rejection of claimant's argument that he was not provided with a complete pulmonary evaluation.

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 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*).

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 of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge properly denied benefits based

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[1] The administrative law judge's findings regarding the length of coal mine employment, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, that the evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) – (iii), and the finding that Dr. Dahhan's opinion does not establish that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

on a finding that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27.

Claimant first contends that Drs. Baker and Simpao provided opinions which are well-reasoned and documented and supportive of a finding of total disability. We disagree. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker's conclusion, that a return to a dusty environment would be medically contraindicated, does not constitute an assessment of total respiratory disability. Decision and Order at 8. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Because the administrative law judge rationally found that Dr. Baker did not diagnose a disabling respiratory or pulmonary impairment, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a heavy equipment operator to Dr. Baker's medical opinion. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Regarding Dr. Simpao's opinion that claimant suffered from a moderate impairment and did not have the respiratory capacity to return to his work as a coal miner, the administrative law judge found that Dr. Simpao "conclusively declared that Claimant had a totally disabling pulmonary impairment, but the bases for his opinion were too general to be persuasive and thus were unreasoned." Decision and Order at 8. The administrative law judge found that Dr. Simpao failed to explain how his findings were supported by the underlying documentation and further found that Dr. Simpao's statement in his deposition that claimant might be able to perform work similar to his past employment in a non-dusty environment undermines a finding of total disability. *Id* at 8. These findings were within the administrative law judge's discretion as fact-finder and are, therefore, affirmed. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113.

Contrary to claimant's contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co.,* 23 BLR 1-1, 1-7 (2004). Furthermore, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. 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. Therefore, we affirm the

administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant next contends that because the administrative law judge did not credit the opinion of Dr. Simpao, who examined claimant at the request of the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 6. The Director responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one," and states that he met his statutory obligation in this case. Director's Brief at 2-3.

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 issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lack 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. Simpao conducted an examination which included the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 9; 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. Simpao's report was incomplete. In addition, the administrative law judge did not find that Dr. Simpao's opinion lacked credibility. Rather, he permissibly determined that it was not persuasive. Therefore, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish a

totally disabling respiratory impairment as it is supported by substantial evidence and is in accordance with law. *See Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge