BRB No. 06-0289 BLA

LONNIE CAUSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	DATE ISSUED: 08/31/2006
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.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Rejection of Claim (03-BLA-6417) of Administrative Law Judge Edward Terhune Miller denying benefits 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 "at least seventeen years" of coal mine employment. 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) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). 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). Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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 5-6. The Director responds, asserting that remand for a credible pulmonary evaluation is not needed in this case. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Alternatively, employer asserts that if the Board decides to remand this case for a credible pulmonary evaluation, the Board should also dismiss employer from liability in this case because of "due process concerns." Employer's Brief at 16. The Director filed a reply to employer's response brief in which he urges the Board to reject employer's due process argument.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]Claimant is Lonnie Causey, the miner, who filed his present claim for benefits on August 1, 2001. Director's Exhibit 1.

[2]We affirm the administrative law judge's finding of "at least seventeen 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).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in failing to find total respiratory disability based on Dr. Baker's opinion.[3] The record contains the opinions of Drs. Baker, Hussain, Rosenberg, and Repsher. In a report dated August 11, 2001, Dr. Baker indicated that claimant has a "Class I impairment based on the FEV1 and Vital Capacity being greater than 80% of predicted." Director's Exhibit 11. Dr. Baker also noted that claimant "has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.* In a letter, dated June 18, 2004, Dr. Baker opined that claimant has:

> the respiratory capacity to perform the work of a coal miner or similar work in a dust free environment, but would be unable to because exertion would exacerbate his chronic bronchitis with increase in cough, sputum production and wheezing. Likewise, any occupation that would expose him to different dust, odors, fumes or other respiratory irritants, as well as exertion, would likewise aggravate his symptoms.

Claimant's Exhibit 3. In contrast, in his October 3, 2001 report, Dr. Hussain opined that claimant suffers from a moderate impairment, but that he has the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12. In Dr. Rosenberg's October 27, 2003 report and Dr. Repsher's June 7, 2004 report, these physicians found that claimant has no respiratory impairment and that he retains the respiratory capacity to perform his last coal mining job. Director's Exhibit 10; Employer's Exhibits 7, 10, 13 at 11.

[3]Citing *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.

The administrative law judge reviewed the medical opinion evidence and found Dr. Baker's reports to be "unpersuasive."[4] Decision and Order at 11. In doing so, the administrative law judge properly noted that Dr. Baker's "recommendation against further coal mine exposure because of a pulmonary disease or condition is not, as a matter of law, a finding of inability to do the work or of disability attributable to that disease." *Id.* at 13; *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge noted that "Dr. Baker did not opine that Claimant was totally disabled from work in a nondusty [sic] environment and did not establish that Claimant would be incapable of performing work comparable to that of his last coal mine employment. In fact, he stated that Claimant has the respiratory capacity to perform his previous coal mine employment." Decision and Order at 13. Because the administrative law judge found that Dr. Baker's notation of a Class I impairment "did not address the specifics of the Class 1 impairment he identified or establish that it would be totally disabling despite the lack of any manifestations on medical testing," the administrative law judge rationally determined that "Dr. Baker's conclusion was not tantamount to a finding of total disability or probative of such disability." *Id.*; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Since the administrative law judge permissibly found that Dr. Baker's opinion is insufficient to establish total disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Therefore, we affirm the

[4]The administrative law judge considered Dr. Baker's status as claimant's treating physician but permissibly chose not to accord greater weight to this physician's opinion on this basis. Decision and Order at 11; *see* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims).

administrative law judge's findings regarding Dr. Baker's opinion pursuant to Section 718.204(b)(2)(iv).[5]

The administrative law judge additionally considered the opinions of Drs. Hussain, Rosenberg, and Repsher. The administrative law judge stated that although Dr. Hussain opined that claimant retains the respiratory capacity to perform his coal mine employment, "his statement that Claimant has a 'moderate' impairment in light of a pulmonary function study and arterial blood gas study which are normal is not explained or supported by the medical evidence of record." Decision and Order at 11. The administrative law judge found that both Drs. Rosenberg and Repsher gave reasoned opinions regarding claimant's respiratory capacity. In doing so, the administrative law judge stated that both of these physicians "determined that Claimant retains the respiratory capacity to do the arduous manual labor of a coal miner, based on the lack of physical symptoms on examination and normal spirometry and arterial blood gas test results."[6] Decision and Order at 13. Because claimant does not allege error in the administrative law judge's weighing of the opinions of Drs. Hussain, Rosenberg, and Repsher pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's findings regarding these opinions. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, we also affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom.*

[5]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).

[6]The administrative law judge stated that Dr. Rosenberg's findings "were based on two comprehensive examinations in addition to a review of the other medical evidence generated with this claim." Decision and Order at 10. The administrative law judge also stated that "Dr. Rosenberg's testimony adds additional credibility to his determinations, as his testimony supported his written conclusions with further explanation of his methodology and rationale." *Id.* at 11. Moreover, the administrative law judge noted that while Dr. Repsher did not examine claimant, he "documents the records he reviewed" in his report. *Id.* The administrative law judge further noted that Dr. Repsher's report is supported by his deposition testimony in which he "explained how all of the arterial blood gas studies and pulmonary function studies were unequivocally normal, even on the tests where poor effort was suggested." *Id.*

Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant next argues that, given the administrative law judge's finding at Section 718.202(a)(4) that Dr. Hussain's opinion is "substantially less persuasive," the Director failed to provide him with a complete and credible pulmonary evaluation, as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[7] In considering Dr. Hussain's opinion pursuant to Section 718.202(a)(4), the administrative law judge found this physician's opinion less persuasive because "his conclusions were based on a single examination, without any review of pertinent other medical records, and his conclusions are not explained in detail like those of Drs. Rosenberg and Repsher." Decision and Order at 11. In response to claimant's assertion that the Director failed to provide him with a credible pulmonary evaluation, the Director asserts that any defect in Dr. Hussain's finding of clinical pneumoconiosis would not affect the outcome of this case because the administrative law judge properly found no evidence of total disability. The Director maintains that "[i]n doing so, [the administrative law judge] effectively credited Dr. Hussain's opinion, which found that claimant retained the pulmonary capacity to do coal mine employment." Director's Response Brief at 2. The Director asserts that the Board should affirm the administrative law judge's denial of benefits based on his finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204. Therefore, the Director concludes that "[a]s a result, even if Dr. Hussain's opinion were defective on the issue of clinical pneumoconiosis, it would not matter." *Id.* 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, we agree with the Director that, based on the facts of this case, a remand is unnecessary.

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

[7]Claimant selected Dr. Hussain to perform a pulmonary evaluation. Director's Exhibit 10. By report dated October 3, 2001, Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a moderate impairment due to pneumoconiosis, but that he retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12.

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 Section 718.202(a)(1) and (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge