BRB No. 06-0340 BLA

LOUIE WHITAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED	)	DATE ISSUED: 08/30/2006
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5987) of Administrative Law Judge Robert L. Hillyard on a claim[1] 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 initially credited claimant with twenty-four years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 or total respiratory disability pursuant to 718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by admitting x-ray evidence submitted by employer in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i). With respect to the merits, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv). Employer responds, arguing that the administrative law judge did not err in submitting its two rebuttal x-ray interpretations into the record and urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a response letter limited to claimant's allegation regarding employer's compliance with the evidentiary limitations regulation. The Director argues the administrative law judge properly admitted employer's two rebuttal readings into the evidence of record.[2]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that in finding that the evidence failed to establish total disability, the administrative law judge should have considered the exertional requirements of

[1] Claimant, Louie Whitaker, filed an application for benefits on June 14, 2001. Director's Exhibit 2.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203, 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 10, 12-13.

claimant's usual coal mine work as a rock truck driver and dozer operator. Claimant further contends that, taking into account the medical opinion of Dr. Baker, inasmuch as claimant's usual coal mine employment involved heavy concentrations of dust exposure on a daily basis, the administrative law judge should have found that claimant's respiratory condition would prevent him from engaging in such employment.

In assessing the probative value of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Baker's opinion was not probative on the issue of total disability as it was "silent" on that issue, *i.e.*, Dr. Baker failed to provide a total disability assessment. Decision and Order at 14. Instead, the administrative law judge accorded probative weight to the opinions of Drs. Hussain, Dahhan, and Castle, who opined that claimant was not suffering from any pulmonary impairment, because their opinions were well-reasoned and documented. Considering together all the evidence relevant to total disability, the administrative law judge found that claimant failed to establish total respiratory disability based on the doctor's opinions and the pulmonary function and blood gas study evidence, all of which was non-qualifying.

Dr. Baker opined that claimant had a mild restrictive ventilatory defect – based on pulmonary function testing.[3] The administrative law judge did not discuss this diagnosis in light of the exertional requirements of claimant's usual coal mine employment duties, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 219, 20 BLR 2-360, 2-374 (6th Cir. 1996). However, the administrative law judge did find that the medical opinions of Drs. Hussain, Dahhan, and Castle, all of whom opined that claimant did not have a respiratory impairment, were well-reasoned and documented. He also found that the pulmonary function and blood gas study evidence was non-qualifying. Claimant has not challenged these findings. Hence, based on the preponderance of the evidence, the administrative law judge rationally found that claimant failed to establish a totally disabling respiratory impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (contraindication to further coal dust exposure does not establish total disability); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is sufficiently

[3] Relying on the tables set forth in the *Guides to the Evaluation of Permanent Impairment*, 5th Edition, Dr. Baker stated, "claimant has a Class II impairment with the FEV_1 and vital capacity [values] both being between 60% and 79% of predicted." Dr. Baker offered no opinion as to whether the impairment he found rendered claimant unable to perform his usual coal mine employment. Director's Exhibit 17.

reasoned and documented is credibility matter for administrative law judge); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 14; Director's Exhibits 15, 16, 41. Accordingly, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Fields*, 10 BLR at 1-19; *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee*, 9 BLR at 1-4. *See Fields*, 10 BLR at 1-19.

Consequently, because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See* 20 C.F.R. §718.204(b)(2); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).[4]

[4] Our affirmance of the administrative law judge's determination that claimant failed to establish total respiratory disability under Section 718.204(b) precludes the need to address the parties' arguments with respect to the administrative law judge's admission of x-ray evidence under Section 725.414(a)(3)(i) or his findings concerning the existence of pneumoconiosis under Section 718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge