BRB No. 07-0125 BLA

Z.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 08/29/2007
	)	
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; 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 (05-BLA-5614) of Administrative Law Judge Paul H. Teitler 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 twenty-one years of coal mine employment pursuant to the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),(4). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Lastly, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, urging the Board to reject claimant's contention that he failed to provide claimant with a complete pulmonary evaluation.[1]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Baker, Rasmussen, Jarboe, and Repsher. Dr. Baker reported that claimant's degree of respiratory impairment is

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[1] Because the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

"minimal or none." Director's Exhibit 11. Dr. Rasmussen opined that claimant has no significant loss of lung function and retains the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 9. Similarly, Dr. Jarboe opined that claimant fully retains the functional respiratory capacity to do his last coal mine job or one of similar physical demand in a dust-free environment. Employer's Exhibits 1, 7. Lastly, Dr. Repsher opined that claimant lacks pulmonary function impairment, and is not disabled from a respiratory standpoint. Employer's Exhibits 4, 12. Based on these medical opinions, the administrative law judge concluded that "[c]laimant has failed to show total disability on the basis of [the] medical opinion [evidence]." Decision and Order at 9.

Claimant asserts 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. We disagree. Dr. Baker diagnosed minimal or no respiratory impairment. It was unnecessary for the administrative law judge to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's opinion of no impairment. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because the Act provides no such presumption, and an administrative law judge's findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-7 n.8 (2004). Therefore, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).

Furthermore, because there is no medical opinion evidence that supports a finding that claimant has a totally disabling pulmonary or respiratory impairment, claimant is unable to establish an essential element of entitlement under 20 C.F.R Part 718. 20 C.F.R. §718.204(b)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.[2] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Finally, claimant contends that, because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Rasmussen's June 17, 2004 opinion provided by the Department of Labor, the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the

[2] In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(1),(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

claim, as required by the Act. The Director responds that he met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

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 record reflects that Dr. Rasmussen conducted an examination and 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). Claimant does not assert any defect with respect to Dr. Rasmussen's opinion regarding total disability. The administrative law judge fully credited Dr. Rasmussen's opinion that claimant has no significant loss of lung function and is not totally disabled. Because the administrative law judge's finding that the evidence did not establish total disability is dispositive of this claim, we agree with the Director that he met his statutory obligation to claimant. *See* Director's Brief at 1 n.1.

Accordingly, the administrative law judge's Decision and Order denying benefits 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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BETTY JEAN HALL
Administrative Appeals Judge