BRB No. 07-0984 BLA

G.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/28/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order–Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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–Denying Benefits (2006-BLA-05542) of Administrative Law Judge Donald W. Mosser (the administrative law judge), on a subsequent 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 credited claimant with twelve years of qualifying coal mine

[1] Claimant's initial claim for benefits was filed on February 23, 1988 and denied on July 29, 1988 for failure to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim for benefits, filed on April 12, 1991, was denied on September 27, 1991, again for failure to establish any element of entitlement. Director's Exhibit 2. The present claim was filed on November 1, 2002. Director's Exhibit 3.

employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that new evidence submitted in support of this subsequent claim established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, considering all of the evidence of record, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish total disability at Section 718.204(b)(2)(iv).[2] The Director, Office of Workers' Compensation Programs (the Director), has responded, urging affirmance.[3]

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.[4] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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 entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant contends that the administrative law judge erred in finding the weight of the evidence insufficient to establish total respiratory disability pursuant to Section

[2] Although claimant refers to the provisions at 20 C.F.R. §718.204(c) in his brief, *see* Claimant's Brief at 2-3, under the amended regulations, total respiratory or pulmonary disability is established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202(1989)(*en banc*); Director's Exhibit 11.

718.204(b)(2)(iv). Specifically, claimant asserts that the opinions of Drs. Baker and Simpao are reasoned, documented and sufficient to establish total disability, and that the administrative law judge should not have rejected these opinions for the reasons provided, but instead should have compared the exertional requirements of claimant's usual coal mine employment with the physicians' assessments of disability. Claimant's Brief at 3-5. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-113.

The administrative law judge accurately reviewed Dr. Baker's report, and permissibly determined that the physician's assessment of a Class 2 impairment was insufficient to support a finding of total respiratory disability because Dr. Baker did not address whether the impairment would prevent claimant from performing the duties of his usual coal mine employment.[5] Decision and Order at 11; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Moreover, while Dr. Baker recommended limiting further coal dust exposure, a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988). Thus, the administrative law judge properly found that Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 11.

In evaluating Dr. Simpao's opinion, that claimant is mildly impaired and lacks the respiratory capacity to perform the work of a coal miner or comparable work, the administrative law judge determined that claimant's usual coal mine employment as a coal truck driver involved sitting for eight to twelve hours per day with no extensive walking, lifting or climbing. Decision and Order at 3, 11, 12; Director's Exhibits 5, 11. The administrative law judge further determined that claimant reported to Dr. Simpao that he could walk up to one-quarter mile, climb eight to ten steps, and lift up to ten pounds before he became short of breath. Decision and Order at 11; Director's Exhibit 11. As Dr. Simpao did not explain how a diagnosis of "mild impairment" would prevent

[5] Dr. Baker opined that claimant "has a Class 2 impairment with the FEV_1 between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition . . . patient 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 the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 10.

claimant from performing the essentially sedentary duties of his usual coal mine employment, the administrative law judge acted within his discretion in according little weight to the physician's opinion. Decision and Order at 11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Conversely, the administrative law judge found that the report of Dr. Rasmussen, stating that the miner retained the pulmonary capacity to perform his last regular coal mine position, was better supported by the objective medical evidence of record. Decision and Order at 12; Director's Exhibit 24; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's findings pursuant to Section 718.204(b)(2)(iv) are supported by substantial evidence, and thus are affirmed.

Finally, claimant's argument that he must be assumed to be totally disabled because pneumoconiosis is a progressive and irreversible disease is rejected, as an administrative law judge's finding of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson*, 12 BLR at 1-113. Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718.

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