BRB No. 08-0106 BLA

J.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/29/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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-05849) of Chief Administrative Law Judge John M. Vittone on a subsequent 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).[1] The administrative law judge noted the

[1] Claimant filed an initial claim for benefits on March 12, 1993, which was finally denied on remand by Administrative Law Judge Gerald M. Tierney on March 5, 1999, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. The Board affirmed Judge Tierney's denial of benefits in *[J.C.] v. Whitaker Coal Co.*, BRB No. 99-0613 BLA (March 15, 2000)(unpub.). *Id*. Claimant took no further action until he filed his subsequent claim on October 27, 2003. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying

parties' stipulation to twenty-one years of coal mine employment, but credited claimant with twenty-six years of coal mine employment, based on the evidence of record, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant established the existence of pneumoconiosis, the administrative law judge determined that claimant established a change in an applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that the evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find the opinions of Drs. Baker and Simpao, considered in conjunction with the exertional requirements of his usual coal mine work, to be sufficient to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] The Director responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

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benefits on May 27, 2004. Director's Exhibit 19. The case was initially transferred to the Office of Administrative Law Judges, but then remanded to the district director to provide claimant a complete pulmonary evaluation pursuant to 20 C.F.R §725.406. Director's Exhibits 22, 23, 26. A formal hearing before Chief Administrative Law Judge John M. Vittone was conducted on January 23, 2007.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and his findings that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last eighteen years of coal mine employment were in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4, 5.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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. *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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

In addressing the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the newly submitted medical opinions of Drs. Baker and Simpao. The administrative law judge found that Dr. Baker's opinion did not support a finding of total disability, as Dr. Baker concluded that claimant has "minimal or no impairment" and "would have the respiratory capacity to do his usual coal mine employment in a dust free environment." Decision and Order at 6; Director's Exhibit 26. The administrative law judge also found that Dr. Simpao's opinion was insufficient to establish total disability as Dr. Simpao diagnosed a "mild impairment" due to pneumoconiosis, but stated that claimant is "not totally disabled from his usual coal mine employment by his respiratory status alone, but rather he is disabled due to a combination of his heart, back and breathing problems." *Id*.; Director's Exhibit 10. The administrative law judge concluded that the medical opinion evidence of record, as a whole, did not support a finding of total disability under 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts on appeal that in addressing the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In support of this contention, claimant states:

> The claimant's usual coal mine work included being a roof bolter, shuttle car operator, miner helper, and belt man. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Baker and Simpao (both of whom diagnosed pulmonary impairments), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge

> Vittone made no mention of the claimant's usual coal mine work in conjunction with Drs. Baker and Simpao's opinions of disability.

Claimant's Brief at 3.

Claimant's argument is without merit. The administrative law judge rationally determined that Dr. Baker's newly submitted opinion does not support a finding of total disability in light of Dr. Baker's statements that claimant has "minimal or no impairment" and that claimant is able to perform his usual coal mine employment.[4] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); Decision and Order at 6; Director's Exhibit 26. In addition, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Simpao's statement, that claimant "is not totally disabled from his usual coal mine employment by his respiratory status alone, but rather he is disabled due to a combination of his heart, back and breathing problems," was a determination that claimant's mild respiratory impairment, standing alone, would not prevent claimant from doing his usual coal mine work. 20 C.F.R. §718.204(b)(1); *see Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 22 BLR 2-320 (6th Cir. 2002); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989); Director's Exhibit 10. Because Drs. Baker and Simpao rendered opinions, based upon their assessment of the extent of claimant's respiratory impairment, that claimant is not disabled from performing his usual coal mine employment, it was unnecessary for the administrative law judge to compare the exertional requirements of claimant's usual work as a roof bolter to the opinions of Drs. Baker and Simpao. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-123; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v.*

[4] In claimant's initial claim, Dr. Baker submitted an opinion, dated August 21, 1991, in which he diagnosed coal workers' pneumoconiosis, chronic bronchitis, and resting hypoxemia. Director's Exhibit 1 at 425. Dr. Baker concluded that claimant "may have difficulty doing sustained manual labor on an 8 hour basis, even in a dust-free environment, due to these conditions." *Id*. In the present case, the administrative law judge acknowledged Dr. Baker's earlier opinion, but determined that he could not reconcile it with the newly submitted opinion in which Dr. Baker stated that claimant is capable of performing his usual coal mine employment. Decision and Order at 6; Director's Exhibit 26 at 13. Accordingly, the administrative law judge acted rationally in finding that Dr. Baker's 1991 opinion had little probative value and did not establish total disability on the merits in the present claim under 20 C.F.R. §718.204(b)(2)(iv). *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988); *see also Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984).

Consolidation Coal Co., 8 BLR 1-262 (1985). In light of claimant's failure to raise a meritorious allegation of error in the administrative law judge's consideration of the medical opinions of record, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

We also reject claimant's assertion that because pneumoconiosis "is proven to be a progressive and irreversible disease…[i]t can therefore be concluded" that it has worsened since it was initially diagnosed, adversely affecting claimant's ability to perform his usual coal mine work or comparable gainful work. Claimant's Brief at 3-4. There is no merit to claimant's argument, as claimant bears the burden of establishing, by competent medical evidence, that he has a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). In this case, we have affirmed the administrative law judge's finding that claimant failed to establish, by a preponderance of the medical evidence of record, that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

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 of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant has failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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