

BRB No. 08-0817 BLA

H.C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 EDWIN HAMILTON COAL, )  
 INCORPORATED )  
 )  
 and ) DATE ISSUED: 08/18/2009  
 )  
 KY COAL PRODUCERS' S-I FUND )  
 )  
 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 - Denying Benefits of Administrative Law Judge Joseph E. Kane, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 - Denying Benefits (2007-BLA-05678) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on July 10, 2006, 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). Director's Exhibit 2. The administrative law judge credited claimant with nine years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that employer is the responsible operator, and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(b)(2)(iv).<sup>1</sup> Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation on the issue of the existence of pneumoconiosis to substantiate his claim, as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has also filed a letter brief, asserting that he has satisfied his burden to provide claimant with a complete pulmonary evaluation.

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.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 suffers from pneumoconiosis arising out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment,

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<sup>1</sup> Claimant asserts that the administrative law judge erred in finding that he is not totally disabled, citing 20 C.F.R. §718.204(c). Claimant's Brief at 4-5. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

and that his total disability is 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2). We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of nine years of coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and that claimant failed to establish total disability 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 11-14.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker, Broudy, and Dahhan. Decision and Order at 7-8, 15. Dr. Baker examined claimant on August 25, 2006, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 11. Dr. Baker opined that claimant has no impairment and retains the pulmonary capacity to perform his last coal mine employment operating a cutting machine. *Id.* Dr. Broudy examined claimant on October 20, 2006, and procured a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 14. Dr. Broudy indicated in his report that claimant retains the respiratory capacity to perform his previous coal mining job running a cutting machine or similarly arduous labor. *Id.* Dr. Dahhan examined claimant on October 26, 2006, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 13. Dr. Dahhan indicated that claimant retains the respiratory capacity to return to his previous coal mining job as an underground miner operating a cutting machine or a job of comparable physical demand. *Id.*

After reviewing the medical opinions, the administrative law judge concluded that no physician found claimant totally disabled pursuant to Section 718.204(b)(2)(iv). Decision and Order at 13. Claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with the medical reports assessing disability. Claimant's Brief at 5. We disagree. Because all the physicians of record opined that claimant retains the pulmonary or respiratory capacity to perform his previous coal mining job or a job of comparable physical demand, we affirm the administrative law judge's finding that claimant did not establish total disability based upon the medical opinion evidence under Section

718.204(b)(2)(iv).<sup>3</sup> *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246, 19 BLR 2-123, 2-127 (6th Cir. 1995). We also affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2), based upon a weighing of all of the evidence relevant to total disability. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 13.

In view of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2), a requisite element of entitlement, we do not need to address claimant's contention that the administrative law judge erred in failing to find the existence of pneumoconiosis pursuant to Section 718.202(a)(1) or his contention that he did not receive a complete pulmonary evaluation on the issue of the existence of pneumoconiosis. *Anderson*, 12 BLR at 1-112. Because the administrative law judge properly found that claimant failed to establish total disability, claimant could not prevail in his claim even if the administrative law judge accorded full weight to Dr. Baker's diagnosis of pneumoconiosis.

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<sup>3</sup> We also reject claimant's suggestion that he is now totally disabled due to pneumoconiosis, because pneumoconiosis is a progressive disease and "a considerable amount of time has passed since the initial diagnosis of pneumoconiosis." Claimant's Brief at 5. An administrative law judge's findings regarding the issue of total disability cannot be based upon assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

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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JUDITH S. BOGGS  
Administrative Appeals Judge