

BRB No. 09-0201 BLA

J.O. )  
(o/b/o S.O.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
WHITAKER COAL CORPORATION ) DATE ISSUED: 08/26/2009  
 )  
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 Denying Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (04-BLA-0147) of Administrative Law Judge Alice M. Craft on a miner's claim<sup>1</sup> filed pursuant to

---

<sup>1</sup> The miner filed an application for benefits on November 15, 1996. Director's Exhibit 1. In a Decision and Order dated January 5, 1999, Administrative Law Judge Daniel Roketenetz denied benefits because the miner did not establish that he had pneumoconiosis or that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 35. The Board affirmed the denial of benefits on August 31, 2000. [*S.O.*] v. *Whitaker Coal Corp.*, BRB No. 99-0389 BLA (Aug. 31, 2000) (unpub.); Director's Exhibit 46. The miner filed a second application for benefits

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). This case is before the Board for the second time. In her first Decision and Order, the administrative law judge credited the miner with at least thirty years of coal mine employment and noted that the claim was a request for modification of a denial of benefits on the miner's claim. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a) and 718.203(b) and, therefore, a change in conditions pursuant to 20 C.F.R. §725.310 (2000).<sup>2</sup> The administrative law judge further found, however, that the evidence did not establish that the miner had a total respiratory disability at 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.<sup>3</sup>

Pursuant to claimant's appeal, the Board affirmed, as unchallenged, the administrative law judge's findings that claimant established that the miner had pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b) and, thereby, a change in conditions at 20 C.F.R. §725.310 (2000). The Board also affirmed the administrative law judge's finding that claimant failed to establish that the miner had a total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). The Board, however, vacated the administrative law judge's Decision and Order denying benefits based on her analysis of Dr. Baker's opinion at 20 C.F.R. §718.204(b)(2)(iv) because she did not discuss Dr. Baker's opinion in its entirety. The Board, therefore, remanded the case for further consideration of Dr. Baker's opinion. Specifically, the Board held that the administrative law judge must consider, on remand,

---

on May 15, 2001, which was construed as a request for modification. Director's Exhibits 53, 119. While the claim was pending, the miner died on November 30, 2002. Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate. Director's Exhibit 58.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The amended version of 20 C.F.R. §725.310 does not apply in cases, such as the present one, in which the claim was pending on the effective date of the new regulations.

<sup>3</sup> The administrative law judge also addressed claimant's survivor's claim, filed on May 19, 2003, Director's Exhibit 101, which was consolidated with the miner's claim. The administrative law judge denied benefits on the survivor's claim because claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The denial of the survivor's claim was affirmed by the Board in its Decision and Order in *J.O. v. Whitaker Coal Corp.*, BRB Nos. 07-0485 BLA and 07-0526 BLA (Feb. 28, 2008) (unpub.).

whether Dr. Baker's assessment that the miner had a mild obstructive ventilatory defect and a Class II impairment, under the *Guides to the Evaluation of Permanent Impairment*, established total respiratory disability at Section 718.204(b)(2)(iv). *J.O. v. Whitaker Coal Corp.*, BRB Nos. 07-0485 BLA and 07-0526 BLA (Feb. 28, 2008) (unpub.).

On remand, the administrative law judge found that Dr. Baker's opinion regarding the miner's respiratory impairment was not sufficient to establish total respiratory disability under Section 718.204(b)(2)(iv) because:

Dr. Baker did not explicitly state that the . . . listed impairment was disabling, and I do not construe that to be his opinion. Moreover, Dr. Baker did not explain the severity of a Class II impairment in relation to the [m]iner's ability to perform work, or address whether such an impairment would prevent the [m]iner from performing [his coal mine employment]. I conclude that Dr. Baker's finding of a Class II impairment is too vague to support a finding of total disability.

Decision and Order on Remand at 3. Because the administrative law judge found that Dr. Baker's opinion was insufficient to establish total respiratory disability under Section 718.204(b)(2)(iv), and that there were no other medical opinions in the record sufficient to establish total respiratory disability,<sup>4</sup> a requisite element of entitlement, she found that the miner's claim must be denied.

On appeal, claimant argues that the administrative law judge erred in failing to find total respiratory disability established under Section 718.204(b)(2)(iv), without considering Dr. Baker's assessment in conjunction with the exertional requirements of claimant's usual coal mine employment. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter of non-participation in this appeal.

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

---

<sup>4</sup> In her prior Decision and Order on the miner's claim, the administrative law judge found that Drs. Myers, Broudy, Wicker, Rosenberg, Vuskovich, Tomashefski, and Hussain all opined that the miner was not disabled. In addition, the administrative law judge noted that Drs. Joyce and Koura did not render a total disability assessment. Administrative Law Judge's Decision and Order Denying Benefits of January 30, 2007 at 17. Claimant did not challenge the administrative law judge's finding with respect to this evidence, in her previous appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).<sup>5</sup>

To establish entitlement to benefits in a miner’s claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant argues that, in finding that Dr. Baker’s opinion did not establish total respiratory disability at Section 718.204(b)(2)(iv), the administrative law judge erred in failing to consider it in conjunction with the exertional requirements of the miner’s usual coal mine work, as a foreman and coal loader.<sup>6</sup>

The administrative law judge, within a rational exercise of her discretion, determined that Dr. Baker’s opinion did not constitute a finding of total respiratory disability because “Dr. Baker did not explain the severity of a Class II impairment in relation to the [m]iner’s ability to perform [his usual coal mine] work”.<sup>7</sup> Decision and Order on Remand at 3. The administrative law judge, therefore, found that the opinion was “too vague to support a finding of total disability.”<sup>8</sup> Decision and Order on Remand

---

<sup>5</sup> As the miner’s last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director’s Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

<sup>6</sup> Claimant also argues that total respiratory disability was established because the miner’s pneumoconiosis precludes employment requiring further coal dust exposure and because pneumoconiosis is a progressive and irreversible disease. These arguments were previously considered and rejected by the Board, however, and will not be addressed again. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 243, 237 (1989) (Brown, J., dissenting).

<sup>7</sup> Dr. Baker noted that the miner had thirty-two years of underground coal mine employment where he hand-loaded coal, worked as a section foreman, and worked as a track foreman, but did not describe the exertional requirements of the miner’s usual coal mine employment. Director’s Exhibits 62 at 3, 107 at 25.

<sup>8</sup> In a report dated April 25, 2001, Dr. Baker diagnosed a mild obstructive ventilatory defect and stated that the miner had a Class II impairment under the American

at 3. Because the administrative law judge found that Dr. Baker's opinion lacked a sufficient description of either the severity of the miner's impairment or the physical limitations caused by the impairment<sup>9</sup> and was, therefore, too vague to establish total respiratory disability, she properly concluded that she could not find that the opinion was sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991) (*en banc*), 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); see also *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Accordingly, we reject claimant's argument and affirm the administrative law judge's determination that claimant failed to satisfy her burden of demonstrating that the miner had a total respiratory disability at Section 718.204(b)(2)(iv). See *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). We affirm, therefore, the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2).

---

Medical Association, *Guides to the Evaluation of Permanent Impairment*, based upon the miner's FEV<sub>1</sub> value being between sixty and eighty percent of the predicted value. Director's Exhibits 62 at 3, 107 at 26.

<sup>9</sup> Dr. Baker listed, among the miner's symptoms under patient history, difficulty in breathing and breathing aggravated by exertion, including experiencing difficulty breathing after walking one-fourth of a mile, but did not otherwise describe any physical limitations caused by the miner's impairment. Director's Exhibits 62 at 3, 107 at 25.

Accordingly, the Decision and Order Denying Benefits on Remand of the administrative law judge is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge