BRB No. 04-0318 BLA

IVAN C. KLINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	DATE ISSUED: 12/28/2004
	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5133) of Administrative Law Judge Janice K. Bullard issued 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). Claimant filed this claim on May 15, 2001. Director's Exhibit 2. The administrative law judge found that the record supported the parties' stipulation to nineteen years of coal mine employment. On the merits of the claim, the administrative law judge found that claimant established the existence of pneumoconiosis by both the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1) and (a)(4), respectively. The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203. The administrative law judge also determined, however, that the relevant evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in crediting Dr. Levinson's invalidations of two qualifying pulmonary function studies administered by Dr. Kraynak on January 10, 2001 and May 12, 2003. Claimant also relies on Dr. Dittman's September 7, 2001 post-bronchodilator pulmonary function study, which resulted in qualifying values. Further, claimant states that the administrative law judge erred in weighing the medical opinion evidence relevant to the total disability issue, but identifies no error on the part of the administrative law judge. Rather, claimant lists several reasons why, in his view, Dr. Kraynak's opinion is credible, documented and reasoned, and due additional weight. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief 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 rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in crediting invalidations rendered by Dr. Levinson, a consulting physician, on two qualifying pulmonary function studies, over the opinion expressed by Dr. Kraynak, the administering physician.[1] The administrative law judge found that Dr. Kraynak's January 10, 2001 pulmonary function study resulted in qualifying values, and Dr. Kraynak noted claimant's good effort. Director's Exhibit 15. Dr. Kraynak conducted another pulmonary function study with qualifying results on May 12, 2003. Claimant's Exhibit 3. Dr. Levinson invalidated Dr. Kraynak's 2001 pulmonary function study in a letter dated July 10, 2001, citing "excessive hesitation" in the FVC curves, "evidence of exhalation occurring before the zero point," thus the FEV1 and FVC did not represent the true capacity, and the MVV curves were variable and lasted only nine and one-half seconds. Employer's Exhibit 2. Dr. Kraynak subsequently reviewed the relevant tracings and contradicted Dr. Levinson's observations, stating, "there was a crisp starting of exhalation" and the MVV curves

[1] Dr. Dittman conducted a pulmonary function study on September 7, 2001, which produced a non-qualifying result pre-bronchodilator, and a qualifying result post-bronchodilator upon which claimant relies. Dr. Dittman, however, invalidated these results based on inconsistent effort. Director's Exhibit 17.

continued for twelve seconds. Claimant's Exhibit 4. Dr. Levinson also invalidated Dr. Kraynak's May 12, 2003 pulmonary function study. He stated, "Each and everyone [sic] of the flow volume curves indicates that there is a gap between inhalation and exhalation suggesting that the patient has been disconnected from the spirometer and therefore the results recorded as the FEV1 and forced vital capacity do not represent the true and complete capacities of Mr. Klinger." Employer's Exhibit 4. Dr. Levinson further stated, "The MVV curves indicate a variable and inconsistent effort so that the patient has not exerted a maximal and sustained effort for 12 to 15 seconds as required." *Id*. Dr. Kraynak responded that he administered the May 12, 2003 pulmonary function study and observed claimant throughout, and found his effort and cooperation to be good. Claimant's Exhibit 4, p.9. The administrative law judge credited Dr. Levinson's invalidations based on his superior credentials, and because his opinion was better reasoned. Decision and Order at 11. The record shows that Dr. Levinson is Board-certified in internal medicine with a subspecialty in pulmonary disease, and is an assistant professor at Temple University School of Medicine. Director's Exhibit 16. The record shows that Dr. Kraynak is Board eligible in family medicine. Claimant's Exhibit 4 at p.5. The administrative law judge thereby provided a valid reason for crediting Dr. Levinson's invalidations of the pulmonary function studies dated January 10, 2001 and May 12, 2003 over Dr. Kraynak's contrary findings. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge thus permissibly found that claimant did not establish total disability by pulmonary function study evidence at Section 718.204(b)(2)(i). Because substantial evidence supports the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i), we affirm it.

Claimant asserts that Dr. Kraynak's medical opinion is sufficient to establish total pulmonary or respiratory disability because, as claimant's treating physician, Dr. Kraynak had the opportunity to perform multiple examinations, and to review claimant's social, occupational and medical histories as well as most of the evidence of record. Claimant, however, makes no specific allegation of error by the administrative law judge.

The Board is not permitted to undertake a de novo adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge, as the trier-of-fact, and the Board, as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987). As we have emphasized in previous cases, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR 1-119; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms

of the relevant law and evidence, the Board has no basis upon which to review the decision. Id.

In the instant case, claimant generally asserts that the medical opinion evidence is sufficient to establish total disability. Claimant has not challenged the rationale provided by the administrative law judge for finding the medical opinion evidence of record insufficient to establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Claimant has failed to identify any errors made by the administrative law judge in the evaluation of the medical opinion evidence and applicable law. Thus, the Board has no basis upon which to review the finding of the administrative law judge at 20 C.F.R. §718.204(b)(2)(iv).

Based on the foregoing, we affirm the finding of the administrative law judge that the evidence of record failed to meet claimant's burden to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement. We, therefore, affirm the administrative law judge's denial of benefits in this case. *See Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge 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