BRB No. 05-0463 BLA

RICKY D. HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CALVARY COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/22/2005
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order–Denying Benefits (03-BLA-5756) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge noted that employer had stipulated to nineteen years of coal mine employment and he adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R.

§718.202(a)(1), and he found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found the evidence insufficient to establish total 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 medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory duty to provide claimant with a complete, credible pulmonary evaluation. Employer has not responded to claimant's appeal. The Director responds, asserting that Dr. Hussain's opinion is comprehensive and reasonable and "therefore the mandate of Section 413(b) does not require that the Board take action in this case."[1] Director's Letter at 2.

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. 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).

We first turn to claimant's assertions regarding the administrative law judge's total disability findings. Claimant asserts that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has determined that all evidence

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[1] Because no party challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis due to his coal mine employment pursuant to 20 C.F.R. §718.202(a)(1) and 20 C.F.R. §718.203(b), or the administrative law judge's findings that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii) is precluded, as the record contains no evidence relevant to a finding thereunder.

relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Virginia. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied,* 484 U.S. 1047 (1988).

Claimant also asserts that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Dr. Baker opined that:

> Patient has a Class 1 impairment with the FEV1 and vital capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 13. Dr. Baker also stated:

> With the presence of pneumoconiosis, 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 13.

Because Dr. Baker did not explain the severity of a Class 1 impairment or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class 1 impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Moreover, since 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), we hold that this portion of Dr. Baker's opinion is likewise insufficient to support a finding of total disability. Further, in view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with her assessment that the claimant was not totally disabled." Claimant's Brief at 9. These factors, however,

have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we therefore decline to address it further.

Because claimant does not raise any further specific allegations of error in the administrative law judge's findings regarding total disability pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant has not established total disability pursuant to Section 718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Finally, claimant argues that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. The Director is statutorily mandated to provide claimant with an opportunity for a complete pulmonary evaluation in order to substantiate his claim *See* 30 U.S.C. §923(b) ("Each miner who files a claim for benefits.…shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation."); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulations provide that a complete pulmonary evaluation "includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contradicted, a blood gas study." 20 C.F.R. §725.406(a).

We agree with the position of the Director, whose duty is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90, that a remand of this case is not warranted based upon the facts of this case. Claimant selected Dr. Hussain to perform his Department-sponsored pulmonary evaluation. As the Director accurately notes, Dr. Hussain conducted a physical examination, took an x-ray and obtained pulmonary function and arterial blood gas study results. Dr. Hussain also completed a report, addressing all of the relevant issues of entitlement. *See* Director's Exhibit 11. Although Dr. Hussain diagnosed a moderate pulmonary impairment, he opined that claimant retained the respiratory capacity to perform the work of a coal miner. *Id.* Director's Exhibit 11.

Because Dr. Hussain performed a complete pulmonary evaluation and addressed all of the relevant issues of entitlement, we hold that the Director satisfied his obligation under the Act to provide claimant with a complete pulmonary evaluation.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b), an essential element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to decline to remand the case to the district director for a complete and credible pulmonary evaluation. Dr. Hussain performed the pulmonary evaluation on claimant[2] for the Department of Labor. In his report, Dr. Hussain diagnosed pneumoconiosis due to dust exposure and diagnosed a moderate impairment. Director's Exhibit 11. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. *Id.* Pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). In the instant case, however, the administrative law judge found that Dr. Hussain's disability opinion is entitled to no weight on the grounds that the physician did

[2] The claimant, Ricky D. Harris, is erroneously referred to as "Mr. Adams" at pages 8-10 of the administrative law judge's Decision and Order.

not consider the exertional requirements of claimant's coal mine employment, yet made a finding of moderate impairment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because the administrative law judge found that Dr. Hussain's disability opinion lacks credibility, the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b)(2), overall, cannot be affirmed. Consequently, I would remand the case to the district director to provide claimant with a complete and credible pulmonary evaluation. *Hodges*, 18 BLR at 1-88-9 n.3.

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BETTY JEAN HALL
Administrative Appeals Judge