BRB No. 06-0545 BLA

WILKIE SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY COAL COMPANY	)	DATE ISSUED: 12/22/2006
	)	
and	)	
	)	
JAMES RIVER COAL COMPNAY	)	
	)	
Employer/Carrier-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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 (04-BLA-5367) of Administrative Law Judge Rudolf L. Jansen 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). In a Decision and Order dated March 8, 2006, the administrative law judge credited the miner with nineteen years of coal mine employment,[1] found the existence of pneumoconiosis arising out of coal mine employment established at 20 C.F.R. §§718.202, 718.203(b),[2] but further found the evidence of record insufficient to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response brief contending that claimant received a complete pulmonary evaluation as contemplated by Section 725.406(a).[3]

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,

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge accepted employer's concession that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and did not reach the issue of whether claimant established the existence of pneumoconiosis at Section 718.202(a)(2)-(4). Decision and Order at 11. The administrative law judge further found that claimant's nineteen years of coal mine employment entitled him to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and that the record contains no evidence to rebut this presumption. Decision and Order at 11.

[3] The administrative law judge's finding of nineteen years of coal mine employment and his findings that claimant established, through employer's concession, the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 a finding of 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).

Claimant initially contends that in analyzing the medical opinion evidence relevant to the issue of total disability, the administrative law judge improperly accorded diminished weight to Dr. Baker's opinion. Claimant's Brief at 3-5. We disagree.

In weighing the medical opinion evidence of record, the administrative law judge found that Drs. Baker and Simpao opined that the claimant is totally disabled while Drs. Broudy and Rosenberg concluded that claimant retains the respiratory capacity to perform his usual coal mine work or comparable dust-free work. Director's Exhibits 10, 12; Employer's Exhibits 1, 3-5; Decision and Order at 12-13. The administrative law judge accorded greater weight to the opinions of Drs. Broudy and Rosenberg, than to the contrary opinions of Drs. Baker and Simpao, because their opinions were well documented, well reasoned, and better supported by the pulmonary function and blood gas study results of record, all of which were non-qualifying. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Director's Exhibits 10, 12; Employer's Exhibits 1, 3-5; Decision and Order at 13.

In evaluating Dr. Baker's opinion, the administrative law judge properly summarized the physician's findings, noting that in a report dated February 23, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure, but did not explicitly state that claimant lacked the respiratory capacity to perform his usual coal mine work. Decision and Order at 9. Instead, referring to the pulmonary function study results, Dr. Baker opined that claimant has a "Class I impairment with the FEV_1 and vital capacity both being greater than 80% of predicted" as defined by the fifth edition of the *Guides to the Evaluation of Permanent Impairment*. Director's Exhibit 12; Decision and Order at 9. The administrative law judge also noted Dr. Baker's additional statement that, pursuant to the *Guides*, claimant "has a second impairment based on [the Guides] which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 12; Decision and Order at 9.

Contrary to claimant's arguments, in finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge did not fail to consider the nature of claimant's usual coal mine employment. Decision and Order at 5; *see Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Rather, the administrative law judge specifically found, based on information provided by claimant, that claimant's last coal mine employment was as a drill and dozer operator, and that his work required sitting in a cab on the drill or on the dozer, operating the equipment with levers. Director's Exhibits 2, 3, 14; Hearing Transcript at 13-14, 15, 19; Decision and Order at 5. Nor did the administrative law judge accord diminished weight to Dr. Baker's opinion as being based solely on work history, but, conversely, permissibly concluded that Dr. Baker's opinion did not support a finding of total disability because the physician had not discussed the physical requirements of claimant's usual coal mine work or described the type of physical exertion he could no longer perform, such that the administrative law judge could infer that claimant is totally disabled from his job as a drill or dozer operator or similar work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 12; Decision and Order at 12. With respect to Dr. Baker's opinion that claimant was also 100% disabled for work in a dusty environment, the administrative law judge properly noted that a mere recommendation against further coal dust exposure is insufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order at 12.

We also reject claimant's assertion that the administrative law judge found the opinion of Dr. Simpao, that claimant's respiratory impairment would prevent him from performing the work of a coal miner or similar work, to be incomplete and not credible, and that, therefore, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[4] Contrary to claimant's arguments, the administrative law judge did not find Dr. Simpao's opinion to be incomplete, but simply noted that, while the physician concluded that claimant's mild impairment would prevent him from returning to his usual coal mine work, Dr. Simpao did not show that he was familiar with claimant's coal mining duties or compare claimant's current physical capabilities with those required of him as a drill and dozer operator.[5] Director's Exhibit 10; Decision and

[4] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

[5] Dr. Simpao reported claimant's coal mine employment as a truck driver, drill operator and dozer operator. Director's Exhibit 10.

Order at 12. Furthermore, the administrative law judge did not discredit Dr. Simpao's opinion, but instead found his opinion to be outweighed by the more probative medical opinions of Drs. Broudy and Rosenberg. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Clark*, 12 BLR at 1-149; Decision and Order at 13. Thus, there is no merit to claimant's argument that he is entitled to a new pulmonary evaluation pursuant to Section 725.406.

Therefore, as the administrative law judge permissibly accorded greater weight to the opinions of Drs. Broudy and Rosenberg than to the contrary opinions of Drs. Baker and Simpao, and as the administrative law judge further properly weighed the medical opinion evidence together with the pulmonary function and blood gas study results of record, all of which were non-qualifying, we affirm the administrative law judge's determination that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR at 1-113; Decision and Order at 16. A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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