BRB No. 08-0399 BLA

L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 12/23/2008
	)	
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.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (2006-BLA-05877) 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). Based on claimant's August 29, 2002 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge then found that the evidence of record supports the parties' stipulation of eighteen years of coal mine employment. Addressing the elements of entitlement, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the existence of pneumoconiosis not established based on the x-ray or medical opinion evidence pursuant to Section 718.202(a)(1), (4), and erred in finding the medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), since the administrative law judge discredited Dr. Simpao's report. Employer responds, urging affirmance of the denial of benefits. In a limited response, the Director asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.[1]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[2] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co.*

[1] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with eighteen years of coal mine employment, and his findings that claimant failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] As claimant's coal mine employment occurred in Kentucky, 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*); Director's Exhibit 3.

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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the probative medical opinion evidence was insufficient to establish total disability. Specifically, the administrative law judge found that "[n]o physician of record opined that Claimant was totally disabled from returning to his prior coal mine employment."[3] Decision and Order at 12.

In challenging the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish total disability. Claimant argues that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work as a roof bolter in conjunction with Dr. Baker's diagnosis of a pulmonary impairment. Claimant's Brief at 7, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Specifically, claimant contends that:

> The claimant's usual coal mine work included being a roof bolter. It can be reasonably concluded that claimant's coal mining duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who diagnosed a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment

[3] The record contains the medical opinions of Drs. Simpao, Baker, Repsher and Jarboe. Dr. Simpao, based on his October 24, 2002 examination, opined that claimant has a mild pulmonary impairment, but that he is not totally disabled and that he is able, from a respiratory standpoint, of performing his usual coal mine employment. Director's Exhibits 7, 28. Dr. Baker examined claimant on April 2, 2003 and, with regard to the extent of any pulmonary impairment, stated "minimal or none with Coal Workers' Pneumoconiosis 1/0, chronic bronchitis and decreased PO_2." Director's Exhibit 9. Dr. Repsher, based on his November 13, 2003 examination of claimant and review of the medical record, opined that claimant does not suffer from any pulmonary impairment. Director's Exhibit 28; Employer's Exhibit 1. Dr. Jarboe, based on his January 29, 2004 examination of claimant and review of the medical record, opined that claimant does not have a totally disabling respiratory impairment and that he retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 28.

> occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 7. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, contrary to claimant's contention, because Dr. Baker correctly reported that claimant last worked as a bolt machine operator, and Dr. Baker stated that the level of impairment was "minimal or none with Coal Workers' Pneumoconiosis 1/0, chronic bronchitis and decreased PO_2," the administrative law judge was not required to further discuss the exertional requirements of claimant's last coal mine job. Director's Exhibit 9; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's opinion.

Additionally, we reject claimant's argument that because pneumoconiosis is a progressive disease, it should be assumed that his condition has worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 7-8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-7 n.8 (2004). Therefore, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm his finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv).

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant states that, with regard to the issue of the existence of pneumoconiosis, the administrative law judge "discredited Dr. Simpao's report because said physician relied upon non-qualifying test results and failed to adequately explain his findings (Decision, page 10)." Claimant's Brief at 6. Consequently, claimant contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. *Id*. The Director responds that Dr. Simpao's opinion satisfies the Department's obligation of providing claimant with a medical opinion that addresses all of the elements of entitlement and that merely because the administrative law judge found Dr. Simpao's opinion less persuasive than the contrary opinions of Drs. Jarboe and Repsher, opinions the administrative law judge found were better-explained, does not mean that the Director failed to meet his statutory obligation to provide a credible pulmonary evaluation.

Director's Letter at 2. Moreover, the Director asserts that remand is not necessary because error, if any, in the administrative law judge's assessment of Dr. Simpao's opinion on the issue of the existence of pneumoconiosis is harmless, because Dr. Simpao's opinion does not support a finding of total disability, an essential element of entitlement. Director's Letter at 3.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form.[4] 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 7. On the dispositive issue of total disability, as discussed above, the administrative law judge properly found that no physician of record opined that claimant is totally disabled. Moreover, on the issue of the existence of pneumoconiosis, we agree with the Director that the administrative law judge did not find that the opinion of Dr. Simpao was incomplete or not credible, but merely found that Dr. Simpao's opinion was not as well-reasoned and documented as the contrary opinions of Drs. Jarboe and Repsher. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); Decision and Order at 10. Therefore, we agree with the Director that he met his obligation, in this case, to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

In light of our affirmance of the administrative law judge's finding that claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b), a requisite element of entitlement in a miner's claim under Part 718, entitlement to benefits is precluded.[5] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] Pursuant to a February 23, 2006 Order of Remand by Administrative Law Judge Rudolf L. Jansen, which remanded the claim to the district director to provide claimant with a complete pulmonary evaluation, Dr. Simpao provided a supplemental report stating that claimant has a mild pulmonary impairment, but that he is not totally disabled and is able, from a pulmonary standpoint, of performing comparable work. Director's Exhibit 28.

[5] In view of our disposition of the case at 20 C.F.R. §718.204(b)(2), we need not address claimant's contentions regarding the administrative law judge's finding that the medical evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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