BRB No. 08-0420 BLA

H.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/22/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM**:**

Claimant appeals the Decision and Order (06-BLA-5848) of Administrative Law Judge Joseph E. Kane denying benefits 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). This case involves a subsequent claim filed on December 23, 2002.[1]

[1] Claimant initially filed a claim for benefits on March 17, 1993. Director's Exhibit A. In a Decision and Order dated September 9, 1994, Administrative Law Judge Bernard J. Gilday, Jr. found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Gilday denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Gilday's denial of benefits. [*H.B.*] *v. Shamrock Coal Co.*, BRB No. 94-4006 BLA (June

After crediting claimant with thirty-one years of coal mine employment,[2] the administrative law judge noted that the issue of the existence of pneumoconiosis was not contested, thereby establishing that one of the applicable conditions of entitlement had changed since the date on which the denial of claimant's prior 1993 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Claimant argues that the administrative law judge erred in finding

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14, 1995) (unpub.). Claimant subsequently filed a request for modification. Director's Exhibit A. The most recent denial of claimant's request for modification was in the form of a Decision and Order issued by Administrative Law Judge Clement J. Kichuk dated March 25, 1999. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Kichuk's denial of claimant's request for modification. [*H.B.*] *v. Director, OWCP*, BRB No. 99-0701 BLA (Apr. 7, 2000) (unpub.). There is no indication that claimant took any further action in regard to his 1993 claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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 (1989)(*en banc*).

[3] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends

that Dr. Baker's opinion did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 23. Because a doctor'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), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 8.

Dr. Baker also opined that:

> As [claimant's] pulmonary function studies showed a vital capacity and FEV1 to be greater than 80% of predicted, he would have a [C]lass 1 or 0% impairment. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 23.

Based upon his finding of a Class 1 or 0% impairment, Dr. Baker opined that "there did not appear to be a disabling impairment." *Id.* Dr. Baker also opined that claimant did "not have a total disability except for that of avoiding coal dust and similar noxious agents." *Id.* Consequently, Dr. Baker's finding of a Class 1 impairment does not 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*).

Claimant's contention that the administrative law judge erred in finding that Dr. Simpao's opinion did not support a finding of total disability also has no merit. Although Dr. Simpao diagnosed a mild pulmonary impairment, Director's Exhibit 11, the doctor subsequently opined that "[w]ith a mild pulmonary impairment, [claimant] is able to work in a dust free environment." Director's Exhibit 23. The administrative law judge, therefore, properly found that Dr. Simpao's opinion supported a finding that "[c]laimant

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that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found 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 were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) held that all evidence 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.

is not totally disabled."[4] Decision and Order at 8. Moreover, the administrative law judge found that Dr. Simpao's opinion, that claimant was not totally disabled, was well-reasoned and supported by the objective evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also found that the medical opinion evidence submitted in connection with claimant's previous claim did not support a finding of total disability. Decision and Order at 9. Claimant alleges no error in regard to the administrative law judge's consideration of this evidence. *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). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5]

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[4] In view of our holding that the opinions of Drs. Baker and Simpao do not support a finding of total disability, we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with their opinions. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

[5] We reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge