BRB No. 08-0422 BLA

N.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 12/19/2008
	)	
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Michelle S. Gerdano (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 (06-BLA-0004) of Administrative Law Judge William S. Colwell (the administrative law judge) denying benefits on

modification of a claim[1] 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).[2] The administrative law judge credited claimant with at least sixteen years of coal mine employment based on employer's concession,[3] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). Consequently, the administrative law judge found that the new evidence established grounds for modification pursuant to 20 C.F.R. §725.310 (2000).[4] On the merits, however, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Further, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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[1] Claimant filed his first claim on February 17, 2000. Director's Exhibit 34. By Order dated March 28, 2000, the district director ordered claimant to show cause within thirty days why his claim should not be denied by reason of abandonment. *Id*. Claimant filed this claim on March 12, 2001. Director's Exhibit 2. In an appeal questionnaire dated March 25, 2001, claimant indicated that he wanted his February 17, 2000 claim withdrawn and his March 12, 2001 claim to represent a new claim under the 2001 regulations. By Proposed Decision an Order dated April 3, 2001, the district director granted claimant's request to withdraw his February 17, 2000 claim. *Id*. Nonetheless, the administrative law judge stated that "the filing of the second application form within one year of the [d]istrict [d]irector's ruling was deemed a modification request." Decision and Order at 20 n.6.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibits 3, 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*).

[4] The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2, and thus do not apply to this claim.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, urging the Board to reject claimant's contention that the case should be remanded to the district director for the Director to provide claimant with a complete and credible pulmonary evaluation.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Hussain, Dahhan, Fino, and Anderson. Dr. Baker opined that claimant has a Class 1 impairment and an occupational disability. Director's Exhibit 9. Dr. Hussain opined that claimant has a moderate impairment and does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 10. By contrast, Drs. Dahhan and Fino opined that from a respiratory standpoint claimant retained the physiological capacity to continue his usual coal mine work or a job of comparable physical demand. Director's Exhibit 24; Employer's Exhibit 1. Similarly, Dr. Anderson opined that from a pulmonary standpoint

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[5] Because the administrative law judge's findings that the new evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), that the new evidence established grounds for modification at 20 C.F.R. §725.310 (2000), and that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant has the ability to do his usual coal mine employment or comparable and gainful work in a dust-free environment. Director's Exhibit 34.

The administrative law judge initially found that Dr. Baker's conclusion, that claimant was occupationally disabled for work in the coal mining industry or similar dusty occupations, did not constitute a finding of total disability under the Act and regulations, because it did not address claimant's functional pulmonary capacity. Decision and Order at 19. The administrative law judge next gave little weight to Dr. Hussain's opinions, that claimant has a moderate impairment and retained the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment, because they were poorly reasoned. *Id.* The administrative law judge then found that the opinions of Drs. Dahhan and Fino were well-reasoned, well-documented, and more consistent with the objective evidence of record. *Id.* In addition, the administrative law judge found that the opinions of Drs. Dahhan and Fino were supported by Dr. Anderson's opinion. *Id.* Further, the administrative law judge noted that Drs. Dahhan and Fino were Board-certified pulmonary specialists. *Id.* Hence, the administrative law judge concluded that claimant failed to establish that he was totally disabled from a respiratory impairment.

Claimant asserts that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the doctors' disability assessments. As noted above, Dr. Baker opined that claimant has a Class 1 impairment. Director's Exhibit 9. However, Dr. Baker failed to explain the severity of such an impairment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Further, the administrative law judge properly found that Dr. Hussain's diagnosis of a moderate impairment was poorly reasoned.[6] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 10. Consequently, 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 the doctors' disability assessments.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally

[6] The administrative law judge stated that "[w]ithout explanation, Dr. Hussain described the degree of [c]laimant's impairment due to his respiratory or pulmonary disease as 'moderate.'" Decision and Order at 12. The administrative law judge additionally stated that "Dr. Hussain's failure to explain his finding of a 'moderate impairment' is particularly problematic, in view of his interpretation of the pulmonary function study as showing only a 'mild' impairment, and his finding that the arterial blood gas study was 'normal.'" *Id.* at 12-13.

disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.202(a)(1)-(4). Consequently, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

Claimant also contends 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. Specifically, claimant argues that "the [administrative law judge] concluded that Dr. Hussain's report [was] poorly reasoned (Decision, page 19)." Claimant's Brief at 4. The Director responds that that "[t]here is no violation of the Director's duty to provide claimant with a credible examination." Director's Letter Brief at 2.

The record reflects that Dr. Hussain 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. Director's Exhibit 10; 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 718.104, 725.406. On the dispositive issue of total disability, the administrative law judge considered the reports of Drs. Baker,[7] Hussain, Dahhan, Fino, and Anderson.[8] Director's Exhibits 10, 24, 34; Employer's Exhibit 1. As discussed, *supra*, the administrative law judge properly found that Dr. Hussain's opinions, that claimant has a moderate impairment and retained the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment, were outweighed by the contrary opinions of Drs. Dahhan and Fino. *Clark*, 12 BLR 1-155; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986);

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[7] The administrative law judge properly found that Dr. Baker's conclusion, that claimant was occupationally disabled for work in the coal mining industry or similar dusty occupations, did not constitute a finding of total disability under the Act and regulations. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

[8] The administrative law judge properly found that Dr. Anderson's opinion, that from a pulmonary standpoint claimant has the ability to do his usual coal mine employment or comparable and gainful work in a dust-free environment, supported the opinions of Drs. Dahhan and Fino. *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). We, therefore, agree with the Director that the administrative law judge found that Dr. Hussain's disability opinion was outweighed by more persuasive evidence, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to claimant. *Cf. Hodges v. BethEnergy Mines, Inc.,* 18 BLR 1-84, 1-93 (1994).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge