BRB No. 09-0353 BLA

DARRELL COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 12/08/2009
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-5890) of Administrative Law Judge Alice M. Craft rendered on a claim filed on February 21, 2006, 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 credited claimant with at least eighteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[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.[3] 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. 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), claimant asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant initially notes that the administrative law judge was required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 6, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal*

[1] Claimant, citing 20 C.F.R. §718.204(c), asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant's Brief at 5. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Co., 7 BLR 1-236 (1984). Claimant argues that because his usual coal mine work included being an equipment operator, mechanic and laborer, "[i]t can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that "[t]aking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment." Claimant's Brief at 6. Claimant asserts that the administrative law judge erred because he "made no mention of claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability." *Id.* Claimant's assertions of error are without merit.

Contrary to claimant's contention, a miner's inability to withstand 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); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Additionally, the administrative law judge properly considered the exertional requirements of claimant's usual coal mine work in finding that claimant is not totally disabled. The administrative law judge specifically acknowledged claimant's testimony that he did "whatever jobs were needed, including mechanic, laborer, equipment operator and shoveling," and that all of his work was in surface mining at a preparation plant. Decision and Order at 3. The administrative law judge also found that claimant's last job was as a mechanic, which required heavy manual labor and exposure to coal dust on a continuous basis. *Id.*; *see* Director's Exhibit 18 at 4-5, 9-10.

Furthermore, in considering the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge correctly found that none of the record physicians opined that claimant has a respiratory disability, and that Dr. Simpao specifically concluded that claimant was capable of performing his usual coal mine work from a respiratory or pulmonary standpoint.[4] Decision and Order at 7-8, 11. Therefore,

[4] Dr. Simpao examined claimant at the request of the Department of Labor and noted that claimant worked a twelve-hour shift that required him to lift fifty to one-hundred pounds, shovel, walk two miles daily, carry a twenty pound tool belt, work in awkward positions, and also bend and stoop. Director's Exhibit 11. Dr. Simpao diagnosed a mild pulmonary impairment based on the objective testing but opined that claimant was not totally disabled from performing his usual coal mine work as a mechanic. *Id.* Dr. Broudy examined claimant and opined that claimant retained the respiratory capacity to perform the work of a coal miner or similar arduous manual labor. Director's Exhibits 14, 16. Similarly, Dr. Westerfield reviewed the results of Dr. Simpao's pulmonary function testing and opined that they were normal. Director's Exhibit 15 at 8. He indicated that claimant retained the respiratory capacity to perform the work of a coal miner. *Id.* at 8-9.

we affirm the administrative law judge's finding that claimant was unable to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv). We also affirm, as supported by substantial evidence, the administrative law judge's finding that that the evidence, overall, is insufficient to establish that claimant is totally disabled.[5] *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 13.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant failed to establish total disability, a requisite element of entitlement, an award of benefits is precluded.[6] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

[5] Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 6. However, contrary to claimant's assertion, there is no such presumption of total disability. The administrative law judge's finding of total disability must be supported by the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

[6] Because we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a requisite element of entitlement, it is unnecessary to address claimant's arguments that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge