BRB No. 05-1021 BLA

RONALD E. HALCOMB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY c/o ARCH COAL, INCORPORATED	)	DATE ISSUED: 02/16/2006
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Ralph D. Carter (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 - Denial of Benefits (2003-BLA-6568) 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). The administrative law judge found that the record supports the parties' stipulation to a coal mine history of at least fifteen years. Decision and Order at 3. Considering the evidence, the administrative law judge found that claimant was unable to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and was unable to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-18. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray and medical opinion evidence and erred in not finding total respiratory disability established based on medical opinion evidence. In addition, claimant contends that because the administrative law judge found Dr. Hussain's opinion to be unreasoned, 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 30 U.S.C. §923(b). Employer responds and urges that the denial of benefit be affirmed. The Director responds, asserting that he has fulfilled his statutory obligation of providing claimant with a complete, credible pulmonary examination. The Director takes no position on the merits of claimant's entitlement.

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).

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 elements of entitlement precludes an award of benefits. *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 argues that the well-reasoned and well-documented opinions of Drs. Baker and Varghese establish the existence of a totally disabling respiratory impairment. In considering the opinion of Dr. Baker, the administrative law judge found that it established that claimant was 100% occupationally disabled because Dr. Baker opined that claimant had, considering his pulmonary function studies, a "Class I impairment as classified in the Guide to Evaluation of Permanent Impairment, 5th Edition," and that

"the guide concludes that persons with pneumoconiosis should limit further exposure to coal dust and that this conclusion implies that the Miner is 100% disabled from returning to coal mine employment or similar dusty occupations." Decision and Order at 16. The administrative law judge determined that Dr. Baker's opinion did not constitute a well-reasoned and well-documented opinion of total respiratory disability because: a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); the physican's documentation regarding claimant's exertional limitations was virtually "non-existent;" and in none of Dr. Baker's reports did he mention claimant's level of impairment or whether claimant was totally disabled and, on two occasions, he reported that examination showed claimant's "respiration was clear/equal with no adventitious sounds bilaterally, and respiration was even and unlabored." Decision and Order at 17. Accordingly, the administrative law judge properly found that Dr. Baker's opinion did not establish a totally disabling respiratory impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Decision and Order at 16.

Turning to Dr. Varghese's opinion, the administrative law judge rejected it because, although Dr. Varghese relied on claimant's employment history, smoking history and symptomatology to find a total respiratory disability, his clinical findings and the results of claimant's pulmonary function study did not support his conclusion. Accordingly, the administrative law judge permissibly found Dr. Varghese's opinion to be insufficiently reasoned and documented to support a finding of total respiratory disability. Claimant's Exhibit 1. 20 C.F.R. §718.104(d)(5); *Collins*, 21 BLR 1-181, 1-191; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003) (opinions of treating physicians get the deference they deserve based on their power to persuade); *Beatty*, 16 BLR at 1-13-14; *Clark*, 12 BLR 1-149; 8 BLR 1-126; *Lucostic* 8 BLR 1-46; *Goss v. Eastern Assoc. Coal Corp.*, 7 BLR 1-400 (1984); *Fuller v. Bibraltar Corp.*, 6 BLR 1-292 (1984).

Lastly, claimant argues that because the administrative law judge found that Dr. Hussain's opinion was not supported by adequate data, was seriously flawed, and was therefore neither well-reasoned nor well-documented, the Director did not provide him with the complete, credible pulmonary evaluation to which he was entitled under the Act and that remand of the case is necessary to provide such evaluation. The Director responds, arguing that even if Dr. Hussain's diagnosis of pneumoconiosis is flawed, there is no need to remand the case for further development of Dr. Hussain's opinion because the administrative law judge found that Dr. Hussain's opinion that claimant did not have

a totally disabling respiratory impairment, which the administrative law judge found to be well-documented and reasoned, would ultimately defeat entitlement. We agree.

In considering the opinion of Dr. Hussain, Claimant's Exhibit 3, while the administrative law judge found the opinion regarding the existence of pneumoconiosis to be unreasoned, Decision and Order at 12, he specifically found the report to be reasoned and documented as to Dr. Hussain's finding that claimant was not disabled from a pulmonary standpoint. Decision and Order at 17. As the Director argues, the administrative law judge considered Dr. Hussain's opinion regarding the nonexistence of a totally disabling respiratory impairment to be supported by the objective evidence and to be reasoned. Claimant's argument that this case must be remanded for further development of the evidence on the issue of pneumoconiosis is rejected. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see* 30 U.S.C. §923(b); *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319, 2-327 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Because claimant has failed to demonstrate total respiratory disability, a requisite element of entitlement pursuant to Part 718, entitlement is precluded, 20 C.F.R. §718.204(b)(2); *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, and we need not address his assertions regarding the existence of pneumoconiosis pursuant to Section 718.202(a). *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of 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