BRB No. 07-0472 BLA

M. S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE	)	DATE ISSUED: 02/21/2008
	)	
Employer/Carrier-Respondents	)	
	)	
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.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2005-BLA-5996) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] The administrative law judge credited claimant with twenty-five years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in evaluating the x-ray evidence for pneumoconiosis, and that he erred in finding that claimant was not totally disabled.[2] Additionally, claimant asserts that the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation as required by the Act. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting that the DOL has satisfied its obligation to provide claimant with a complete pulmonary evaluation as required by the Act.

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).

After our consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits. Specifically, we affirm his finding that claimant failed to establish total disability.

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[1] Claimant filed his claim on August 23, 2004. Director's Exhibit 2.

[2] In challenging the administrative law judge's finding on the issue of total disability, claimant references the regulation at 20 C.F.R. §718.204(c). Claimant's Brief at 4, 5. We note, however, that under the revised regulations, the pertinent regulation for establishing total disability is 20 C.F.R. §718.204(b)(2), while Section 718.204(c) is the regulation relevant to the issue of disability causation. *See* 20 C.F.R. §718.204(b), (c).

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

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 one of these elements precludes entitlement. *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).

In this case, claimant generally contends that the administrative law judge erred in failing to find that he established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).[4] Claimant generally asserts that, in addressing the issue of total disability, the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work, in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, 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). However, claimant's only specific argument with respect to Section 718.204(b)(iv) is that, because claimant's usual coal mine work included being a continuous miner operator:

> 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, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. 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 assertion, the administrative law judge considered his usual coal mine work, and acknowledged that claimant's job "as a continuous miner required him to stand approximately ten to fifteen feet away from

[4] Because claimant does not challenge the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

where the coal was actually being cut by machine five or six times per week."[5] Decision and Order at 11; *see McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1221 (1984).

In weighing the conflicting medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge permissibly credited the opinion of Dr. Broudy, that claimant had no respiratory impairment and was not totally disabled, over the contrary opinion of Dr. Simpao, that claimant was totally disabled from performing his usual coal mine work by a mild respiratory impairment, because the administrative law judge determined that Dr. Broudy's opinion was better explained and better supported by the objective evidence of record. Decision and Order at 12; Director's Exhibit 9; Employer's Exhibit 2; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-113 (6th Cir. 1995). As noted by the administrative law judge, although Dr. Simpao diagnosed that claimant had a mild respiratory impairment, the doctor also indicated that claimant's blood gas tests and pulmonary function studies were "normal." Decision and Order at 12; Director's Exhibit 9. Because the administrative law judge determined that Dr. Simpao did not specifically discuss the basis for his diagnosis of total disability, the administrative law judge reasonably accorded his opinion less determinative weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 12. Therefore, we affirm administrative law judge's finding that the medical opinion evidence failed to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).[6] *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability.[7]

[5] The administrative law judge noted that there was no further description of claimant's usual coal mine duties provided in the record before him. Decision and Order at 11 n.15.

[6] We also reject claimant's suggestion that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease, which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 5-6. 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.*, 23 BLR 1-1, 1-7 n.8 (2004).

[7] In light of our affirmance of the administrative law judge's finding that claimant is not totally disabled, it is unnecessary that we address claimant's argument that the

Additionally, we reject claimant's assertion that, because the administrative law judge rejected Dr. Simpao's diagnosis of pneumoconiosis in his consideration of the evidence at Section 718.202(a)(4), the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to provide him an opportunity to substantiate his claim, as required by the Act.[8] Claimant's Brief at 4. 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); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (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. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a); *see Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528 (6th Cir. 2003) (unpub.). Moreover, because any alleged problem with Dr. Simpao's pneumoconiosis finding does not affect his opinion on the issue of total disability, we agree with the Director that the DOL has satisfied its obligation to provide claimant with a complete pulmonary evaluation.

Consequently, because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

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administrative law judge erred in failing to find that he has pneumoconiosis. Claimant's Brief at 2-4.

[8] The Director maintains that Dr. Simpao performed a complete pulmonary evaluation insofar as he rendered an opinion on all of the requisite elements of entitlement. Director's Brief at 1-2.

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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JUDITH S. BOGGS
Administrative Appeals Judge