BRB No. 08-0363 BLA

J.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIAMOND MAY COAL COMPANY, c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
and	)	
	)	DATE ISSUED: 02/12/2009
PROGRESS FUELS CORPORATION	)	
	)	
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 – Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2007-BLA-5661) of Administrative Law Judge Larry W. Price rendered 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 adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and found the evidence

sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203, but insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find Dr. Simpao's opinion, considered in conjunction with the exertional requirements of his usual coal mine work, to be sufficient to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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, 363 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

---

[1] Claimant asserts that the administrative law judge erred by not finding that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(4). Claimant's Brief at 2. Under the revised regulations, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b). The regulation pertaining to disability causation, previously set forth at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and his findings that the evidence is insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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.

Failure to establish any one of these elements precludes a finding of 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Simpao, Vuskovich and Jarboe. The administrative law judge found that this evidence did not support a finding of total disability as Dr. Simpao opined that claimant had a mild pulmonary impairment, but was not totally disabled, Dr. Jarboe opined that claimant retains the respiratory capacity to work as a miner, and Dr. Vuskovich opined that claimant is not disabled from a pulmonary standpoint.[4] Decision and Order at 4; Director's Exhibit 10; Employer's Exhibits 1-4.

Claimant asserts that in addressing the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 3, 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). In support of this contention, claimant states:

> It can be reasonably concluded that claimant's regular 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, as well as the medical opinion of Dr. Valentino Simpao (who did diagnose a minimal pulmonary impairment), 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. [The administrative law judge] made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability.

[4] Dr. Simpao examined claimant at the request of the Department of Labor on August 28, 2006, and recorded the results of his examination on Form CM-988. Director's Exhibit 10. Dr. Simpao characterized the degree of severity of claimant's pulmonary impairment as "mild" and when asked to categorize the extent to which his diagnosis of pneumoconiosis contributed to claimant's pulmonary impairment stated that "[claimant] is not totally disabled due to his pulmonary impairment." *Id*.

Claimant's Brief at 3.

Claimant's argument that the administrative law judge was required to compare the exertional requirements of claimant's usual coal mine employment as a roof bolter to the findings set forth in Dr. Simpao's medical report is without merit. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Dr. Simpao indicated that he was aware that claimant's last coal mine employment as a roof bolter required bending, stooping, and crawling. Director's Exhibit 10. Dr. Simpao further stated that claimant is not totally disabled due to his mild pulmonary impairment. *Id.* Because the administrative law judge rationally relied on Dr. Simpao's uncontradicted medical opinion that claimant is not totally disabled due to his pulmonary impairment, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Director's Exhibit 10.

We also reject claimant's assertion that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable gainful work. Claimant's Brief at 3-4. There is no merit to claimant's argument. Claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant has the general 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 has failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge