

BRB No. 08-0419 BLA

H.C. )  
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 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 02/12/2009  
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 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) 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.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; 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: McGRANERY, HALL and BOGGS, Administrative Appeals  
Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-5679) of  
Administrative Law Judge Alice M. Craft rendered on a subsequent claim<sup>1</sup> filed pursuant

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<sup>1</sup> Claimant filed a claim for benefits on January 22, 1997, which was denied by the  
district director on August 21, 1997, for failure to establish any of the requisite elements  
of entitlement. Director's Exhibit 1. Claimant requested a hearing, but later filed a letter  
on November 13, 1997, indicating that he wished to withdraw his claim. *Id.* On  
November 21, 1997, the district director denied claimant's request for a withdrawal of his  
claim and issued an Order to show cause why the claim should not be deemed  
abandoned. *Id.* Claimant responded to the Order, stating only that he wished to

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). Director's Exhibit 3. The administrative law judge credited claimant with at least seventeen years of coal mine employment and determined that because the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, the administrative law judge further determined, based on her consideration of all of the record evidence, that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to find that he is totally disabled from his usual coal mine work.<sup>2</sup> Claimant further asserts that because the administrative law judge did not credit the opinion of Dr. Simpao that he is totally disabled, the Department of Labor (DOL) has failed to provide him with a complete and credible pulmonary evaluation as required under the Act. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, urging the Board to reject claimant's assertion that he did not receive a complete pulmonary evaluation and affirm the denial of benefits.

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withdraw his claim. *Id.* Thereafter, the case file was administratively closed. *Id.* Claimant filed his current claim on October 28, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on January 2, 2004. Director's Exhibit 18. Claimant requested a hearing, which was held on March 23, 2005 before Administrative Law Judge Thomas F. Phalen, Jr. Director's Exhibit 25. On August 17, 2005, Judge Phalen remanded the case in order for the district director to provide claimant with a complete pulmonary evaluation. On remand, claimant was examined by Dr. Baker on February 10, 2007. After receipt of Dr. Baker's medical report, the case was forwarded to the Office of Administrative Law Judges and the case was reassigned to Administrative Law Judge Alice M. Craft (the administrative law judge). A hearing was held on May 10, 2007. *Id.* Thereafter, the administrative law judge issued her Decision and Order Denying Benefits on January 31, 2008, which is the subject of this appeal.

<sup>2</sup> Claimant asserts that the administrative law judge erred in finding that he is not totally disabled, citing to 20 C.F.R. §718.204(c). Claimant's Brief at 3. 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), while the provision pertaining to disability causation is now found at 20 C.F.R. §718.204(c).

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.<sup>3</sup> 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 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. 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant notes that the administrative law judge is required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability.<sup>4</sup> Claimant's Brief at 3, 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 Coal Co.*, 7 BLR 1-469 (1984). Claimant argues that because his usual coal mine work included being a dozer operator and truck driver, "[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 in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 3.

Contrary to claimant's contention, however, a miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman*

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

<sup>4</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of seventeen years of coal mine employment, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), but that the evidence was insufficient to establish total disability 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).

*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). Furthermore, in this case, the administrative law judge properly considered claimant's usual coal mine duties in assessing whether the medical opinion evidence was sufficient to establish that claimant was totally disabled. See *Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

As noted by the administrative law judge, Dr. Simpao examined claimant at the request of the DOL on April 17, 2003 and opined that claimant suffered from a mild respiratory impairment. Decision and Order at 15; Director's Exhibit 12. Although Dr. Simpao diagnosed that claimant did not retain the respiratory capacity to perform regular coal mine duties, Director's Exhibit 25, the administrative law judge found that Dr. Simpao's opinion was entitled to less weight at 20 C.F.R. §718.204(b)(2)(iv) because the doctor "did not, however, specify whether he was taking into account [claimant's] actual job duties as a truck driver and bulldozer" when rendering his diagnosis. Decision and Order at 15-16.

The administrative law judge further considered Dr. Baker's opinion on the issue of total disability. Dr. Baker examined claimant on behalf of DOL, in connection with the prior claim, on February 10, 1997, see Director's Exhibit 1, and again on February 10, 2005, in connection with his subsequent claim, see Director's Exhibit 25. During the course of both examinations, Dr. Baker diagnosed that claimant suffers from a mild respiratory impairment but stated that claimant is not totally disabled from performing the work of a coal miner. Director's Exhibits 1, 25. The administrative law judge determined that, in comparison to Dr. Simpao's opinion, Dr. Baker's opinion was reasoned and documented and entitled to more weight. Decision and Order at 16. The administrative law judge also found that the weight of the non-qualifying pulmonary function and arterial blood gas study evidence, along with Dr. Baker's opinion, established that claimant's mild respiratory impairment would not preclude claimant from performing his usual coal mine work. *Id.*

Because claimant does not specifically challenge the administrative law judge's credibility determinations or the weight she accorded the opinions of Drs. Simpao and Baker, we affirm the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 16. We further affirm, as supported by substantial evidence, the administrative law judge's finding that the

evidence overall is insufficient to establish that claimant is totally disabled.<sup>5</sup> *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 16.

Claimant next argues that he did not receive a complete pulmonary evaluation on the issue of total disability since the administrative law judge concluded that Dr. Simpao's report was not well-reasoned. Claimant's Brief at 4. We disagree.

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), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). Claimant underwent his first DOL pulmonary evaluation with Dr. Simpao on April 17, 2003. Director's Exhibit 12. In his Order of Remand dated August 17, 2005, Administrative Law Judge Thomas F. Phalen, Jr., determined that because Dr. Simpao had not specifically addressed the issue of whether claimant was totally disabled due to pneumoconiosis, claimant had not received a complete pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Director's Exhibit 25. Therefore, Judge Phalen remanded the claim to the district director to provide claimant with a new pulmonary evaluation. *Id.* On remand, claimant was examined by Dr. Baker on February 10, 2007. *Id.* Dr. Baker performed all of the necessary medical testing and provided an opinion which addressed all of the requisite elements of claimant's entitlement.<sup>6</sup> *Id.* Because Dr. Baker specifically addressed the issue of total disability and his opinion was credited by the administrative law judge, we see no merit to claimant's assertion that the Director failed to provide him with a complete pulmonary evaluation. *See Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003) (unpub.). Thus, we reject claimant's argument.

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<sup>5</sup> 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 9. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-7 n.8 (2004).

<sup>6</sup> The Sixth Circuit has held that a report in which the physician addresses the essential elements of entitlement may satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation. *See Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003) (unpub.)

Because we affirm the administrative law judge's finding that 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 administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge