BRB No. 08-0494 BLA

M.C. Claimant-Petitioner v. ICG HAZARD, LLC and AMERICAN INTERNATIONAL SOUTH INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/10/2009 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.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (07-BLA-5674) 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 credited

claimant with thirty to thirty-five years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b), a necessary element of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal. [2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Ebeo, Rasmussen, Jarboe, and Dahhan. The administrative law judge found that:

> There is no medical opinion evidence indicating that Claimant is totally disabled for [*sic*] a respiratory or pulmonary impairment. Dr. Ebeo performed the OWCP evaluation and found Claimant did not have a pulmonary or respiratory impairment and could perform his previous coal

[1] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc)*.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> mine employment or work requiring similar effort. Dr. Rasmussen opined Claimant retains the pulmonary capacity to perform his regular coal mine employment. Dr. Jarboe opined that Claimant has no respiratory or pulmonary impairment and that Claimant retains full pulmonary capacity to perform heavy manual labor. Dr. Dahhan opined that Claimant retains the physiological capacity to return to his previous coal mining work or job of comparable physical demand.

Decision and Order at 4 (citations omitted); Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibits 1-4. The administrative law judge therefore determined that the medical opinion evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment at Section 718.204(b)(2)(iv). Decision and Order at 4.

Claimant asserts that the administrative law judge erred in failing to consider the physical requirements of claimant's previous coal mine work as a dozer operator in conjunction with the medical opinion evidence under Section 718.204(b)(2)(iv). Specifically, claimant contends that:

> It can be reasonably concluded that such duties [of a dozer operator] 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 3.

We disagree. 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); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Further, the administrative law judge rationally determined that the opinions of Drs. Ebeo, Rasmussen, Jarboe, and Dahhan did not support a finding of total disability, where each physician explicitly stated that claimant is capable of performing his usual coal mine employment. Decision and Order at 4; Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibits 1-4. It was therefore unnecessary for the administrative law judge to compare these physicians' opinions with the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

We also reject claimant's argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant's Brief at 8-9. The Act provides no such presumption, and an administrative law judge's findings 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). As claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(b)(2)(iv), we affirm the determination that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2).

Thus, because claimant has failed to establish total disability, a requisite element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See 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.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge