BRB No. 08-0495 BLA

J.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCUST GROVE, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 01/30/2009
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5354) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) denying benefits on a claim filed on February 25, 2005 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-one years of coal mine employment based on the parties' stipulation,[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant contends that the exertional requirements of claimant's usual coal mine employment must be compared with a physician's assessment of claimant's respiratory impairment and that it would be error for the administrative law judge to find that claimant could perform his usual coal mine employment without considering the physical requirements of such work. Claimant further contends that he is totally disabled because his usual coal mine employment involved exposure to heavy concentrations of dust on a daily basis and his respiratory condition would preclude him from being exposed to a dusty environment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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. 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 (1965).

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[1] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 3, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Because claimant did not establish total disability, the administrative law judge did not address whether claimant had pneumoconiosis, whether it arose out of coal mine employment, or whether it was totally disabling pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(c).

[3] Because the administrative law judge's length of coal mine employment finding and his findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) (the administrative law judge found that none of the pulmonary function or blood gas studies resulted in qualifying values and that there was no evidence of cor pulmonale with right-sided congestive heart failure) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Baker, Broudy, and Dahhan. Dr. Baker considered claimant's history of coal mine employment, his symptoms, his test results, and the findings on physical examination. Director's Exhibit 14. Noting the results of claimant's pulmonary function study, Dr. Baker found that claimant had a class 2 or 10% to 25% impairment of the whole person under the Guide to the Evaluation of Permanent Impairment, Fifth Edition, but nonetheless opined that claimant had the respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment. *Id*. Similarly, after considering claimant's coal mine employment history, symptoms, findings on physical examination and test results, Dr. Broudy opined that claimant retained the respiratory capacity to do his previous work or work requiring similar effort. Director's Exhibit 18. Lastly, after considering claimant's coal mine employment history, symptoms, findings on physical examination and test results, Dr. Dahhan reported a mild obstructive ventilatory impairment on spirometry testing, but opined that claimant retained the respiratory physiological capacity to return to his previous coal mining work or a job of comparable physical demand. Employer's Exhibit 1. The administrative law judge properly concluded, therefore, that because all of the physicians provided reasoned opinions that claimant had the respiratory capacity to work as a coal miner or to do his previous coal mine work, claimant failed to establish total respiratory disability by medical opinion evidence pursuant to Section 718.204(b)(2)(iv).[4] *See Cornett v. Benham Coal, Inc.*, 227

[4] Describing claimant's coal mine employment, the administrative law judge stated that "[c]laimant initially worked as a truck driver, then as a heavy equipment operator, and lastly as a foreman at [a] strip site." Decision and Order at 4. The administrative law judge noted that, as a foreman, claimant oversaw the daily operations of stripping coal, supervised at least twenty men, and was responsible for the workers' safety, governmental regulations, and the tonnage reports. The administrative law judge further noted that if a worker was off, claimant would step in to operate the equipment and perform mechanic work. The administrative law judge noted that claimant left coal mine employment in 2004 because he was laid-off. *Id*. at 2.

Dr. Baker noted that while claimant's forty years of surface mining was mostly as an equipment operator, claimant also drove a truck. Director's Exhibit 14. Dr. Baker also noted that claimant's last coal mine employment from 1991 to October 2004 was as a heavy equipment operator. *Id*. Dr. Broudy noted that "[claimant] drove a coal truck for five or six years before becoming a heavy equipment operator in 1968." Director's

F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Accordingly, we affirm the administrative law judge's finding at Section 718.204(b)(2)(iv).

We reject claimant's contention that the inadvisability of further coal dust exposure is sufficient to establish total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no medical evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

Exhibit 18. Dr. Broudy also noted that claimant worked in a supervisory role at his last coal mine employment. *Id*. Dr. Dahhan noted that all of claimant's mining work was outside as a heavy equipment operator, which included a dozer and loader. Employer's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order denying 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