BRB No. 09-0284 BLA

ALLEN G. STUMP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENTEC PROCESSING	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 01/20/2010
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05001) of Administrative Law Judge Janice K. Bullard rendered on a claim filed on October 21, 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 accepted the parties' stipulation to twenty-seven years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's determination that he did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4) and total disability pursuant to Section 718.204(b)(iv).[1] Claimant also maintains that the administrative law judge erred in allowing employer to submit two readings of the x-ray dated November 17, 2005. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[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 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

[1] Citing 20 C.F.R. §718.204(c), claimant asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant's Brief at 6. 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).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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 Exhibits 3.

totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Upon review of the Decision and Order, the evidence of record and the arguments on appeal, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Alam, Simpao and Broudy. Dr. Alam examined the claimant on June 21, 2002 and obtained a nonqualifying pulmonary function study (PFS) and a nonqualifying blood gas study (BGS). Employer's Exhibit 3. Dr. Alam diagnosed bronchitis, but determined that claimant did not suffer from a respiratory or pulmonary impairment. *Id*. Dr. Simpao examined claimant on November 17, 2005, at the request of the Department of Labor. Director's Exhibit 11. Dr. Simpao diagnosed clinical pneumoconiosis, based upon Dr. Westerfield's positive x-ray reading, and obtained a nonqualifying PFS and a nonqualifying BGS. *Id*. Dr. Simpao determined that claimant has a moderate pulmonary impairment related, in part, to dust exposure in coal mine employment, and is totally disabled by this impairment. *Id*. Dr. Broudy reviewed claimant's medical records and, in a report dated February 25, 2007, stated that claimant does not have a respiratory or pulmonary impairment. Employer's Exhibits 1, 2.

Claimant initially asserts that, in addressing the issue of total disability, the administrative law judge is 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 6, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Taylor v. Evans & Gambrel Coal Co., Inc.*, 12 BLR 1-83 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant specifically maintains:

> The claimant's usual coal mine work included being a miner operator, roof bolter, cut machine operator, foreman, mechanic, electrician and shuttle car operator. It can be reasonably concluded that such 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. Simpao, 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. Judge Bullard made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability.

Id. at 6-7. Claimant also contends that, because pneumoconiosis is a progressive disease that was initially diagnosed several years ago, "it can therefore be concluded" that he has become totally disabled by it. *Id*. at 7.

We hold that claimant's arguments are without merit. Medical or other advice 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, 12 BLR 2-254 (6th Cir. 1989). With respect to Dr. Simpao's opinion, the administrative law judge rationally determined that Dr. Simpao's diagnosis of a moderate impairment was outweighed by the contrary opinions of Drs. Alam and Broudy, as they are better supported by the objective evidence of record. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (*en banc*); Decision and Order at 9. Because the administrative law judge found the opinions in which Drs. Alam and Broudy determined that claimant has no respiratory or pulmonary impairment more persuasive, she was not required to compare the exertional requirements of claimant's usual coal mine work to Dr. Simpao's finding of a moderate pulmonary impairment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. We also reject claimant's contention that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. An administrative law judge's finding on the issue of total disability must be based solely upon the medical evidence of record. *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-7 n.8 (2004).

Because claimant raises no other specific challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2). Based upon claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded.[4] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] In light of this disposition, we need not address claimant's allegations of error regarding the administrative law judge's evidentiary rulings and her findings that the x-ray and medical opinion evidence are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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