BRB No. 04-0924 BLA

PAUL E. FELTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/15/2005
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits of Administrative Law Judge Daniel J. Roketenetz 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). After crediting claimant with fifteen years of coal mine employment, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(b). Claimant asserts that the administrative law judge erred in considering evidence proffered by employer in excess of the evidentiary limitations at 20 C.F.R. §725.414. Claimant also argues that the Department of Labor (DOL) failed to provide him with a credible pulmonary examination as required by the regulation at 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. In the event that the Board decides to vacate the denial, employer argues that the administrative law judge must reconsider on remand whether claimant's claim was timely filed.[1] Employer also contends that if the claim is remanded for a new pulmonary evaluation, due process requires that liability for benefits transfer to the Black Lung Disability Trust Fund. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief arguing that the DOL satisfied its obligation to provide claimant with a complete pulmonary evaluation. The Director also filed a reply to employer's response brief, asserting that employer's right to due process would not be violated in the event that the claim were remanded for a new pulmonary evaluation, and therefore that employer should remain liable for benefits.

[1] In arguing that claimant's subsequent claim was not timely filed, employer cites to claimant's deposition testimony, indicating that he was told by "doctors who examined him on his state claim" he was totally disabled due to pneumoconiosis. Employer's Brief at 2, n 1; Claimant's Deposition, Director's Exhibit 5 at 17. Contrary to employer's assertion, the administrative law judge considered both claimant's testimony and the Workers' Compensation Opinion and Award issued in 1994, noting that "[t]he [o]pinion makes no mention of a finding of total disability, and indeed, [found] that [c]laimant [was] asymptomatic." Decision and Order at 6. The administrative law judge thus properly determined that claimant had not been told by a physician that he was totally disabled due to pneumoconiosis until he received such a diagnosis from Dr. Baker on April 28, 2001. *Id.* Because claimant filed for benefits within three years of Dr. Baker's medical determination, the administrative law judge properly found that claimant's subsequent claim was timely filed.

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. 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 Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*). After consideration of the administrative law judge's Decision and Order, and the issues and arguments raised by the parties on appeal, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically we affirm the administrative law judge's finding that claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

A. Total Disability

In addressing the issue of whether claimant was totally disabled, the administrative law judge first determined that claimant was unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge specifically noted that "the one reading of complicated pneumoconiosis on chest x-rays, as rendered by Dr. Hussain, is outweighed by the negative readings rendered by every other physician of record, as well as by the other medical evidence of record including the negative CT scan evidence readings." Decision and Order at 16. With respect to the pulmonary function study evidence, the administrative law judge found that none of the pulmonary function studies were qualifying and that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17. The administrative law judge also found that the preponderance of the arterial blood gas studies were non-qualifying, and thus that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 17-18. Because there was no evidence that claimant suffered from cor pulmonale with right sided-congestive heart failure, the administrative law judge found that claimant failed to establish his total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).[2] Decision and Order at 18.

[2] The administrative law judge's findings with respect to 20 C.F.R. §§718.304, 718.204(b)(2)(i)-(iii) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In weighing the medical opinion evidence for total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly considered Dr. Baker's opinion as supportive of claimant's burden of proof. The administrative law judge, however, correctly found that Dr. Baker's opinion, advising claimant to avoid further dust exposure by not returning to work, was not the equivalent of an opinion finding that claimant was totally disabled. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-54 (6th Cir. 1989); Decision and Order at 18. Furthermore, the administrative law judge permissibly found Dr. Baker's diagnosis that claimant had a mild respiratory impairment was outweighed by the contrary opinions of Drs. Dahhan and Rosenberg that claimant had no respiratory impairment that would preclude him from returning to work.[3] Decision and Order at 18. Contrary to claimant's contention, because the administrative law judge determined that claimant had no respiratory or pulmonary impairment, he committed no error by failing to specifically discuss the exertional requirements of claimant's last coal mine job. *See Wetzel v Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 18. Consequently, because substantial evidence supports the administrative law judge's determination that claimant has no respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4]

B. Complete Pulmonary Evaluation

Claimant does not assert that he was denied the right to a complete pulmonary evaluation based on the administrative law judge's findings at 20 C.F.R

[3] Claimant correctly points out that Dr. Fino's report was admitted into the record in excess of the evidentiary limitations. Dr. Fino provided a consultative opinion based on a record review. His opinion was not proffered by employer as one of its two affirmative medical reports, nor can Dr. Fino's report satisfy the definition of rebuttal evidence as described at 20 C.F.R. §725.414(a)(3)(ii). However, since the administrative law judge cited to Dr. Fino's report mainly as additional support for his decision to credit the opinions of Drs. Rosenberg and Dahhan at 20 C.F.R. §718.202(a)(4), we consider the administrative law judge's error in admitting Dr. Fino's report into the record to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984),

[4] The administrative law judge noted that Dr. Hussain's rationale for his diagnosis of total disability was listed as "dyspnea, effort intolerance" Decision and Order at 19. The administrative law judge found Dr. Hussain's opinion to be outweighed by the better reasoned and better documented opinions of Drs. Dahhan and Fino who opined that claimant was not totally disabled. *Id.*

§718.204(b)(2)(iv).[5] Director's Brief at 2, n.2. Rather, the basis for claimant's argument, that he is entitled to a new pulmonary evaluation, centers around the administrative law judge's treatment of Dr. Hussian's opinion at 20 C.F.R. §718.202(a) with respect to the issue of pneumoconiosis. Notwithstanding, we note that claimant's assertion that he was not provided a complete and credible pulmonary evaluation has no merit with respect to Dr. Hussain's opinion on total disability. Although the administrative law judge observed that Dr. Hussain failed to provide a "well-reasoned" and "well-documented" opinion on the issue of total disability, the administrative law judge did not specifically reject Dr. Hussain's opinion on the grounds that it was not a credible opinion. Rather, the administrative law judge found only that Dr. Hussain's opinion was entitled to less weight when compared to the better reasoned and documented opinions provided by Drs. Dahhan and Rosenberg. Decision and Order at 18. Claimant is not entitled to a new pulmonary examination simply because Dr. Hussain's opinion on the issue of total disability was not assigned controlling weight at 20 C.F.R. §718.204(b)(2)(iv). *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

C. Entitlement to Benefits

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, *see* 20 C.F.R. §718.204(b), a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we also affirm his denial of benefits on the miner's subsequent claim.

[5] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Accordingly, the administrative law judge's Decision and Order –Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge