BRB No. 05-0285 BLA

LONNIE MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNICORN MINING COMPANY	)	DATE ISSUED: 07/27/2005
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest		

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

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2003-BLA-5806) of Administrative Law Judge Daniel J. Rokotenetz 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). Claimant filed his application for benefits on July 6, 2001. Director's Exhibit 1. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with at least sixteen years of coal mine employment. Decision and Order at 4. Addressing the elements of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 6-11. He further found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 11-14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits, arguing that he erred in finding the x-ray evidence and medical opinion evidence insufficient to establish the existence of pneumoconiosis. In addition, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total respiratory disability. Claimant also contends that remand to the district director is required, as the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation (the Director), also responds and contends that remand for a complete pulmonary evaluation is not warranted in this case.[1]

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 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] The parties do not challenge the administrative law judge's decision to credit claimant with sixteen years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii). We, therefore, affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

In challenging the administrative law judge's denial of benefits, claimant contends that Dr. Baker's opinion is well reasoned and documented, and that it is sufficient for "invoking the presumption of total disability." Claimant's Brief at 6. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. However, the *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to 20 C.F.R. Part 718, the Part 727 regulations are not relevant.[2]

Addressing the administrative law judge's weighing of the medical opinion evidence, claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. In particular, claimant contends that the non-qualifying nature of the pulmonary function studies relied upon by Dr. Baker does not establish the absence of a respiratory impairment. Claimant's Brief at 7. Claimant also argues that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Dr. Baker's opinion of total disability and did not consider claimant's age, education or work experience in conjunction with his assessment that claimant was not totally disabled, citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). Claimant's Brief at 7-8. Lastly, claimant contends that since pneumoconiosis is a progressive and irreversible disease, claimant's pneumoconiosis has worsened, and that such worsening would adversely affect his ability to perform his usual coal mine employment. Claimant's Brief at 8-9. These contentions are without merit.

With respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment with the FEV1 and vital capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 15. Dr. Baker then stated that:

Patient has a second impairment based on Section 5.8, Page 106,

[2] Even assuming the applicability of the 20 C.F.R. Part 727 regulations, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the interim presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

> Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 15.

The administrative law judge determined that Dr. Baker's opinion does not support a finding of total disability under Section 718.204(b)(2)(iv), as the doctor "does not adequately diagnose a totally disabling respiratory impairment." Decision and Order at 14. We affirm this finding as it is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker did not render a diagnosis of a totally disabling respiratory or pulmonary impairment, as Dr. Baker's report does not include an assessment of claimant's physical limitations nor did he diagnose an impairment which would prevent claimant from performing his usual coal mine employment.[3] Director's Exhibit 15; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). The administrative law judge also properly determined that Dr. Baker's statement that claimant should avoid further coal dust exposure does not constitute a diagnosis of total respiratory or pulmonary disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Furthermore, contrary to claimant' assertion, the administrative law judge did not err by failing to compare the exertional requirements of claimant's coal mine employment with claimant's physical limitations. *Cornett*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc); see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). As indicated above, Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment. Director's Exhibit 15. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under Part C of the Act.[4] *See* 20 C.F.R. §718.204;

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[3] As the Director notes, the *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class 1 impairment as involving no impairment to the whole person. Director's Response Brief at 2 n.4.

[4] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did

Ramey v. Kentland-Elkhorn Coal Corp., 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987).

In weighing the remainder of the medical opinion evidence regarding total disability, the administrative law judge accorded greater weight to the opinions of Drs. Dahhan and Fino, that claimant has no respiratory impairment, as he found these opinions well reasoned and documented as they are supported by the objective evidence of record. Decision and Order at 14; Director's Exhibit 16; Employer's Exhibit 4. The administrative law judge also accorded greater weight to the opinion of Dr. Hussain, that while claimant had a moderate impairment, he retained the respiratory capacity to perform the work of a coal miner, as it is supported by the objective of record. Decision and Order at 13-14; Director's Exhibit 13. As claimant does not allege any specific error in these findings, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988), we affirm the administrative law judge's decision to accord greater weight to the opinions of Drs. Dahhan Fino and Hussain. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983). Therefore, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence.[5] Decision and Order at 9-11; *see Fields*,10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

In light of our affirmance of the administrative law judge's finding that claimant has failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv), we reject claimant's contention that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant

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not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

[5] We reject claimant's argument that "because pneumoconiosis is proven to be a progressive and irreversible disease" it can be concluded that his condition has worsened and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

contends that the administrative law judge discredited Dr. Hussain's opinion because he concluded that Dr. Hussain's diagnosis of pneumoconiosis was merely a restatement of an x-ray interpretation. Claimant's Brief at 5. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform his pulmonary examination. Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a moderate impairment. Director's Exhibit 13. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. *Id*.

While the administrative law judge found Dr. Hussain's diagnosis of pneumoconiosis is not supported by its documentation, he did not discredit Dr. Hussain's opinion as devoid of any weight at all with respect to the issue of pneumoconiosis, but rather, credited the opinions of Drs. Dahhan and Fino, that claimant does not suffer from pneumoconiosis, as well-reasoned and well-documented. Decision and Order at 10-11; *see generally Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992). Moreover, the administrative law judge credited Dr. Hussain's opinion with respect to the issue of total disability. The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require him to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Hussain's opinion lacks credibility, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.

Since claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 20 C.F.R. §718.204(b)(2),[6] a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits in this miner's claim is precluded. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[6] In light of our affirmance of the administrative law judge's finding that the medical evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement, we decline to address claimant's contentions regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §718.202(a). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *see also 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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JUDITH S. BOGGS
Administrative Appeals Judge