BRB No. 05-0293 BLA

JOHN L. BOGGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/28/2005
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	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-6211) of Administrative Law Judge Joseph E. Kane denying benefits 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). This case involves a claim filed on November 5, 2001. After crediting claimant with eighteen years of coal mine employment, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that although the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the medical evidence was insufficient to establish total

disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant alleges further that the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits and also asserts that he met his obligation to provide claimant with a complete and credible pulmonary evaluation and 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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 considering the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant contends that the administrative law judge erred in finding that the medical opinions of Drs. Baker and Chaney were insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). While Drs. Baker and Chaney opined that claimant was totally disabled, Dr. Hussain opined that claimant was not totally disabled. Decision and Order at 4-5, 8-9; Director's Exhibits 12-14. Although the administrative law judge found that Dr. Baker's opinion,[2] was well documented, the administrative law

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

[2] Dr. Baker opined that:

judge also found that it was not well supported and not entitled to "significant probative weight," and was thus insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 8-9. With respect to Dr. Chaney's opinion, the administrative law judge attributed "no weight" to the report because while the doctor found that claimant was "totally disabled for any future employment," he did not attribute the disability to "any of the numerous physical and mental conditions" he detailed, and performed "no testing for pulmonary impairment, nor did he mention it." Decision and Order at 8. The administrative law judge next found that the contrary opinion of Dr. Hussain[3] was "well reasoned and well documented" and entitled to "significant weight" regarding whether claimant was totally disabled pursuant to Section 718.204(b)(2)(iv). Decision and Order at 8. The administrative law judge, therefore, found that claimant failed to establish, by a preponderance of the medical opinion evidence, total disability pursuant to Section 718.204(b)(2)(iv). *Id.*

Claimant's contention that the administrative law judge erred in finding that the opinions of Drs. Baker and Chaney were insufficient to establish total disability is without merit. The administrative law judge correctly discredited Dr. Chaney's opinion since the doctor did not state an explicit opinion regarding whether claimant suffered from a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204;

> Patient has a Class 2 impairment with the FEV1 between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.
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> Patient has a second impairment based on the presence of pneumoconiosis, based on Section 5.8, Page 106, Chapter Five, Guides to 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 occupation.

Decision and Order at 5, 8-9; Director's Exhibit 14.

[3] The administrative law judge stated that "Dr. Hussain finds no respiratory impairment whatsoever." Decision and Order at 5, 8; Director's Exhibit 12. The administrative law judge noted that Dr. Hussain conducted "extensive testing, together with a complete physical examination and appropriate histories." *Id.*

Decision and Order at 8. Moreover, the administrative law judge permissibly found that Dr. Baker's diagnosis of a "Class 2 impairment" was insufficient to support a finding of total disability because the doctor failed to explain the meaning of such a diagnosis in light of the nonqualifying pulmonary function study, which showed a "mild obstructive ventilatory defect." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 8; Director's Exhibit 14. In addition, the administrative law judge noted that Dr. Baker opined that persons who develop pneumoconiosis should limit further exposure to coal dust. Decision and Order at 8-9. The administrative law judge correctly found, however, that since a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion was also insufficient to support a finding of total disability. *Id.*

Additionally, claimant contends that the administrative law judge erred in failing to compare claimant's usual coal mine work with Dr. Baker's "Class 2" impairment rating. Claimant's Brief at 8. Contrary to claimant's contention,[4] the administrative law judge found that Dr. Baker's impairment rating was not credible because it was unexplained. *Clark*, 12 BLR 1-149. Under those circumstances, it was unnecessary for the administrative law judge to consider claimant's exertional job requirements. Having permissibly found that the preponderance of the medical opinion evidence does not support a finding of total pulmonary disability, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[5] Accordingly, we affirm the administrative law

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[4] Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant asserts that the administrative law judge erred in failing to mention his age, education, or work experience in conjunction with the administrative law judge's assessment that the claimant was not totally disabled. Claimant's Brief at 5. Claimant's age, education, and work experience are relevant to establishing total respiratory disability at 20 C.F.R. Part 410. Because claimant filed his claim subsequent to March 31, 1980, however, the provisions of 20 C.F.R. Part 718, rather than 20 C.F.R. Part 410, are to be applied. 20 C.F.R. §718.2; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

[5] Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. These factors are relevant in determining whether claimant can perform comparable and gainful employment, not whether he can perform his usual coal mine employment. *White v. New White Coal Compay, Inc.*, 23 BLR 1-1 (2004); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-87 (1988).

judge's finding that claimant failed to demonstrate total respiratory disability by the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(iv); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant next contends that because the administrative law judge did not credit Dr. Hussain's April 27, 2001 opinion provided by DOL, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds, acknowledging that he must provide a medical opinion that is credible. Director's Brief at 2. The Director further notes that although the Department-sponsored evaluation report must be credible, there is no requirement that the report of the Department-sponsored evaluation be dispositive.[6] *Id.* The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 12. The administrative law judge did not find, nor does claimant allege, that Dr. Hussain's report was incomplete from a medical standpoint.[7] Claimant asserts, instead, that the administrative law judge

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Claimant also asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 3. Claimant has not identified any presumption of total disability that is applicable in this case.

[6] The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

[7] In discussing Dr. Hussain's report, the administrative law judge stated in pertinent part:

> Imtiaz Hussain, M.D., whose credentials are not provided, submitted a report of a consultative medical examination of the claimant, dated January 23, 2002. (DX 12). He obtained a social history and coal mine

failed to take into account the fact that the opinion of Dr. Hussain was contrary to the remaining medical evidence of record and thus renders Dr. Hussain's report suspect, necessitating remand for the administrative law judge to ascertain whether Dr. Hussain's report is credible and, if not, to determine if claimant was provided a complete and credible pulmonary evaluation, as required by the Act. Claimant's Brief at 4.

With respect to the issue of total disability, the administrative law judge did not find that Dr. Hussain's opinion was incomplete or lacking credibility. Rather, the administrative law judge described Dr. Hussain's opinion as supported by the objective evidence and determined that because Dr. Hussain explicitly indicated that claimant has no respiratory impairment whatsoever his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 8; Director's Exhibit 12. Based upon these determinations, which claimant has not challenged, the administrative law judge found that Dr. Hussain's opinion regarding total disability--the element of entitlement upon which the administrative law judge based the denial of benefits--was complete and credible. In light of this fact, remand to the district director is not required. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 at 1-113 (1989); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988); *Short v. Westmoreland*

> employment history (eighteen years), as well as medical and hospitalization histories and current symptoms (daily sputum production, wheezing, dyspnea and cough), a family history and a review of systems. *Id.* Mr. Boggs has no history of smoking. Dr. Hussain conducted chest x-rays, pulmonary function studies and arterial blood gas studies and performed a complete physical examination. He found congestive heart failure, mild airway obstruction, and mild resting hypoxemia. He further determined that claimant has no occupational lung disease caused by his coal mine employment and no pulmonary impairment.

Decision and Order at 4-5; Director's Exhibit 12.

Coal Co., 10 BLR 1-127 (1987). Because claimant does not assert any additional error and has not raised any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(b)(2), a necessary element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, and since the administrative law judge's finding that the medical opinions of record are insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) is supported by substantial evidence, the administrative law judge's finding thereunder is affirmed, and we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *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.

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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