BRB No. 05-0294 BLA

JAMES L. ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 07/27/2005
	)	
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.), for claimant.

Sarah M. Hurley (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 – Denying Benefits (03-BLA-6194) of Administrative Law Judge Joseph E. Kane denying benefits on a subsequent 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).[1] The administrative law judge credited claimant with twenty-seven years of coal mine employment and found the

[1] Claimant's first claim, filed on September 6, 1991, was denied because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. *Asher v. Director, OWCP*, BRB No. 96-0833 BLA (Nov. 22, 1996)(unpub.). Claimant filed his current application for benefits on November 26, 2001. Director's Exhibit 3.

existence of pneumoconiosis established based on stipulations by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinions pursuant to Section 718.204(b)(2)(iv).[2] The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 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, 718.202, 718.203, 718.204. Failure to establish 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, the arguments raised on appeal 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. The administrative law judge properly denied benefits based on a finding that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27.

Claimant first contends that the administrative law judge erred in discrediting Dr. Baker's opinion.[3] We disagree. The administrative law judge permissibly found that Dr.

[2] The administrative law judge's findings that claimant has not established total disability pursuant to 20 C.F.R. §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).

[3] Dr. Baker examined claimant on October 26, 2002 and opined that claimant suffers from coalworkers' pneumoconiosis, category 1/1 on the basis of abnormal x-ray and significant history of coal dust exposure. Dr. Baker also diagnosed chronic bronchitis on the basis of history. Dr. Baker opined that the results of claimant's pulmonary function and blood gas tests were normal and that claimant suffered from a

Baker failed to justify his diagnosis of total disability in light of the non-qualifying pulmonary function and blood gas studies he performed. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Moreover, Dr. Baker's opinion that claimant's pneumoconiosis renders him 100% occupationally disabled for working in any type of dusty occupation amounts to no more than a recommendation against further exposure to coal mine dust and is insufficient to establish total pulmonary or respiratory disability under the Act. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Claimant next contends that the administrative law judge should have considered the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Baker's opinion. Contrary to claimant's suggestion, Dr. Baker opined that claimant suffered from a Class I impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, which the administrative law judge properly determined was essentially a diagnosis of no impairment. Decision and Order at 6; *see Vargo v. Valley Camp Coal*, 7 BLR 1-901, 1-903 n.1 (1985). The administrative law judge was not required to compare the assessment of no impairment with the exertional requirements of claimant's usual coal mine work. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We therefore reject claimant's allegation of error.

Claimant also contends that the administrative law judge erred by relying on Dr. Hussain's opinion that claimant is not totally disabled because the physician did not diagnose pneumoconiosis. Claimant contends that it is therefore necessary to remand this case for the administrative law judge to determine whether Dr. Hussain's opinion is credible and thus whether claimant was provided a complete, credible pulmonary evaluation by the Department of Labor (DOL). This contention is without merit.

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 issue of whether

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Class I impairment. Dr. Baker also stated that "With the presence of pneumoconiosis, the patient has a second impairment, based on Section 5.8, Page 106, 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 19 at 3.

the Director has met this duty may arise 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).

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. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge accepted Dr. Hussain's opinion that claimant has "No Impairment," finding it to be well-documented and well-reasoned. Decision and Order at 5; Director's Exhibit 11 at 5. Because Dr. Hussain's opinion was complete and the administrative law judge did not find that it lacked any credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Claimant next argues that the administrative law judge was required to consider claimant's age, education, and work experience in determining whether claimant established that he is totally disabled, *citing Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). These factors, however, are not relevant to making disability determinations under Part C of the Act. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 (2004).

Lastly, claimant argues that, because pneumoconiosis is a progressive and irreversible disease, it can be concluded that claimant's pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected claimant's ability to perform his usual coal mine employment. We reject claimant's contention because an administrative law judge's finding as to the presence of total disability must be based solely on the medical evidence in the record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8.

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. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish a

totally disabling respiratory impairment as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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