BRB No. 06-0950 BLA

L.L. Claimant-Petitioner	)	
v.	)	DATE ISSUED: 07/27/2007
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 (05-BLA-5590) of Administrative Law Judge Adele Higgins Odegard 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). The administrative law judge credited claimant with twenty-one years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on January 12, 2004, pursuant to the

regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge indicated that the Black Lung Disability Trust Fund would be responsible for any benefits awarded to claimant, as Blue Diamond Coal Company is no longer responsible for the payment of claims due to its bankruptcy. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge determined, however, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. The Director has responded in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation and to affirm the denial of benefits.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[2] The administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203(b) and pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The record contains the medical opinions of Drs. Simpao, Baker and Rasmussen. Dr. Simpao examined claimant at the request of the Department of Labor on February 5, 2004 and obtained a nonqualifying pulmonary function study and a nonqualifying blood gas study.[3] Dr. Simpao indicated that claimant's pulmonary function study results could have been affected by his "fair" level of cooperation and effort. Director's Exhibit 12. Dr. Simpao concluded that claimant has a moderate degree of obstructive airway disease and a moderate impairment. *Id*. Dr. Baker submitted a report dated March 17, 2005, in which he diagnosed both clinical and legal pneumoconiosis, but did not offer an opinion as to whether claimant suffers from a totally disabling respiratory or pulmonary impairment. Claimant's Exhibit 1. Based upon his examination of claimant on June 26, 2005, Dr. Rasmussen stated that claimant has "a moderate loss of lung function" that rendered claimant incapable of performing his usual coal mine employment, which required "considerable heavy labor and some very heavy manual labor." Director's Exhibit 27.

The administrative law judge gave little weight to Dr. Simpao's opinion, as the doctor did not set forth the rationale underlying his diagnosis of a moderate impairment. Decision and Order at 10. The administrative law judge rejected Dr. Baker's opinion on the ground that Dr. Baker did not address the issue of total disability. *Id*. With respect to Dr. Rasmussen's opinion, the administrative law judge determined that it constituted a reasoned medical judgment regarding claimant's ability to do heavy manual labor, but did not support a finding of total disability because Dr. Rasmussen did not have an accurate understanding of the nature of claimant's usual coal mine employment. *Id*. at 11. The administrative law judge concluded, therefore, that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in rejecting Dr. Rasmussen's "well reasoned and well documented" opinion that claimant does not retain the pulmonary capacity to perform his last coal mine job. Claimant's Brief at 3. Claimant further argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work to the assessments of claimant's respiratory impairment proffered by Drs. Rasmussen and Simpao. These contentions are without merit.

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[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set forth in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

Contrary to claimant's assertion, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Rasmussen's opinion was insufficient to establish total disability under Section 718.204(b)(2)(iv) because it was based upon an inaccurate understanding of the nature of claimant's last coal mine work. Claimant bears the burden of establishing the exertional requirements of his usual coal mine employment. *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). In the present case, the administrative law judge noted that claimant reported in conjunction with his application for benefits that during his last three years as a miner, he worked as a scoop operator. Decision and Order at 11; Director's Exhibit 4. The administrative law judge also noted that in response to the question on Form CM-911, regarding the amount of physical activity that his last mining job required, claimant indicated that it involved sitting eight to twelve hours per day, and that claimant did not provide any further information regarding whether the job required crawling, lifting, standing, or carrying. *Id*. With respect to claimant's hearing testimony, the administrative law judge stated that claimant testified at length about the extent to which he was exposed to coal dust, but did not describe the specific duties that he was required to perform during his last year of coal mine employment and did not detail the exertional requirements of his last coal mine job.[4] Decision and Order at 11; Hearing Transcript at 12, 15. Based upon this evidence, the administrative law judge rationally concluded that Dr. Rasmussen's description of claimant's "rigorous duties" as an underground scoop *and* shuttle operator was contradicted by the other evidence of record and, therefore, his opinion, that claimant cannot perform heavy manual labor, is insufficient to establish total disability in light of the actual exertional requirements of claimant's usual coal mine employment.[5] *Cornett*

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[4] Claimant maintains that because the relevant forms and his hearing testimony were apparently lacking sufficient detail regarding the nature of his usual coal mine employment, this case should be remanded so that Dr. Rasmussen and the administrative law judge can be provided with information regarding the exertional requirements of claimant's last coal mine job. Claimant's Brief at 5. Because it was claimant's obligation to ensure that he submitted adequate information on this issue, we reject claimant's argument. *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

[5] Claimant's assertion that Dr. Rasmussen's opinion is sufficient to invoke the presumption of total disability also has no merit. 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. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations, and the presumptions set forth therein, are not applicable in this case. Moreover, even if the Part 727 regulations applied, the United States Supreme Court has held that all evidence relevant to a

v. Benham Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); Decision and Order at 11.

The administrative law judge also acted within her discretion as fact-finder in determining that Dr. Simpao's opinion was insufficient to establish total disability. The administrative law judge reasonably accorded "little weight" to Dr. Simpao's statement that claimant had a "moderate impairment" because he failed to identify the basis for his diagnosis. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-113 (6th Cir. 1995); Decision and Order at 10. Because the administrative law judge provided a valid rationale for discrediting Dr. Simpao's diagnosis of a moderate impairment, he was not required to compare Dr. Simpao's assessment with the exertional requirements of claimant's last coal mine job. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability under Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence.

Next, claimant contends that because the administrative law judge found that "Dr. Rasmussen's conclusions concerning the issue of disability are suspect," the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Claimant's Brief at 5. Claimant requests, therefore, that this case be remanded to the district director so that he can receive another pulmonary evaluation. In light of the fact that Dr. Simpao, rather than Dr. Rasmussen performed the pulmonary evaluation provided by the Department of Labor, any alleged deficiencies in Dr. Rasmussen's examination of claimant do not implicate the Director's obligation under the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*).

Moreover, as the Director maintains, Dr. Simpao's examination constituted a complete pulmonary evaluation. Dr. Simpao examined claimant on February 5, 2004 and obtained a chest x-ray, pulmonary function study, arterial blood gas study, EKG, and claimant's work and medical histories. Director's Exhibit 12. The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's examination was incomplete. To the contrary, the administrative law judge gave some weight to Dr. Simpao's opinion and, as the Director observes, rationally determined that even if fully

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particular method of invocation must be weighed by the administrative law judge before the 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).

credited, diagnoses of a moderate impairment, such as those made by Drs. Simpao and Rasmussen, do not support a finding of total disability in light of the exertional requirements of claimant's usual coal mine job. Decision and Order at 10, 11. Because Dr. Simpao's report included the requisite testing, addressed the necessary elements of entitlement, and was accorded some weight by the administrative law judge, the Director has provided claimant with a credible evaluation on the issue of total disability, the dispositive issue in this case. We decline, therefore, to remand this case as requested by claimant.[6] *Hodges*, 18 BLR at 1-89-90.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, we affirm the administrative law judge's denial of benefits.

[6] *See Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.)(a report in which the physician addresses the essential elements of entitlement may satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation).

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