BRB No. 02-0707 BLA

ROBERT WAYNE BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
IKERD BANDY COMPANY, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision of

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Acting 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (01-BLA-0935) of Administrative Law Judge Robert L. Hillyard 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).[1] Claimant also requests review of the Board's Order issued on September 25, 2002, denying claimant's motion to withdraw his claim. The administrative law judge credited claimant with twenty-three years and three months of coal mine employment, and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge denied benefits.

Claimant filed a Notice of Appeal with the Board on July 12, 2002, and subsequently filed a Motion for Remand in Order to Voluntarily Withdraw Claim, wherein claimant indicated his desire to withdraw his claim, as he believed it would be in his best interest to file a claim for benefits under the amended regulations. In an Order dated September 25, 2002, the Board held that "[s]ince there has been a final decision by an adjudication officer in the instant case, the provisions of Section 725.306 are not applicable." Board's Order dated September 25, 2002 at 2. Consequently, the Board denied claimant's request for withdrawal.

On appeal, claimant asserts that the administrative law judge erred in finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). In addition, claimant asserts that the Board erred by failing to grant claimant's motion to withdraw. Employer/carrier has not submitted a brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, addressing only claimant's challenge to the Board's denial of claimant's motion to withdraw, and urges the Board to reject claimant's request to revisit the issue.[2]

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the administrative law judge's length of coal mine employment finding, and his finding that claimant has not established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

As a preliminary matter, we consider claimant's challenge to the Board's Order denying claimant's request for withdrawal of his claim. We decline to address the merits of claimant's assertion that the Board erred by denying claimant's motion to withdraw his claim. The Board reviews the findings of fact and conclusions of law "on which the decision or order appealed from was based." 20 C.F.R. §802.301. Claimant's argument that the Board erred in denying his request for withdrawal of his claim does not address a finding of the administrative law judge, but rather requests review of an Order issued by the Board. Moreover, if claimant intended that his arguments be construed as a request for reconsideration of the Board's September 25, 2002 Order denying claimant's request for withdrawal of his claim, we deny this request as untimely. Claimant's Petition for Review and brief, wherein he alleges error by the Board in denying claimant's request for withdrawal of his claim, was dated November 16, 2002 (and was received by the Board on December 2, 2002), more than thirty days after the issuance of the Board's Order. 20 C.F.R. §802.407.

With respect to the administrative law judge's findings pursuant to Section 718.204(b), claimant asserts that the medical opinion evidence is sufficient to establish that he is totally disabled. Claimant notes that Dr. Baker's opinion supports claimant's burden of establishing total disability and claimant contends that a single medical opinion may be sufficient to invoke the presumption of total disability. Claimant argues that Dr. Baker's opinion is well documented and reasoned, and contends that the administrative law judge erred in rejecting Dr. Baker's opinion because it was based on the results of a non-qualifying pulmonary function study. Claimant also asserts that the administrative law judge erred by not comparing the exertional requirements of claimant's usual coal mine employment with the medical opinions assessing disability, and further contends that the administrative law judge should have considered claimant's age, education and work experience in determining claimant's ability to perform comparable and gainful employment. Finally, 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.

At Section 718.204(b), the administrative law judge detailed the medical opinion evidence and noted that Drs. Hansbrough and Jarboe opined that claimant is not disabled,[3] but that Dr. Baker concluded that claimant has an impairment, Class 1, based on the pulmonary function study results.[4] The administrative law judge stated "Dr. Baker did not explain why the normal results noted on pulmonary function study and arterial blood gas study result in an impairment." Decision and Order at 9. Therefore, the administrative law judge found Dr. Baker's opinion regarding claimant's pulmonary capacity outweighed by the "clearer and well-supported conclusions of Drs. Hansbrough and Jarboe." *Id*.

[3] Dr. Jarboe examined claimant on March 6, 2001, and the record contains both his medical report and his deposition. Dr. Jarboe opined that claimant has no significant respiratory impairment, and that he "fully retains the functional respiratory capacity to do his last coal mining job of bossing on a strip mine…." Employer's Exhibit 2. Dr. Hansbrough examined claimant on November 14, 2000, and stated that claimant has no pulmonary impairment. In addition, Dr. Hansbrough indicated that claimant has the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibit 9.

[4] Dr. Baker examined claimant on November 10, 2001, and opined that claimant has a Class 1 impairment with his FEV_1 and vital capacity greater than 80% of predicted. Dr. Baker also stated:

> 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 occupation.

Claimant's Exhibit 1.

We affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge properly accorded greater weight to the opinions of Drs. Jarboe and Hansbrough, which the administrative law judge reasonably found were the better supported opinions of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). We reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. This analysis is only required in situations where a physician details a claimant's physical limitations but does not provides an opinion regarding the extent of any disability from which the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Moreover, Dr. Hansbrough specifically opined that claimant has no pulmonary impairment, Director's Exhibit 9, and Dr. Jarboe was aware that claimant's last coal mine employment was working as a boss at a strip mine, Employer's Exhibit 2. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, contrary to claimant's assertion, the administrative law judge is not required to consider claimant's age, educational and work experience. These issues are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5]

Inasmuch as we affirm the administrative law judge's finding that the evidence is insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(i)-(iv), one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc), we affirm the administrative law judge's denial of benefits.[6]

[5] Claimant's further asserts 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. We reject claimant's argument, 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).

[6] In view of our affirmance of the administrative law judge's finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), we need not address claimant's challenge to the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge