BRB No. 03-0735 BLA

ELDON CHILDERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/24/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

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

Sarah M. Hurley (Howard 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-5090) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge acknowledged the parties' stipulation and found that claimant was a coal miner within the meaning of the Act for at least twenty years and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge noted the concession by the Director, Office of Workers' Compensation Programs (the Director), that claimant established the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(4), but found that the evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding Dr. Baker's medical opinion insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] Claimant also contends the administrative law judge erred in his analysis of the opinions of Drs. Hussain and Burki in weighing all of the evidence relevant to total disability together.[3] The Director responds, urging remand of the claim for further consideration.[4]

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).

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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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's reference to "Section 718.204(c)(4)" is misplaced. The regulation regarding establishing total disability by a reasoned medical opinion is now contained in 20 C.F.R. §718.204(b)(2)(iv).

[3] We affirm as unchallenged on appeal the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[4] The Director has filed a Motion to Remand in this case to which claimant has not responded. The Board accepts the Director's Motion to Remand as his response brief and herein decides the case on its merits.

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 totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

As a preliminary matter, we note that the Director has submitted "Attachment A" with his Motion to Remand which is a copy of the record of claimant's first claim for benefits that was not included in the record of this claim. It reflects that claimant filed an initial claim for black lung benefits on April 29, 1994. That claim was denied by the district director on October 5, 1994 and November 28, 1994, based on claimant's failure to establish any of the requisite elements of entitlement. Claimant took no further action on that claim. Claimant's second claim, filed on March 15, 2001, is currently on appeal.[5] Decision and Order at 3; Director's Exhibit 2. Thus, this claim is a duplicate claim and is subject to consideration under the regulations at 20 C.F.R. §725.309(d) (2000) in accordance with the standards set forth in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In light of the fact that claimant has now established the existence of pneumoconiosis, an element of entitlement previously adjudicated against him, he has established a material change in conditions pursuant to 20 C.F.R. §725.309(d) as a matter of law. As such, claimant was entitled to a *de novo* review of all of the evidence by the administrative law judge to determine if total disability was established. *Id.*,. Although the administrative law judge reviewed all of the evidence of record submitted in this claim, he only considered evidence obtained since the denial of claimant's previous claim and did not consider and weigh the evidence submitted with the first claim. Claimant does not contest the administrative law judge's failure to weigh this evidence. Since none of the credible previously submitted evidence supports a finding of total disability, we hold that any error by the administrative law judge in failing to weigh this evidence is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[5] On claimant's current application for benefits, Form CM-911, in answer to the question "Have you (or anyone on your behalf) ever filed a claim for Federal Black Lung benefits before?" the "No" box is checked. Director's Exhibit 2.

With respect to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish total disability. The administrative law judge noted that Dr. Baker diagnosed a Class I impairment based on the FEV1 and vital capacity being greater than 80% of predicted as classified in the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*.[6] Decision and Order at 6; Director's Exhibit 9. The administrative law judge permissibly found that Dr. Baker's rationale for diagnosing a totally disabling impairment was insufficient to support a finding of total disability because Dr. Baker merely opined that claimant should limit his further exposure to coal dust. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 6; Director's Exhibit 9. Thus, we affirm the administrative law judge's determination to accord Dr. Baker's opinion little weight on the issue of total disability.

With respect to the administrative law judge's evaluation of the remaining relevant medical opinions on the issue of total disability at Section 718.204(b)(2)(iv), he noted that Dr. Hussain is a board-certified pulmonary specialist who diagnosed a moderate pulmonary impairment which would preclude performance of coal mine work due to impaired effort tolerance and dyspnea. Decision and Order at 6; Director's Exhibit 8. In contrast, the administrative law judge noted that Dr. Burki opined that claimant had no impairment and had the respiratory capacity to perform his former coal mine employment based on normal pulmonary function and blood gas studies. Decision and Order at 6-7; Director's Exhibit 20. The administrative law judge concluded that the opinion of Dr. Hussain outweighed the opinion of Dr. Burki and that total disability was established at Section 718.204(b)(2)(iv). Claimant has not challenged these findings and they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 since the administrative law judge did so in finding total disability based on Dr. Hussain's opinion. Decision and Order at 7. Additionally, we hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant in determining the miner's ability to perform comparable and gainful work, and not in establishing

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[6] *Guides to the Evaluation of Permanent Impairment, Fifth Edition* indicates that a Class 1 assessment for respiratory disorders, using pulmonary function test results describes a 0% impairment. *Id*. Table 512. p.107.

total disability from performing claimant's usual coal mine work pursuant to. 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, we reject claimant's assertion that the administrative law judge erred in failing to conclude that claimant's condition has worsened to the point of being totally disabling since pneumoconiosis is a progressive and irreversible disease in light of his finding at Section 718.204(b)(2)(iv) that total disability was established. Decision and Order at 7.

In weighing the all of the objective evidence together with the medical opinions, however, the administrative law judge found that Dr. Hussain's opinion did not outweigh the sum of the nonqualifying pulmonary function studies and blood gas studies combined with the limited weight of Dr. Burki's opinion. Decision and Order at 7-8. Claimant asserts that the administrative law judge has provided a conflicting evaluation of the evidence. We disagree. The administrative law judge must discuss all of the evidence of record and determine whether the record contains "contrary probative evidence." "Contrary probative evidence" refers to all evidence, medical and otherwise, that is contrary to and probative of the fact to be established by the method used to establish total disability. The administrative law judge must assign the contrary probative evidence, if any, appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, 10 BLR at 1-22; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). In this case, although the administrative law judge found that Dr. Hussain's opinion, standing alone, outweighed Dr. Burki's "poorly reasoned"opinion, the administrative law judge, as fact-finder, could rationally find that the combined weight of all of the contrary probative evidence outweighed the doctor's opinion. As such, the administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(b)(2) and this finding is affirmed.

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 1-26; *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); *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Because claimant failed to establish total

disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *Trent*, 11BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the Director's Motion for Remand is denied and the administrative law judge's Decision and Order - Denial of 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