BRB No. 03-0763 BLA

DANNY EUGENE BRUCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HORIZONS COAL, INCORPORATED	)	DATE ISSUED: 06/29/2004
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, 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 (02-BLA-5297) of Administrative Law Judge Thomas F. Phalen, Jr. 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 credited claimant with twenty-four and one-half years of coal mine employment and adjudicated this 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)(1)-(4). The administrative law judge also found the evidence 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 challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also 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). Employer has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.[2]

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).

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).[3] We disagree. The administrative law judge considered the reports of Drs. Baker and

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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). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

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

[3]Claimant 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 6. However, claimant has not identified any presumption of total disability that is applicable in this case.

Hussain. In a report dated June 19, 2001, Dr. Baker opined that claimant suffers from a Class 1 impairment. Director's Exhibit 7. Dr. Baker also opined that claimant was occupationally disabled from working in the coal mining industry or similar dusty occupations because of the development of pneumoconiosis. *Id*. Dr. Hussain, in a report dated August 10, 2001, opined that claimant suffers from a mild pulmonary impairment. Director's Exhibit 6. Dr. Hussain further opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id*. Based on his weighing of the opinions of Drs. Baker and Hussain, the administrative law judge found the evidence insufficient to establish total disability.

Claimant asserts that the administrative law judge erred in finding that the opinions of Drs. Baker and Hussain are insufficient to establish total disability. Specifically, claimant asserts that the administrative law judge did not consider the exertional requirements of claimant's usual coal mine employment in conjunction with the physical assessments of Drs. Baker and Hussain. Contrary to claimant's assertion, the administrative law judge did consider the exertional demands of claimant's usual coal mine employment as a foreman against Dr. Baker's opinion that claimant suffers from a Class 1 impairment and Dr. Hussain's opinion that claimant suffers from a mild impairment. With regard to the exertional requirements of claimant's usual coal mine employment, the administrative law judge stated, "I have determined that [claimant] was 53 years of age at the time of the hearing, and that his last position was that of mine foreman, which did not require an excessive amount of exertion to perform." Decision and Order at 11.

In considering the opinions of Drs. Baker and Hussain with respect to the issue of total disability, the administrative law judge stated:

> While, between the two, it may be concluded that [claimant] at least may have had a mild pulmonary impairment, I am unable to conclude that the impairment was of sufficient effect to foreclose his last employment as a mine foreman. Neither of them found that [claimant] does not retain the pulmonary capacity to work in that coal mine employment, or in comparable employment.

Id. at 12. Based on his consideration of the exertional requirements of claimant's last coal mine employment as a foreman, the administrative law judge indicated that a mild impairment would not disable claimant. Because Dr. Baker failed to explain the severity of a Class 1 impairment or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, the administrative law judge permissibly found that Dr. Baker's diagnosis of a Class 1 impairment was not more severe than a mild impairment, and thus, was insufficient to support a finding of total disability. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 7. Because a doctor's recommendation against further coal dust

exposure is insufficient to establish a totally disabling respiratory impairment, *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 is also insufficient to support a finding of total disability. Thus, we reject claimant's assertion that the administrative law judge erred in finding that the opinions of Drs. Baker and Hussain are insufficient to establish total disability.[4]

We additionally hold, contrary to claimant's suggestion, 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 only in determining the miner's ability to perform comparable and gainful work, not to establishing total disability from claimant's usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Finally, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Since 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.[5] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v.*

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[4]Claimant asserts that the administrative law judge erred in discrediting Dr. Baker's opinion because it is not reasoned. The administrative law judge indicated that he did not find that Dr. Baker's opinion is reasoned because Dr. Baker failed to provide an adequate explanation for the cause of the impairment. The administrative law judge specifically stated, "[Dr. Baker] did not attribute specific reasons to either of the two causes (coal dust and/or cigarette smoking) other than those set forth herein." Decision and Order at 12. The administrative law judge therefore concluded that "[t]his lessened the weight to be given his determination of an impairment, but did not definitively negate it altogether." *Id*. The issues of disability and disability causation are distinct. *See* 20 C.F.R. §718.204(b)(2) and (c). Nonetheless, since the administrative law judge alternatively considered Dr. Baker's opinion and properly found that it is insufficient to establish total disability, we hold that any error by the administrative law judge in discrediting Dr. Baker's opinion at Section 718.204(b) based on Dr. Baker's failure to provide an adequate explanation for the cause of disability is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]In view of our disposition of this case at 20 C.F.R. §718.204(b)(2), we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(1) and (a)(4). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge