

BRB No. 04-0341 BLA

LONNIE L. STARNES)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN COALS CORPORATION)
)
 and)
)
 HORIZON NATURAL RESOURCES) DATE ISSUED: 06/27/2005
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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:

Claimant¹ appeals the Decision and Order – Denial of Benefits (03-BLA-5166) of Administrative Law Judge Thomas F. Phalen in a miner’s 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 the miner with “at least” twenty-seven years of coal mine employment. Decision and Order at 4. Initially, the administrative law judge found the claim to be timely filed in accordance with 20 C.F.R. §725.308. *Id.* at 3. Applying the regulations pursuant to 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 total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 6-13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and (a)(4). Claimant’s Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. *Id.* at 6-9. Employer² responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge’s denial of benefits because he properly found that claimant failed to establish total respiratory disability. Director’s Brief at 1-2. The Director further contends that the administrative law judge erred in his consideration of the

¹ Claimant is Lonnie L. Starnes, the miner, who filed his claim for benefits on February 14, 2001. Director’s Exhibit 1.

² Employer, Mountain Coals Corporation, dissolved on September 30, 2004 in the Horizon Natural Resources Company’s bankruptcy. The Director, Office of Workers’ Compensation Programs (the Director), previously maintained that any of employer’s liability for any benefits awarded in this claim is secured by a trust, established by employer’s former corporate parents and presently maintained by Foundation Coal Company. On March 8, 2005, the Director and Foundation Coal Company filed a joint motion to hold this case in abeyance because they were attempting to negotiate a settlement addressing the extent of liability, if any, that the Foundation Coal Corporation, or the trust it administers, has in the case. On May 16, 2005, the Director filed a letter withdrawing his status report which implicated Foundation Coal Corporation for any liability in this case. The Director also stated that employer’s counsel will continue to defend this case. Accordingly, in an Order dated June 10, 2005, the Board lifted the abeyance held in this case.

October 25, 2001 x-ray pursuant to Section 718.202(a)(1) and the medical opinion evidence pursuant to Section 718.202(a)(4).³ *Id.* at 2-3.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in rejecting the opinions of Drs. Baker and Hussain. Claimant's Brief at 7-8. Specifically, claimant contends that the administrative law judge erred in failing to mention "claimant's usual coal mine work in conjunction with Drs. Hussain [sic] and Baker's opinions of disability." *Id.* at 8.

The record contains the medical opinions of Dr. Castle, a reviewing physician, and Drs. Dahhan, Baker, and Hussain, examining physicians. Dr. Castle opined that claimant has a very mild degree of airway obstruction, but retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 4. Dr. Dahhan found no evidence of pulmonary disability and that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 19. Dr. Hussain stated that claimant has moderate pulmonary impairment and that claimant has the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 12, 24 at 8, 11. Dr. Baker indicated that claimant has a "Class 1 impairment . . . based on the FEV1 and vital capacity being 80% or greater." Director's Exhibit 13. Dr. Baker further stated that because claimant has developed pneumoconiosis he "should limit further exposure to the

³ We affirm the administrative law judge's finding of "at least" twenty-seven years of coal mine employment, his finding that claimant's claim is timely filed, and his finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

offending agent,” additionally stating: “This would suggest [claimant] is 100% occupationally disabled.” *Id.* At his deposition, Dr. Baker testified that his opinion that claimant is “100% occupationally disabled” is based solely upon his belief that claimant should limit further coal dust exposure in order to prevent progression of pneumoconiosis and that claimant would have the pulmonary ability to perform his usual coal mine employment in a non-dusty environment. Employer's Exhibit 5 at 8-9. Drs. Castle, Dahhan, and Baker all noted that claimant’s coal mine employment included work as a foreman and operating heavy equipment.⁴

In considering the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Baker’s opinion, that claimant should limit further exposure to coal dust to prevent the progression of pneumoconiosis, “is not the equivalent of a finding of total disability,” adding that Dr. Baker testified that claimant retains the pulmonary capacity to perform his usual coal mine employment in a non-dusty work environment. Decision and Order at 12. Because the administrative law judge rationally determined that Dr. Baker’s opinion merely advised claimant to avoid further coal dust exposure, we hold that the administrative law judge reasonably found Dr. Baker’s opinion to be insufficient to establish total disability under Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Furthermore, since Dr. Baker’s opinion is insufficient to establish total disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant’s assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant’s usual coal mine work with Dr. Baker’s assessment of claimant’s impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff’d*, 9 BLR 1-104 (1986)(*en banc*).

The administrative law judge next considered the opinions of Drs. Dahhan, Castle, and Hussain. Decision and Order at 12. The administrative law judge stated that the preponderance of the well-reasoned and well-documented medical opinion evidence establishes that claimant is not totally disabled. Decision and Order at 12. In doing so, the administrative law judge permissibly found the opinions of Drs. Dahhan and Castle to be reasoned and documented, noting that “[t]heir findings are supported by the objective

⁴ Claimant testified that when he last worked in coal mine employment, he was employed as a working foreman which included “loading holes” and running “dozers, dragline, [and] loaders.” Hearing Transcript at 13. The administrative law judge noted that claimant worked “as an above-ground foreman” and his duties “consisted of supervising miners, loading holes, and running dozers, dragline, and loaders.” Decision and Order at 3.

evidence of record, as well as the disability determination of Dr. Hussain.” *Id.*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As previously discussed, the administrative law judge also stated that “Dr. Baker’s opinion does not constitute a finding of total disability.” *Id.* Therefore, the administrative law judge concluded that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Although, as claimant contends, the administrative law judge did not consider the exertional requirements of claimant’s usual coal mine work together with Dr. Hussain’s opinion, we hold that it was unnecessary for him to perform such an analysis because Dr. Hussain ultimately concluded that claimant has the respiratory capacity to perform his coal mine employment or comparable work in a dust-free environment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash*, 9 BLR at 1-51-52. In addition, it is unclear from Dr. Hussain’s report, whether Dr. Hussain was aware of claimant’s last coal mine employment, as required by *Cornett*.⁵ However, unlike in *Cornett*, the administrative law judge, in the instant case, did not rely on Dr. Hussain’s report to find that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Rather, the administrative law judge primarily relied on the opinions of Drs. Dahhan and Castle, noting only that Dr. Hussain’s opinion was not inconsistent with the opinions of Drs. Dahhan and Castle. Decision and Order at 12.

Claimant also 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. Claimant’s Brief at 9. We reject claimant’s argument, as an administrative law judge’s findings must be based solely on the medical evidence contained in the record.⁶ *See* 20 C.F.R. §725.477(b).

⁵ 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, 1-202 (1989)(*en banc*).

⁶ Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant asserts that the administrative law judge erred in failing to mention his age, education, or work experience in conjunction with the administrative law judge’s assessment that claimant was not totally disabled. Claimant’s Brief at 8. Claimant’s age, education, and work experience are relevant to establishing total respiratory disability at 20 C.F.R. Part 410. Because claimant filed his claim subsequent to March 31, 1980, however, the provisions

As claimant has not raised any additional assertions of error by the administrative law judge with respect to 20 C.F.R. §718.204(b)(2)(iv) and his weighing of the medical opinions of record therein, 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), as supported by substantial evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits.⁷ *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

of 20 C.F.R. Part 718, rather than 20 C.F.R. Part 410, are to be applied. 20 C.F.R. §718.2; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-203 (1986).

⁷ In light of the foregoing, it is unnecessary for us to address claimant's assertions regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), as a finding of entitlement is precluded in this case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*)

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge