

BRB No. 04-0762 BLA

HOMER J. COLLETT)
)
 Claimant-Petitioner)
)
 v.)
)
 SHAMROCK COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 06/13/2005
 JAMES RIVER COAL COMPANY)
)
 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant¹ appeals the Decision and Order – Denial of Benefits (03-BLA-5500) of Administrative Law Judge Daniel J. Roketenetz in a miner’s subsequent 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 nineteen years of coal mine employment pursuant to the parties’ stipulation, Hearing Transcript at 8. Decision and Order at 4. Initially, the administrative law judge found claimant’s subsequent claim to be timely filed in accordance with 20 C.F.R. §725.308. *Id.* at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new 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 7-15. Accordingly, benefits were denied.

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 6-8. Claimant further asserts that because the administrative law judge found Dr. Baker’s opinion to be unreasoned and undocumented, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation as required under the Act. *Id.* at 5-6. Lastly, claimant asserts that the administrative law judge erred in allowing employer to submit a total of three medical reports, rather than the two permitted by the regulatory limitations outlined in 20 C.F.R. §725.414. *Id.* at 5. Employer and the Director respond, urging affirmance of the administrative law judge’s 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 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).

¹Claimant is Homer J. Collett, the miner, who filed his second claim for benefits on April 5, 2001. Director's Exhibit 3. Claimant’s first claim for benefits was filed on August 12, 1998 and finally denied on December 9, 1998. Director's Exhibit 1.

²We affirm the administrative law judge’s finding of nineteen years of coal mine employment and his finding that claimant’s subsequent claim is timely filed, 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).

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*).

Claimant's second claim was filed on April 5, 2001, shortly after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Claimant's first claim was denied by a United States Department of Labor claims examiner on December 8, 1998 because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 1.

Because this case involves a subsequent claim, the administrative law judge considered only the newly submitted evidence to determine if one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. *White*, 23 BLR at 1-3. However, because the record as a whole is insufficient to support claimant's burden of establishing total respiratory disability, we affirm the denial of benefits on the merits.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii), because none of the pulmonary function and blood gas studies contained in the record yielded qualifying³ values, claimant has failed to demonstrate total respiratory disability pursuant to these subsections. Director's Exhibits 1, 8, 38; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Similarly, claimant has failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) because the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we hold that claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(b)(2)(iii).

³A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in rejecting Dr. Baker's reports. Claimant's Brief at 7. Specifically, claimant contends that the administrative law judge erred in failing to mention "claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." *Id.* at 7. The record contains the new medical opinions of Drs. Baker, Broudy, Dahhan, and Vuskovich, who all found that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 1, 8, 38; Employer's Exhibits 1, 3, 6. The old medical opinion evidence consists of a 1998 report by Dr. Baker also opining that claimant retains the respiratory capacity to perform his coal mine employment. Director's Exhibit 1. Considering the newly submitted medical opinions of Drs. Baker, Broudy, Dahhan, and Vuskovich, the administrative law judge found these opinions to be insufficient to establish total respiratory disability. Decision and Order at 15.

With regard to Dr. Baker, this physician examined claimant on September 1, 1998 and July 14, 2001. Director's Exhibits 1, 8. In his 1998 report, Dr. Baker found that claimant has a mild pulmonary impairment and concluded that claimant has the respiratory capacity to perform his coal mine employment or comparable work in a dust-free environment. Director's Exhibit 1. Dr. Baker initially noted in his report that claimant's coal mine employment included work as a repairman, electrician, and belt examiner.⁴ *Id.* In 2001, Dr. Baker noted that claimant has a mild impairment and mild to moderate hypoxemia. Director's Exhibit 8. But on a form attached to his 2001 report, Dr. Baker characterized claimant's pulmonary impairment as "no impairment" and concluded that claimant has the respiratory capacity to perform his coal mine employment or comparable work in a dust-free environment. *Id.*

After considering the new medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge stated:

No physician finds that the Claimant is totally disabled. Even Dr. Baker, who finds a mild impairment, specifically finds that the Claimant is able to return to his coal mine employment. Drs. Broudy, Dahhan and Vuskovich find that the Claimant does not have any respiratory impairment and that he retains the pulmonary capacity to perform his coal mine work. Accordingly, total disability has not been established pursuant to Section 718.204.

⁴Claimant testified that when he was last employed in coal mine employment, he worked as a repairman and electrician which required "heavy manual type-work." Hearing Transcript at 13-14. The administrative law judge noted that claimant worked as "a repair electrician," involving "heavy manual labor." Decision and Order at 3.

Decision and Order at 15. Additionally, the administrative law judge outlined Dr. Baker's specific findings, noted above, earlier in his Decision and Order. *Id.* at 10. Although the administrative law judge did not consider the exertional requirements of claimant's usual coal mine work together with Dr. Baker's opinion, we hold that it was unnecessary for him to perform such an analysis because Dr. Baker ultimately concluded that claimant has no pulmonary impairment and that he has the respiratory capacity to perform his coal mine employment or comparable work in a dust-free environment. Director's Exhibits 1, 8. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

Claimant also argues that the Director failed to fulfill his statutory obligation to provide claimant with a credible pulmonary evaluation.⁵ Specifically, claimant asserts that the administrative law judge discredited Dr. Baker's opinion because he found it was not well-reasoned or well-documented. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Baker to perform a pulmonary examination on him. Director's Exhibit 7. Dr. Baker diagnosed pneumoconiosis and opined that claimant suffers from a mild impairment. Director's Exhibits 1, 8. On a form attached to his 2001 report, Dr. Baker characterized claimant's pulmonary impairment as "no impairment." Director's Exhibit 8. Dr. Baker also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibits 1, 8. The administrative law judge gave less weight to Dr. Baker's diagnosis of pneumoconiosis because he found it was not well-reasoned or well-documented since it was only based on an x-ray and coal dust exposure history. However, the administrative law judge did not discredit Dr. Baker's opinion as devoid of any weight at all. See generally *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. See generally *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Baker's opinion lacks credibility, we reject

⁵The Director, Office of Workers' Compensation Programs (the Director), urges the Board to reject claimant's argument that he failed to provide claimant with a complete and credible pulmonary evaluation as required under the Act. Director's Brief at 2-3. Specifically, the Director argues that "[o]nly where the examination provided by the Director is either incomplete or inherently defective (*i.e.*, not entitled to any weight at all) has the Director failed to meet his obligation." *Id.* at 2.

claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

Next, claimant 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 8. 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).

Lastly, claimant contends that the administrative law judge erred in permitting employer to submit medical opinion evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director contends that any error the administrative law judge may have made in accepting one medical opinion in excess of the regulatory limitations outlined in 20 C.F.R. §725.414 is harmless "given the complete lack of any affirmative evidence of total disability." Director's Brief at 2 n.4. Because the administrative law judge permissibly accorded less weight to the only piece of medical evidence that could possibly be supportive of claimant's burden regarding total respiratory disability, any error in permitting employer to submit medical opinion evidence in excess of the evidentiary limitations set forth at Section 725.414 is harmless.⁷ *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young*, 11 BLR at 1-150; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the medical opinion evidence is insufficient to establish

⁶Citing *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 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).

⁷If the administrative law judge had only considered two of the three medical opinions submitted by employer, he still would have found the evidence insufficient to demonstrate total respiratory disability because claimant failed to submit evidence establishing this element of entitlement.

total respiratory disability, we hold that claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *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.⁸ *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

⁸In 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*).

HALL, Administrative Appeals Judge, dissenting:

Because the administrative law judge determined that Dr. Baker's opinion regarding the existence of pneumoconiosis was "neither well-reasoned nor well-documented," I would hold that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Consequently, I would vacate the administrative law judge's denial of benefits and remand this case to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of all of the evidence of record.

BETTY JEAN HALL
Administrative Appeals Judge