BRB No. 05-0184 BLA

CHARLES R. JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	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-Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., Kentucky, for employer.

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-6126) of Administrative Law Judge Rudolf L. Jansen 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] Based upon a review of the record, the administrative law judge accepted the parties' stipulation and credited claimant with thirteen years of coal mine employment. Decision and Order-Denying Benefits at 3; Hearing Transcript 8. The administrative law judge further found that the evidence failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis or total disability under Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv). Claimant further argues that the Director, Office of Workers' Compensation Programs (the Director), failed to satisfy his obligation under Section 413(b) of the Act, 30 U.S.C. §923(b), and 20 C.F.R. §725.406(a), to provide claimant with a complete and credible pulmonary evaluation. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director has filed a limited response stating that he discharged his obligation to provide claimant with a complete and credible pulmonary evaluation.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

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

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[1] Claimant filed his claim for benefits with the Department of Labor on July 2, 2001. Director's Exhibit 2. His claim was denied by the district director on March 25, 2003. Director's Exhibit 38. Claimant requested a formal hearing before the Office of Administrative Law Judges.

[2] We affirm as unchallenged the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), 725.414, and his finding crediting claimant with thirteen years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Under Section 718.204(b)(2)(iv), claimant alleges that Dr. Baker's opinion that, due to claimant's "class II breathing impairment which was the result of coal dust exposure, the claimant was 100% occupationally disabled," is sufficient for "invoking the presumption of total disability." Claimant's Brief at 6. Contrary to claimant's allegation, claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-1171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Director's Exhibit 11. Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *Trent*, 11 BLR at 1-27.

Claimant also contends that the administrative law judge should not have rejected Dr. Baker's well reasoned and well documented opinion. Claimant's brief at 7. The administrative law judge found Dr. Baker's opinion did not establish total disability.[3] Decision and Order – Denying Benefits at 12. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's authority. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded to this evidence when deciding whether a party has met its burden of proof. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Claimant further argues that taking into consideration claimant's usual coal mine employment and Dr. Baker's opinion, it is rational to conclude that claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Claimant's Brief

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[3] Dr. Baker diagnosed coal workers' pneumoconiosis based on an abnormal x-ray and a significant history of dust exposure. Dr. Baker further found that claimant has a Class II impairment with the FEV1 and vital capacity less than 80% of predicted based upon "*Guides to the Evaluation of Permanent Impairment,*" which corresponds to 10%-25% impairment of the whole person. *Guides to the Evaluation of Permanent Impairment* 107, Table 5-12 (5th ed. 2001). Dr. Baker found a "second impairment based on Section 5.8, page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*," which provides that persons who develop pneumoconiosis should limit further exposure to the offending agent. Dr. Baker observed that "this would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 11.

at 8. Claimant specifically states that the administrative law judge made no mention of claimant's usual coal mine employment in conjunction with Dr. Baker's opinion of disability. *Id.* Although Dr. Baker listed the jobs involved in claimant's employment history, he did not mention the physical limitations specific to claimant's coal mine work for the administrative law judge to infer from his opinion that claimant was totally disabled under Section 718.204(b)(2)(iv).[4] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). In addition, Dr. Baker's second impairment statement, that claimant should limit further exposure to coal dust, is not equivalent to a finding of total disability. Director's Exhibit 11; Decision and Order at 8; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 897 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Lafferty v. Cannelton Industries, Inc.* 12 BLR 1-190 (1989).

Claimant also argues that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 9. Contrary to claimant's contention, there is no evidence in the record to support this allegation. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[5]

Claimant also contends that because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was found unreasoned on the issue of pneumoconiosis "the Director has failed to provide the claimant with a complete, credible

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[4] Dr. Baker stated that claimant worked seventeen to eighteen years in the coal mining industry, about half underground and half on the surface. Dr. Baker stated that underground, claimant cut and blasted coal, operated a scoop, and did general labor. Dr. Baker recorded that on the surface, claimant ran an auger and operated an oiler. Dr. Baker also noted that claimant stated that he can walk up to one-fourth of a mile on level ground before he has to stop and catch his breath. Director's Exhibit 11.

[5] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience, and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which we did not reach in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1)(i), (ii).

pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that "as the [administrative law judge] did not discredit Dr. Hussain's opinion on the issue of disability, any defect in Dr. Hussain's pneumoconiosis diagnosis would be harmless. Director's Response Letter at 2.

The Act requires that "[e]ach miner who files a claim…be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C.§923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F. 2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

With respect to the issue of total disability, the administrative law judge did not find that Dr. Hussain's opinion was incomplete or lacking credibility. The administrative law judge found that Dr. Hussain explicitly indicated that claimant is able to perform his coal mine work, and therefore his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order – Denying Benefits at 12. Thus, Dr. Hussain's opinion regarding total disability one of the elements of entitlement upon which the administrative law judge based the denial of benefits was complete and credible. In light of this fact, remand to the district director is not required. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-88 n.3; *Cline*, 917 F.2d at 11, 14 BLR at 2-105; *Newman*, 745 F.2d at 1166, 7 BLR at 2-31.

Because claimant makes no other specific challenge to the administrative law judge's credibility determinations with respect to the medical opinion evidence of Drs. Baker and Hussain, we affirm the administrative law judge's finding that claimant failed to establish that he suffers from a totally disabling respiratory impairment under Section 718.204(b)(2) as it is supported by the non-qualifying pulmonary function and blood gas studies and the medical opinion evidence. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We decline to reach the arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a)(4), in light of our affirmance of total disability on the merits. *See* 20 C.F.R. §718.204(b)(2); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order-Denying 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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JUDITH S. BOGGS
Administrative Appeals Judge