BRB No. 05-0187 BLA

STAFFORD SMALLWOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
IKERD BANDY COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 06/29/2005
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-5420) of Administrative Law Judge Rudolf L. Jansen on a subsequent[1] claim filed on June 25, 2001 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 noted that at the hearing the parties stipulated that claimant worked for thirty-one years in the coal mine industry. Decision and Order-Denying Benefits at 3; Hearing Transcript 8. Based upon a review of the record, the administrative law judge accepted the parties' stipulation and credited claimant with thirty-one years of coal mine employment. The administrative law judge further found that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2), the elements of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge denied benefits pursuant to 20 C.F.R. §725.309(d).

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 argues further 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 urging the Board to reject claimant's argument that a remand is required based upon Section 413(b) of the Act.[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).

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[1] Claimant's prior claim was filed on August 6, 1997 and was denied by the district director on December 1, 1997. Director's Exhibit 1.

[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 thirty-one years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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; *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 claimant is "100% occupationally disabled" is well reasoned and documented, and is sufficient for "invoking the presumption of total disability." Claimant's Brief at 6. Claimant asserts that in addition to claimant's work history, Dr. Baker based his opinion on claimant's medical history, x-rays, physical examination, pulmonary function and blood gas studies. Claimant notes that the Board has previously held that it is error to reject a medical opinion solely because it is based on non-conforming pulmonary function studies. Claimant's Brief at 7. Claimant also argues that an administrative law judge would be in error in finding a claimant able to perform his usual coal mine work without considering the exertional requirements of that work. Claimant's Brief at 7-8. Claimant contends that the administrative law judge made no mention of claimant's usual coal mine work in analyzing Dr. Baker's opinion of total disability. *Id.* Citing *Bentley v. Director, OWCP,* 7 BLR 1-612 (1984), claimant argues that the administrative law judge erred in failing to consider claimant's age or work experience when finding that claimant is not totally disabled. Claimant's Brief at 8.

Claimant's contentions under Section 718.204(b)(2)(iv) are without merit. The administrative law judge acknowledged that Dr. Baker's opinion recorded claimant's occupational and smoking histories and the results of claimant's examination, x-ray, pulmonary function, and blood gas studies. Decision and Order at 7; Director's Exhibit 26. The administrative law judge rationally determined, however, that Dr. Baker did not opine that claimant is totally disabled, as he testified on November 15, 2001 that claimant has no impairment and could return to his usual coal mine work, assuming that it required repetitive lifting, bending, stooping, pushing and pulling on an eight to ten hour basis. *Id.*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985) (*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*); Director's Exhibit 26 at 9-11. The administrative law judge also acted rationally in finding that Dr. Baker's statement that claimant should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director,* OWCP, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Grambel Co.*, 12 BLR 1-83 (1988).

We also find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with Dr. Baker's assessment of claimant's physical limitations. Such a comparison is

necessary only to establish that the doctor understands the claimant's exertional requirements when he opines that claimant is capable of performing his usual coal mine employment. In this case, this comparison was not required because claimant does not dispute that Dr. Baker was familiar with his usual coal mine work when the doctor stated that claimant can engage in his usual coal mine work as a mechanic, assuming that it required repetitive lifting, bending, stooping, pushing and pulling on an eight to ten hour basis. Director's Exhibit 26 at 10-11; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Ondecko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.* 9 BLR 1-201 (1986).

Additionally, claimant 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. Moreover, claimant's assertion of vocational disability based on his age, limited education, and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[3]

Claimant also contends that because the opinion of Dr. Hussain, who examined him at the request of the Department of Labor, was discredited by the administrative law judge because Dr. Hussain did not provide an adequate explanation for his diagnosis of COPD, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that even "if Dr. Hussain's finding with regard to the existence of coal mine employment-related lung disease were questionable," Dr. Hussain, like Drs. Baker and Broudy, concluded that claimant is not totally disabled, and therefore, "a remand for further development would not change the outcome in this case." Director's Brief at 2.

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[3] 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).

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).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 13; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Under Section 718.202(a)(4), the administrative law judge assigned Dr. Hussain's opinion less weight because he failed to provide an adequate explanation regarding the etiology of claimant's COPD, but that is not the same as finding the report not credible regarding total disability under Section 718.204(b)(2)(iv). Because Dr. Hussain's report was complete with respect to Section 718.204(b)(2)(iv) and the administrative law judge did not find that it was not credible, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges,* 18 BLR at 1-93.

Because all of the medical opinions of record, including the opinions from the prior claim, concluded that claimant has the respiratory capacity to return to his usual coal mine work, and because of all the pulmonary function and blood gas studies submitted with this claim and the prior claim are non-qualifying, a finding of total disability under Section 718.204(b)(2) is precluded on the merits and we must therefore affirm the administrative law judge's denial of benefits. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). We therefore need not address claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a)(4), because any error in the administrative law judge's findings on this issue is harmless in light of our affirmance on the merits under Section 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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., concurring:

I concur in the majority's determination to affirm the administrative law judge's Decision and Order denying benefits but I write separately because I disagree with the majority's discussion of two issues raised by claimant: (1) the Director's obligation to provide a complete and credible pulmonary examination, and (2) Dr. Baker's opinion that claimant can perform his usual coal mine job.

First, I take exception to the majority's statement: "Because Dr. Hussain's report was complete with respect to Section 718.204(b)(2)(iv) and the administrative law judge did not find that it was not credible, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation." (citations omitted). Both the premise and conclusion in that statement are unsound. The majority's assertion that "Dr. Hussain's report was complete with respect to Section 718.204(b)(2)(iv) and the administrative law judge did not find that it was not credible…" cannot withstand scrutiny. Dr. Hussain opined both that claimant had a mild respiratory impairment and that he could perform his usual coal mine employment, but Dr. Hussain gave no indication that he knew even the job title, much less the exertional requirements of claimant's usual coal mine employment. Director's Exhibit 13. The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which held in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that because a mild impairment may be totally disabling, an administrative law judge should not credit a medical opinion that the miner can perform his usual coal mine employment unless the administrative law judge

determines that the doctor knows the exertional requirements of his work. According to the teaching of *Cornett*, Dr. Hussain's opinion was not complete on the subject of total disability and the majority was mistaken in saying it was complete. The majority was correct in stating that the administrative law judge found it credible, but considered in light of *Cornett*, that finding was in error. Yet because claimant never raised this issue it was unnecessary for the majority to address it. Thus, the majority's statement regarding Dr. Hussain's opinion was both incorrect and unnecessary.

The majority's conclusion from its faulty premise is likewise unsound: "there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation." The majority should have realized from the Director's letter in response to claimant's brief that there must be some merit to claimant's argument that he was denied a complete, credible pulmonary evaluation since the Director does not even attempt to argue that he has discharged his statutory obligation: he argues only that the decision can be affirmed without reaching the issue of whether claimant was provided the complete pulmonary examination. It is particularly noteworthy that while the Director urges the Board to affirm the denial of benefits, the Director explicitly refrains from stating that the decision was right: "We take no position at this time on whether the ALJ's denial of benefits was correct …." (Letter from the Director at 1.)

Since Dr. Hussain's opinion on the existence of pneumoconiosis was correctly found by the administrative law judge to be unreasoned, and since the doctor's opinion on total disability is similarly unreasoned, as discussed *supra*, one can understand why the Director avoided taking a position on the issue of whether he has provided claimant with a complete, credible pulmonary evaluation. Thus far, the Sixth Circuit has dealt with the issue in unpublished decisions and has held that the Director has discharged his responsibility if the doctor's report addresses the essential elements of entitlement, even though in one case the court stated that the doctor's conclusion "was an unexplained contradiction of his diagnosis from one year earlier, and appeared to be based only on an x-ray reading that was called into question." *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003). Applying that test, the Director has discharged his duty in this case.

But the Director's argument in this case is that a remand for a complete pulmonary evaluation would be futile because the evidence from the objective studies and medical opinions is unanimous that claimant is not totally disabled. Claimant disputes this, relying upon Dr. Baker's opinion. Because in discussing Dr. Baker's opinion the majority failed to set forth claimant's argument and how the administrative law judge dealt with the issue, this is the second discussion in the majority opinion to which I take exception. Claimant relied upon Dr. Baker's finding of a Class I impairment under the American Medical Association's Guides to the Evaluation of Permanent Impairment (5th

ed. 2000) and the Sixth Circuit's decision in *Cornett* to argue that the administrative law judge could not rely upon Dr. Baker's opinion that claimant could perform his coal mine work, without first determining the exertional requirements of that work. (Brief for Claimant at 8). The administrative law judge correctly observed that Dr. Baker's diagnosis reflects a 0-10% impairment of the whole person. Decision and Order at 7. The administrative law judge reasonably chose to rely on Dr. Baker's statement in his deposition that claimant has "no impairment," in fact, the doctor opined: "he has no impairment based on the Guides to the Evaluation of Permanent Impairment, Fifth Edition." *Id.*, Director's Exhibit 26 at 9. Since the doctor had found no respiratory impairment the administrative law judge could properly credit the doctor's opinion that claimant could perform his coal mine work, without first determining the exertional requirements of that work. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997).

In sum, I believe that the administrative law judge's decision denying benefits should be affirmed because claimant has not demonstrated an error in the administrative law judge's determination that claimant did not establish a totally disabling respiratory impairment, an essential element of entitlement. Based upon that determination, I agree with the Director that it is not necessary to reach the question of whether the Director has discharged his statutory duty. Although I dissociate myself from the majority's discussion of two issues, I agree with the conclusion that the denial of benefits should be upheld.

REGINA C. McGRANERY
Administrative Appeals Judge