BRB No. 05-0942 BLA

JIMMY R. BURKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/26/2006
	)	
NALLY & HAMILTON ENTERPISES	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE 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.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (04-BLA-5137) of Administrative Law Judge Daniel J. Roketenetz rendered 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). Claimant filed his application for benefits on

December 12, 2001.[1] Director's Exhibit 2. The administrative law judge credited claimant with ten years of coal mine employment[2] and found that claimant failed to establish both the existence of pneumoconiosis and total disability under 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in failing to find the existence of pneumoconiosis or total disability established pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[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 supported by substantial evidence, is rational, and is 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered three medical reports. Dr. Baker concluded that claimant's degree of respiratory or pulmonary impairment is "minimal to none." Director's Exhibit 23. Dr. Burki found "no evidence of pulmonary functional abnormality . . . in this subject." Director's Exhibit 14.

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[1] Claimant previously filed a claim for benefits on October 5, 2000, but withdrew it. It was therefore considered by the administrative law judge not to have been filed. *See* 20 C.F.R. §725.306; Decision and Order at 4; Director's Exhibit 1.

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge's length of coal mine employment determination and his findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, BLR 6 BLR 1-710 (1983).

Finally, Dr. Hussain diagnosed a "mild impairment" that he opined would not prevent claimant from performing the work of a coal miner. Director's Exhibit 11. The administrative law judge found these medical reports "well-reasoned and well-documented," and determined that since "[n]o physician of record diagnosed the Claimant with a totally disabling respiratory impairment," claimant did not establish that he is totally disabled. Decision and Order at 12.

Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 6, citing *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a drill operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Glen Baker (who did diagnose a minimal pulmonary impairment), it is rational to conclude that the 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 at 6. Claimant's argument is without merit. A statement that a miner 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 and Gambrel Co.*, 12 BLR 1-83 (1988).

Moreover, the administrative law judge found that Dr. Baker diagnosed no impairment. Thus, it was unnecessary for him to compare the exertional requirements of claimant's job duties with Dr. Baker's no-impairment opinion. *Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Further, we reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8

(2004). Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv).

Because claimant failed to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27. Thus, we need not address claimant's arguments concerning the administrative law judge's weighing of the evidence regarding the existence of pneumoconiosis under 20 C.F.R. §718.202(a), as error, if any, in the administrative law judge's findings would be harmless. *See 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-Denial of 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