

BRB No. 07-0781 BLA

M.M. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SHAMROCK COAL COMPANY )  
 )  
 and ) DATE ISSUED: 06/27/2008  
 )  
 SUN 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 Denying Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (2006-BLA-05474) of Administrative Law Judge Kenneth A. Krantz 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).<sup>1</sup> Based on the parties' stipulation, the administrative law judge credited claimant with thirteen years of coal mine employment, but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray and medical opinion evidence in finding that he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Claimant also argues that the administrative law judge erred in failing to compare Dr. Baker's diagnosis of a Class II respiratory impairment, with the exertional requirements of claimant's usual coal mine work, prior to concluding that claimant is not totally disabled pursuant to Section 718.204(b)(2)(iv).<sup>2</sup> Claimant further asserts that, because the administrative law judge

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<sup>1</sup> Claimant filed his claim on March 19, 2001. Director's Exhibit 2. On July 24, 2002, the district director issued a Proposed Decision and Order Denying Benefits. Director's Exhibit 34. Claimant requested a hearing, which was held on August 12, 2003 before Administrative Law Judge Joseph E. Kane. At the hearing, Judge Kane questioned whether claimant had received a complete pulmonary evaluation because Dr. Hussain, who performed an examination of claimant at the request of the Department of Labor, had reported that claimant's cooperation in performing his pulmonary function testing was "poor." Director's Exhibit 41. Judge Kane subsequently issued an Order remanding the case to the district director for a valid pulmonary function study pursuant to 20 C.F.R. §725.406. *Id.* After additional medical development, the case was assigned to Administrative Law Judge Daniel J. Roketenetz, who found that, because Dr. Hussain graded claimant's cooperation and ability to understand directions as "poor" during pulmonary function testing, claimant had not been provided a complete pulmonary evaluation pursuant to Section 725.406. Director's Exhibit 45. Judge Roketenetz issued an Order of Remand dated July 26, 2005. *Id.* After additional medical development, the case was assigned to Administrative Law Judge Kenneth A. Krantz (the administrative law judge). A hearing was held on January 12, 2007 and the administrative law judge's Decision and Order Denying Living Miner's Benefits was issued on May 21, 2007.

<sup>2</sup> Claimant specifically states that the administrative law judge erred in failing to find that he established total disability under 20 C.F.R. §718.204(c). Claimant's Brief at 7. However, because this claim was filed after January 9, 2001, the revised regulations are applicable. Under the revised regulations, the pertinent regulation for establishing

did not credit the opinion of Dr. Hussain, the Department of Labor (DOL) has failed to provide him with a complete pulmonary evaluation to substantiate his claim, as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief and argues that DOL has satisfied its obligation to provide claimant with a complete pulmonary evaluation.<sup>3</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a 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. Failure to establish any one of these elements precludes entitlement. *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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability and he erred in failing to properly address the exertional requirements of claimant's usual coal mine work in discussing the medical opinions at Section 718.204(b)(2)(iv). Claimant's Brief at 6-9. Claimant's arguments are

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total disability is 20 C.F.R. §718.204(b), while Section 718.204(c) is the regulation relevant to the issue of disability causation. See 20 C.F.R. §718.204(b), (c).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding of thirteen years of coal mine employment; his determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3); and his finding that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

without merit. In his February 4, 2001 report, Dr. Baker stated that claimant had an impairment based on a diagnosis of pneumoconiosis because persons with pneumoconiosis should limit further exposure to coal dust, and would be considered “100 [percent] occupationally disabled for work in [the] coal mining industry.” Director’s Exhibit 12. Dr. Baker also stated:

Patient has a Class II impairment based on the FEV1 being less than 80 [percent] of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

*Id.*

In weighing Dr. Baker’s opinion, the administrative law judge properly found that Dr. Baker’s statement that claimant should not work in order to avoid further coal dust exposure does not support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); Decision and Order at 7. The administrative law judge also permissibly found Dr. Baker’s diagnosis of a Class II respiratory impairment to be “incorrect” since “per table 5-12 on page 107, to qualify for a Class [II] impairment [c]laimant’s FEV1 would have to be less than sixty percent of predicted value, not eighty percent.” Decision and Order at 7 (emphasis omitted). Thus, because the administrative law judge permissibly found Dr. Baker’s opinion, that claimant is totally disabled, to be not well-reasoned, we affirm the administrative law judge’s decision to assign Dr. Baker’s opinion less weight at Section 718.204(b)(2)(iv). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

Additionally, the administrative law judge credited the opinions of Drs. Dahhan and Broudy, who understood the exertional requirements of claimant’s coal mine job, and specifically diagnosed that claimant had no respiratory impairment that would preclude the performance of his usual coal mine duties. *See Clark*, 12 BLR at 1-155; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Because claimant does not allege error with respect to the weight accorded the opinions of Drs. Dahhan and Broudy, we affirm the administrative law judge’s finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987). We also affirm, as supported by substantial evidence, the administrative law judge’s overall determination that claimant failed to prove total respiratory disability pursuant to Section 718.204(b).<sup>5</sup>

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<sup>5</sup> Claimant asserts that, because pneumoconiosis is a progressive disease, “[i]t can therefore be concluded that during the considerable amount of time that has passed since

Claimant's next argument is that he failed to receive a complete pulmonary evaluation as required by the Act. Claimant's Brief at 6. 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).

Dr. Hussain examined claimant on July 11, 2001, and performed a full range of testing, including a chest x-ray, a pulmonary function study and a blood gas study. Director's Exhibit 13. He diagnosed coal workers' pneumoconiosis, hypoxemia based on the blood gas study, and a restrictive defect based on the results of the pulmonary function test.<sup>6</sup> *Id.* Dr. Hussain indicated on the Department of Labor examination form that claimant had a severe respiratory impairment and, when asked to provide his opinion as to whether claimant has the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment, Dr. Hussain answered "No" by check-marking the appropriate box on the form. *Id.* On remand, the district director advised Dr. Hussain that his medical report was not in compliance with the regulatory standards because: "1) he failed to record claimant's occupational history of thirteen years of coal mine employment, and 2) claimant's cooperation and understanding on the pulmonary function test was poor and claimant was not given the opportunity to produce satisfactory results." Director's Exhibit 45. An additional pulmonary function test was performed on November 30, 2005, which produced higher FEV1 and FVC values, in comparison to the prior study.<sup>7</sup> However, claimant's cooperation and understanding were also recorded as

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the initial diagnosis of pneumoconiosis [his] 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 assertion, however, there is no such presumption of total disability. The administrative law judge findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-6-7 (2004).

<sup>6</sup> The July 11, 2001 pulmonary function test produced an FEV1 value of 2.04, an MVV of 38, and an FVC of 2.61. Director's Exhibit 13. The cooperation and understanding of claimant in performing the test was listed as "poor." *Id.*

<sup>7</sup> The November 30, 2005 pulmonary function test produced, pre-bronchodilator, an FEV1 of 2.82, an FVC of 3.61 and an MVV of 38. Director's Exhibit 45-8. The test

poor on the November 30, 2005 test. Director's Exhibit 45-8. By letter dated January 13, 2006, the district director asked Dr. Hussain to consider that claimant worked thirteen years in coal mine employment and address whether claimant's cooperation and understanding in performing the November 30, 2005 pulmonary function testing was satisfactory. Director's Exhibit 45-7. Dr. Hussain replied to the district director's request by preparing a hand-written statement, on the bottom portion of a copy of the district director's January 13, 2006 letter, which stated:

Repeat breathing test – PFT still shows inconsistent effort. On the best effort the results are normal. Therefore as per requirement he does not have pulmonary impairment and therefore not entitled to disability.

Director's Exhibit 45-7.

In weighing Dr. Hussain's opinion at Section 718.204(b)(2)(iv), the administrative law judge noted that Dr. Hussain "failed to give the [c]laimant a second opportunity to produce satisfactory results in his pulmonary function tests." Decision and Order at 8. The administrative law judge concluded that Dr. Hussain's opinion was "inconsistent and poorly reasoned" and he assigned it "significantly diminished weight." *Id.*

Claimant argues that since Dr. Hussain's opinion was found to be poorly reasoned, the case must be remanded to the district director for a complete pulmonary evaluation by a different physician. Claimant's Brief at 6. The Director, however, maintains that it has satisfied its obligation to provide a complete pulmonary evaluation and that it is unnecessary for the Board to remand this case for further medical development. Director's Brief at 2. We agree with the Director on this issue.

The administrative law judge questioned the validity of the November 30, 2005 pulmonary function test and assigned Dr. Hussain's opinion less weight. However, as noted by the Director, despite claimant's inconsistent effort in performing the November 30, 2005 test, the values obtained on that study were non-qualifying<sup>8</sup> for total disability under the regulations. Director's Brief at 2, citing *Crapp v. United States Steel Corp.*, 6

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produced, post-bronchodilator, an FEV1 of 2.50, and an FVC of 3.24, but there was no MVV value recorded. *Id.* Claimant's cooperation was listed as "poor." *Id.*

<sup>8</sup> A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b).

BLR 1-476, 1-479 (1983). Since Dr. Hussain specifically stated that claimant is not totally disabled based on his review of the November 30, 2005 study, and Dr. Hussain's opinion, even if better explained, would not assist claimant in establishing total disability, we agree with the Director that "any flaws in Dr. Hussain's report do not justify remand for additional medical development."<sup>9</sup> Director's Brief at 2. We, therefore, reject claimant's argument that he is entitled to a new pulmonary evaluation by a different physician.

Because claimant failed to establish that he is totally disabled, a requisite element of entitlement, benefits are precluded. *Perry*, 9 BLR at 1-2. We therefore affirm, as supported by substantial evidence, the administrative law judge's denial of benefits.<sup>10</sup>

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<sup>9</sup> See *Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003) (unpub.) (a report in which the physician addresses the essential elements of entitlement may satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation).

<sup>10</sup> As we affirm the administrative law judge's denial of benefits based on his finding that claimant is not totally disabled, it is not necessary that we address claimant's argument that the administrative law judge erred in failing to find that he has pneumoconiosis, or that he did not receive a complete pulmonary examination based on the administrative law judge's determination not to credit Dr. Hussain's diagnosis of pneumoconiosis. 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 Denying Living Miner's 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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BETTY JEAN HALL  
Administrative Appeals Judge