

BRB No. 08-0806 BLA

P.S. )  
 )  
 Claimant-Petitioner )  
 v. )  
 )  
 LEECO, INCORPORATED ) DATE ISSUED: 06/23/2009  
 )  
 and )  
 )  
 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 Joseph E. Kane, 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.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (07-BLA-5675) of Administrative Law Judge Joseph E. Kane 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). In a Decision and Order dated July 25, 2008, the administrative law judge credited claimant with eleven years of coal mine employment,<sup>1</sup> and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has submitted a response, asserting that a remand is not necessary for claimant to receive a new pulmonary evaluation.<sup>2</sup>

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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,

---

<sup>1</sup> The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

<sup>2</sup> The administrative law judge's finding of eleven years of coal mine employment, and that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

718.204. Failure to establish any one of these elements precludes a finding of 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits. We specifically affirm the administrative law judge's finding, based on a consideration of all of the record evidence, that claimant is not totally disabled and, therefore, that he is not entitled to benefits.

The evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv) consists of the medical opinions of Drs. Baker, Hussain, Dahhan, and Vuskovich. Dr. Baker diagnosed a Class I respiratory impairment as defined by the fifth edition of the *Guides to the Evaluation of Permanent Impairment*. Director's Exhibit 11. Dr. Baker further stated, pursuant to the *Guides*, that claimant "has a second impairment" because "persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 11.

Dr. Hussain examined claimant on behalf of the Department of Labor and initially opined that claimant had a moderate respiratory impairment, and that he was unable to perform his regular coal mining duties. Director's Exhibit 9. Later, when asked to explain his opinion in light of the objective testing, Dr. Hussain concluded that claimant has no pulmonary impairment, based on pulmonary function testing, and retains the respiratory capacity to perform his usual coal mine work.<sup>3</sup> Director's Exhibit 42. Dr. Dahhan opined that claimant has no evidence of any significant or functional pulmonary impairment and he retains the respiratory capacity to return to his last coal mine employment. Employer's Exhibits 1, 2. Dr. Vuskovich agreed with Drs. Hussain and Dahhan that claimant does not have a pulmonary impairment, and retains the respiratory capacity for his previous coal mine work. Employer's Exhibits 3, 4 at 13, 14-15.

---

<sup>3</sup> The record reflects that on November 30, 2006, the administrative law judge found that Dr. Hussain's initial opinions on the issues of pneumoconiosis, total disability, and disability causation, contained in his July 25, 2001 report, were "unreasoned and undocumented." Director's Exhibit 42 at 82-83. Thus, the administrative law judge remanded the case to the district director to provide a complete pulmonary evaluation that included "a well reasoned and well-documented diagnosis" on these issues. Director's Exhibit 42 at 83. Pursuant to the administrative law judge's November 30, 2006 Order of Remand, the district director asked Dr. Hussain to clarify his 2001 opinion. Dr. Hussain submitted a supplemental report on February 16, 2007. Director's Exhibit 42 at 4.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that Dr. Hussain's opinion was not sufficient to meet claimant's burden of proof. Decision and Order at 12. The administrative law judge also found that Dr. Baker's opinion was insufficient to establish total disability. Decision and Order at 12. The administrative law judge further found, however, that even assuming Dr. Baker's opinion was sufficient to establish total disability, it was entitled to less probative weight than the "better reasoned and documented" opinions of Drs. Dahhan and Vuskovich. Decision and Order at 12.

Claimant does not challenge the weight accorded to the opinions of Drs. Hussain, Dahhan, and Vuskovich. Claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion. Specifically, claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's diagnosis of a Class I respiratory impairment. Claimant's Brief at 7-8. We disagree. Dr. Baker's assessment of a Class I impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Chapter 5, p. 107, Table 5-12 (5th ed. 2001), corresponds to a rating of no impairment. See *Gamble v. Penn Allegheny Coal Co.*, 5 BLR 1-457, 1-459-60 (1983). Consequently, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's medical report. See *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Furthermore, as noted by the administrative law judge, while Dr. Baker stated that claimant was 100% percent disabled for work, he specifically reached that conclusion based on his finding that claimant "should limit further exposure" to coal dust. Decision and Order at 12; Director's Exhibit 11. The administrative law judge properly concluded that a statement that a miner should avoid further coal dust exposure is not the equivalent of a finding of total disability. See *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); Decision and Order at 11.

We also 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. Claimant's Brief at 8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. See *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Therefore, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Claimant next contends that because the administrative law judge did not credit Dr. Hussain's opinion concerning the existence of pneumoconiosis at 20 C.F.R.

§718.202(a)(4), “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 5-6. The Director asserts that, contrary to claimant’s argument, because Dr. Hussain addressed all of the elements of entitlement, a remand for a complete pulmonary evaluation is unnecessary under the facts of this case. Director’s Brief at 4-5.

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; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). Dr. Hussain performed all of the necessary medical testing and provided an opinion that addressed all of the requisite elements of claimant’s entitlement. *See Gallaher v. Bellaire Corp.*, 71 F.App’x. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(holding that the Director discharged his responsibility where a physician’s report addressed the essential elements of entitlement). Moreover, Dr. Hussain opined that claimant is not totally disabled, and the administrative law judge denied the claim on that basis.<sup>4</sup> *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Thus, we reject claimant’s argument.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR at 1-1 (1986) (*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Moreover, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Consequently, we affirm the administrative law judge’s finding that claimant did not establish that he is totally disabled. Because claimant is unable to establish total disability, a requisite element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We therefore affirm the denial of benefits.

---

<sup>4</sup> The administrative law judge accorded “little weight” to Dr. Hussain’s diagnosis of clinical pneumoconiosis in part because Dr. Hussain relied on a positive reading on an x-ray that was re-read as negative by a more highly qualified reader. Decision and Order at 10.

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge