BRB No. 98-1189 BLA

HENRY L. KILBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED:_____
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1573) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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). The instant case involves a 1996 duplicate claim.[1] The administrative law judge initially found the evidence sufficient

[1]The relevant procedural history of the instant case is as follows: Claimant filed a claim for benefits with the Social Security Administration (SSA) on May 21, 1973. Director's Exhibit 34. The SSA denied the claim on September 24, 1973. *Id.*

to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1996 claim on the merits. After crediting claimant with at least thirty-three years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Department of Labor denied the claim on November 16, 1981. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on July 18, 1996. Director's Exhibit 1.

[2]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). While Dr. Myers indicated that claimant suffered from a totally disabling pulmonary impairment,[3] Director's Exhibit 11, Drs. Anderson,[4] Baker[5] and Dahhan[6] indicated that claimant did not suffer from a totally disabling pulmonary impairment. Director's Exhibits 10, 12, 31. We note that the administrative law judge erred to the extent that he discredited Dr. Myers' opinion regarding the extent of claimant's respiratory impairment because the doctor did not relate claimant's disability to his coal dust exposure. The etiology of a claimant's disability is properly addressed at 20 C.F.R. §718.204(b), and not under subsection (c)(4). However, the administrative law judge permissibly found that Dr. Myers' opinion that claimant suffered from a totally disabling respiratory impairment was outweighed by the contrary opinions of Drs. Anderson, Baker and Lane.[7] Decision and Order at 13;

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[3]In a report dated October 2, 1995, Dr. Myers opined that claimant was not physically able, from a pulmonary standpoint, to do his usual coal mine employment. *Id.* Dr. Myers noted that claimant was limited by a Class II functional impairment. *Id.*

[4]In a report dated May 18, 1995, Dr. Anderson opined that claimant was physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 10.

[5]In a report dated August 1, 1996, Dr. Baker opined that claimant suffered from a mild pulmonary impairment. Director's Exhibit 12. The administrative law judge permissibly found that Dr. Baker's diagnosis of a mild pulmonary impairment was insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983) (An administrative law judge may find that a doctor's assessment of a respiratory impairment as mild establishes that it is not totally disabling); Decision and Order at 13; Director's Exhibit 12.

[6]In a report dated February 7, 1997, Dr. Dahhan opined that claimant suffered from a mild obstructive ventilatory defect with no evidence of total or permanent pulmonary disability. Director's Exhibit 31. Dr. Dahhan further opined that claimant retained the respiratory capacity to continue his previous coal mining work. *Id.*

[7]We note that the administrative law judge, in his earlier consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), found that the medical opinions of Drs. Myers, Anderson, Baker and Lane were all "well-reasoned and well-documented as each physician took complete historical information, conducted a physical examination, and performed objective medical tests." Decision

Director's Exhibits 10, 13, 31. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Since claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See 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*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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and Order at 11.