BRB No. 03-0545 BLA

PAUL ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/29/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Benefits (02-BLA-5313) of Administrative Law Judge Joseph E. Kane 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).[1] Claimant filed the instant claim, a

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

duplicate claim, on February 16, 2001.[2] After crediting claimant with twenty-five years of coal mine employment based upon the stipulation of the parties, the administrative law judge considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), stipulated that claimant established the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge further determined that, because these elements of entitlement were previously adjudicated against claimant, claimant established a material change in conditions under 20 C.F.R. §725.309(d). The administrative law judge also found, however, that the evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, he denied benefits. On appeal, claimant challenges the administrative law judge's finding that total disability was not established under Section 718.204(b)(2)(iv). The Director responds, urging affirmance of the administrative law judge's decision denying benefits.[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 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).

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became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed an initial claim for benefits on January 1, 1970 with the Social Security Administration, which denied the claim on October 11, 1973. Director's Exhibit 1. This claim was finally denied by the Department of Labor on April 24, 1981. *Id.* Claimant filed a second claim on February 26, 1993, which was finally denied on January 24, 1994 by the district director, who found that claimant established none of the elements of entitlement under 20 C.F.R. Part 718 (2000). Director's Exhibit 2. Claimant thereafter took no further action in pursuit of benefits until filing this duplicate claim on February 16, 2001. Director's Exhibit 4.

[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and findings that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and a material change in conditions pursuant to 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 9.

On appeal, claimant argues that the administrative law judge erred in discounting Dr. Baker's opinion, that claimant suffers from a totally disabling pulmonary impairment, as poorly reasoned. Claimant argues that the administrative law judge should have credited Dr. Baker's opinion as sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) in view of the fact that the doctor based his opinion upon a physical examination, medical and work histories and symptoms, in addition to the objective test results.[4] Claimant's contention lacks merit.

In his November 20, 1991 opinion, Dr. Baker indicated that the pulmonary function study administered for his examination indicated a "possible mild obstructive defect." Director's Exhibit 2. Dr. Baker opined that claimant is not physically able from a pulmonary standpoint to perform his usual coal mine employment, and advised that claimant should have no further dust exposure. *Id.* In a later opinion, dated December 5, 2001, Dr. Baker stated that claimant has a "Class I impairment," is one hundred percent occupationally disabled for his work in the coal mines, and should avoid further coal dust exposure. Director's Exhibit 18. Dr. Baker indicated that the pulmonary function studies and arterial blood gas studies administered at the December 2001 examination were "normal." *Id*.

A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge properly discounted Dr. Baker's 1991 opinion as poorly reasoned because Dr. Baker's finding of a "possible mild obstructive defect" was based on a pulmonary function study, the validity of which was questioned by the technician administering the test, and because Dr. Baker provided no further rationale for his conclusion that claimant is totally disabled. *Clark*, 12 BLR at 1-155; Decision and Order at 11; Director's Exhibit 2. Moreover, the administrative law judge properly discounted Dr. Baker's 1991 opinion on the basis that it is significantly older than the more recently submitted, 2001 reports of Drs. Baker and Hussain. *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Decision and Order at 12; Director's Exhibits 2, 12, 18.

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[4]Claimant suggests that "a single medical opinion [supportive of a finding of total disability] may be sufficient for invoking the presumption of total disability." Claimant's Brief at 4. Claimant has not identified any presumption of total disability that is applicable in this case, however.

With regard to Dr. Baker's December 5, 2001 report, the administrative law judge properly rejected Dr. Baker's opinion as poorly reasoned on the basis that Dr. Baker did not attempt to explain how the objective studies, which he indicated were normal, supported a finding that claimant is totally disabled, and because Dr. Baker offered no further rationale for his conclusions. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22; Decision and Order at 12; Director's Exhibit 18. Thus, we reject claimant's contention that the administrative law judge erred in discounting Dr. Baker's opinion that claimant is totally disabled.

Claimant additionally argues that the administrative law judge's consideration of the previously submitted medical opinions of Drs. Anderson, Wright and Wicker, which indicate that claimant retains the respiratory capacity to perform his usual coal mine employment, violated the limitation on evidence imposed by 20 C.F.R. §725.414.[5] This contention lacks merit. As the Director notes, the pertinent regulation at Section 725.414 provides that "[a]ny evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d).

We reject claimant's next contention that Dr. Hussain's medical opinion, indicating that claimant suffers from a mild respiratory impairment, supports a finding of total disability. Dr. Hussain, who examined claimant on August 3, 2001, indicated that claimant has a mild airways obstruction, but retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 12. The administrative law judge properly accorded determinative weight to Dr. Hussain's opinion pursuant to Section 718.204(b)(2)(iv) upon finding the opinion well-reasoned and documented because it is supported by Dr. Hussain's underlying objective testing, and the other objective evidence of record. *Clark*, 12 BLR at 155; Decision and Order at 12; Director's Exhibit 12.

In further challenging the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(b)(2)(iv), claimant argues that the administrative law judge was required to consider, in conjunction with the opinions of Drs. Baker and Hussain, the exertional requirements of claimant's usual coal mine work, which included loading coal, transporting coal and working as a track man. We disagree. As discussed above, while Dr. Baker indicated that

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[5]The administrative law judge found these opinions entitled to little weight because they are significantly older than the more recently submitted opinions, which were submitted in 2001. *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Decision and Order at 11-12; Director's Exhibits 2, 12, 18.

claimant has a "Class I impairment," Director's Exhibit 18, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to provide an adequate explanation for his opinion that claimant is totally disabled. *Clark*, 12 BLR at 1-155; Fields, 10 BLR at 1-22; Decision and Order at 12; Director's Exhibit 18. Furthermore, Dr. Hussain specifically indicated that claimant is not totally disabled. Director's Exhibit 12. An opinion which specifically addresses whether a miner is totally disabled, as opposed to an opinion which does not address total disability specifically, but only addresses the degree of impairment from which an inference of total disability could be drawn by comparing claimant's job duties to the opinion, need not be discussed in terms of claimant's job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, we hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant only in determining claimant's ability to perform comparable and gainful work, not to establishing total disability from performing claimant's usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *Fields*, 10 BLR at 1-22.

Finally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits, and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). For the reasons discussed above, we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We also affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5-6. Because claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. 20 C.F.R. §718.204(b)(2)(i)-(iv); *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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge