BRB No. 05-0881 BLA

JERRY WAYNE HUBBARD	)	
Claimant-Petitioner	)	
v.	)	
RICHLAND COAL COMPANY	)	DATE ISSUED: 03/21/2006
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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Denise Kirk Ash, Lexington, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIUM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5229) of Administrative Law Judge Rudolf L. Jansen 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 June 23, 2005, the administrative

law judge credited the miner with fifteen years of coal mine employment,[1] and found that the evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, but was insufficient to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge 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 credible 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 filed a limited response brief contending that claimant received a complete pulmonary evaluation as contemplated by Section 725.406(a).[2]

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, 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).

---

[1] The record indicates that claimant's coal mine employment occurred 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*).

[2] The administrative law judge's finding of fifteen years of coal mine employment and his findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 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).

Claimant initially contends that in analyzing the medical opinion evidence relevant to the issue of total disability, the administrative law judge improperly accorded diminished weight to Dr. Baker's opinion. Claimant's Brief at 3. Claimant asserts that Dr. Baker's opinion did not rely solely on claimant's work history as the basis for his opinion, but instead was well-reasoned and well-documented and should not have been rejected by the administrative law judge. Claimant's Brief at 3. Claimant also contends that the administrative law judge should have considered Dr. Baker's opinion in conjunction with the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 4-5. In addition, claimant asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it must be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine employment or comparable and gainful work is adversely affected. Claimant's Brief at 5.

In a report dated August 28, 2002, Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure and chronic bronchitis by history. Dr. Baker did not explicitly state that claimant was totally disabled from performing his usual coal mine work, but instead, referring to the pulmonary function study results, he opined that claimant has a "Class 2 impairment with the FEV1 and vital capacity between 60% and 79% of predicted" as defined by the fifth edition of the *Guides to the Evaluation of Permanent Impairment*. Director's Exhibit 12. Dr. Baker further stated, pursuant to the *Guides*, that claimant "has a second impairment based on the presence of pneumoconiosis" 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 12.

Contrary to claimant's arguments, the administrative law judge did not fail to consider the nature of claimant's usual coal mine employment. Decision and Order at 4; *see Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Rather the administrative law judge specifically found, based on information provided by claimant, that claimant's last coal mine employment was as a "loader operator," and that his work required sitting for ten hours a day and did not require lifting, crawling or standing.[3] Director's Exhibits 3, 4, 17; Hearing Transcript at 12; Decision and Order at 4. Nor did the administrative law judge accord diminished weight to Dr. Baker's opinion as being based solely on work history, but, conversely, permissibly concluded that Dr. Baker's

[3] The administrative law judge also noted claimant's testimony that, at the time of the hearing, he was working twenty-five to forty hours a week in the heating and cooling business, and that his duties required twisting, squatting, turning and lifting up to one hundred pounds, although he sometimes had help with the heavier jobs. Hearing Transcript at 24-25.

opinion did not support a finding of total disability because the physician had not discussed the physical requirements of claimant's usual coal mine work or described the type of physical exertion he could no longer perform, such that the administrative law judge could infer that claimant is totally disabled from his job as a loader operator or similar work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 12; Decision and Order at 11. With respect to Dr. Baker's opinion that claimant was also 100% disabled for work in a dusty environment, the administrative law judge permissibly accorded it less weight as being a recommendation against further coal dust exposure and, therefore, insufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order at 11.

We also reject claimant's assertion that the administrative law judge discredited the opinion of Dr. Simpao, that claimant's respiratory impairment would prevent him from performing the work of a coal miner or similar work, and that, therefore, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[4] Contrary to claimant's arguments, the administrative law judge did not discredit Dr. Simapo's opinion, but instead found his opinion to be "entitled to less probative value is assessing total disability" because, like Dr. Baker, Dr. Simpao did not describe claimant's former duties or the physical exertion required to perform them.[5] *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Clark*, 12 BLR 1-149. Thus, there is no merit to claimant's argument that the administrative law judge rejected Dr. Simpao's opinion as not credible.

Therefore, as the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Simpao, and as the administrative law judge further properly weighed the medical opinion evidence[6] together with the pulmonary function and blood gas study results of record, all of which were non-qualifying, we affirm the

---

[4] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

[5] Dr. Simpao reported claimant's most recent coal mine employment as "heavy equipment operator, bull dozer enloader," and thus evidently was aware of the exertional requirements of claimant's coal mine employment. Director's Exhibit 10.

[6] The only remaining medical opinion of record is that of Dr. Broudy, who opined that claimant retains the respiratory capacity to perform his usual coal mine work. Director's Exhibit 13.

administrative law judge's determination that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR 1-111, 1-113. A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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

____

JUDITH S. BOGGS
Administrative Appeals Judge