BRB No. 07-0521 BLA

J.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RICH MOUNTAIN COAL COMPANY	)	DATE ISSUED: 03/25/2008
	)	
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 – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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 - Denial of Benefits (2005-BLA-05940) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge credited

claimant with twenty years of coal mine employment, based on a stipulation by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director also responds, asserting that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.[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.[4] 33 U.S.C. §921(b)(3), as incorporated into the

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[1] On his application for black lung benefits, Form CM-911, claimant indicated that he had previously filed a claim for benefits, which was denied. Director's Exhibit 2. At the hearing, counsel for employer stated that he understood that the previous claim was "voluntarily withdrawn." Hearing Transcript at 8. Consequently, that claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] In asserting that the administrative law judge erred by not finding that he was totally disabled, claimant cites 20 C.F.R. §718.204(c). Claimant's Brief at 6. Under the amended regulations, the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b)(2). The regulation pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b)(2000), is now found at 20 C.F.R. §718.204(c).

[3] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living 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; *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). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant asserts that in addressing the issue of total disability pursuant to 20 C.F.R. §718.204(b)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 7, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Specifically, claimant argues that:

> The claimant's usual coal mine work included being a heavy equipment operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who diagnosed a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. [The administrative law judge] made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

Claimant's Brief at 7.

Claimant's argument is without merit. The administrative law judge considered the medical opinions that actually addressed whether claimant is totally disabled, which consisted of Dr. Rasmussen's September 1, 2004 report, Dr. Broudy's December 20,

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[4] The record indicates that the 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 (1989)(*en banc*).

2004 and December 15, 2005 reports, and Dr. Durham's April 19, 2005 report. Decision and Order at 13; Director's Exhibits 12, 18; Claimant's Exhibit 4; Employer's Exhibit 1. The administrative law judge determined that Dr. Broudy's opinion, that claimant has moderate chronic obstructive airways disease due to smoking, but retains the respiratory capacity to perform regular coal mine job duties, was well-reasoned and well-documented. Decision and Order at 14; *see* Director's Exhibit 18 at 3; Employer's Exhibit 1 at 3. Drs. Rasmussen and Durham opined that claimant cannot perform his coal mine employment from a respiratory standpoint, but the administrative law judge discounted these opinions because he found that they were not as well-reasoned as Dr. Broudy's contrary opinion. Decision and Order at 14; *see* Director's Exhibit 12 at 12-32, 12-37.

With regard to Dr. Baker's opinion, the administrative law judge noted in his discussion of the evidence relevant to the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) that:

> Dr. Baker diagnosed coal worker's pneumoconiosis; however[,] he did not provide an explanation as to the basis of that diagnosis. In addition, Dr. Baker diagnosed Claimant with chronic bronchitis and chronic obstructive pulmonary disease but he did not indicate whether those conditions arose from coal dust inhalation.

Decision and Order at 8; Claimant's Exhibit 4. A review of Dr. Baker's progress notes indicates that, contrary to claimant's assertion, they do not include an explicit diagnosis of a respiratory or pulmonary impairment causing disability. *See* Claimant's Exhibit 3. Therefore, it was reasonable for the administrative law judge to omit Dr. Baker's report from his discussion of the evidence relevant to total disability. Furthermore, contrary to claimant's suggestion, a statement that a miner should limit further exposure to coal dust is not equivalent to a diagnosis of total disability. *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).

The administrative law judge permissibly relied on Dr. Broudy's opinion, that claimant "retains the respiratory capacity to perform the work of an underground coal miner or do similarly arduous manual labor," which he found was supported by claimant's non-qualifying pulmonary function and blood gas studies. Decision and Order at 14; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Director's Exhibit 18; Employer's Exhibit 1. Consequently, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment as a dozer and loader operator to the findings set forth in the medical reports. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

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 7-8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *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 his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Claimant also contends that because the administrative law judge did not credit Dr. Rasmussen's opinion concerning the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability at 20 C.F.R. §718.204(b)(2)(iv), "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 6. The Director, in a limited response, urges the Board to reject claimant's contention that the Director failed to provide a complete pulmonary evaluation, arguing that Dr. Rasmussen provided an opinion regarding the existence of pneumoconiosis and total disability. The Director further asserts that the administrative law judge "did not wholly discredit that opinion, but merely found it outweighed by contrary evidence." Director's Letter Brief at 2. Consequently, the Director contends that he has fulfilled his statutory obligation to provide claimant with the opportunity to substantiate his claim through a "complete, and credible" pulmonary evaluation. *Id.*

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).

The record reflects that Dr. Rasmussen conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 12; *see* 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Contrary to claimant's contention, the administrative law judge did not discredit Dr. Rasmussen's opinion outright. With regard to the existence of pneumoconiosis, the administrative law judge noted that Dr. Rasmussen opined that "although [c]laimant has a significant history of exposure to coal mine dust, a 'clinical diagnosis of coal workers' pneumoconiosis cannot be established.'" Decision and Order at 8; Director's Exhibit 12. The administrative law judge noted further that

"Dr. Rasmussen diagnosed chronic obstructive pulmonary disease, a chronic productive cough, and airflow obstruction due to both coal dust exposure and cigarette smoking." *Id*. In weighing Dr. Rasmussen's opinion on the issue of the existence of pneumoconiosis, the administrative law judge stated:

> Dr. Rasmussen's opinion should be entitled to less weight. Dr. Rasmussen diagnosed chronic pulmonary obstructive disease and airflow obstruction due to coal dust exposure and cigarette smoking. However, his only reason for diagnosing these impairments was [c]laimant's work history. I find this opinion less than well-reasoned and entitled to less weight than that of Dr. Broudy.

Decision and Order at 9. In evaluating Dr. Rasmussen's opinion with regard to total disability, the administrative law judge noted that:

> Dr. Rasmussen opined, based on a physical examination, pulmonary function studies, arterial blood gas studies, and a chest x-ray that [c]laimant had a moderate ventilatory impairment, diagnosing chronic productive cough and airflow obstruction. In addition, he found that [c]laimant does not retain the capacity to work in heavy manual labor. He opined that his exposure to coal dust only minimally contributes to his impairment; however, he noted that both cigarette smoking and his coal mine dust exposure contribute to his impairment.

Decision and Order at 13. The administrative law judge determined that Dr. Rasmussen's opinion was not as well-reasoned as Dr. Broudy's contrary opinion because Dr. Rasmussen relied on non-qualifying pulmonary function and blood gas studies without explaining how the documentation supported his conclusion.[5] Decision and Order at 14; Director's Exhibit 12; *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 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Thus, the administrative law judge reasonably chose to give greater weight to the better reasoned and documented opinion of Dr. Broudy, that claimant does not suffer from pneumoconiosis and is not totally disabled. *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that administrative law judges

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[5] A qualifying pulmonary function study or blood gas 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, Appendices B and C, respectively. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

"may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Consequently, as the Director argues, the administrative law judge did not wholly discredit Dr. Rasmussen's opinion on the issues of the existence of pneumoconiosis and total disability, nor was Dr. Rasmussen's opinion incomplete, as he provided an opinion regarding each of these elements of entitlement. Director's Letter Brief at 2. We agree with the Director that the administrative law judge properly found Dr. Rasmussen's opinion outweighed, as the Director is not required to provide claimant with a dispositive medical evaluation, but only one that is complete and credible, Dr. Rasmussen's medical opinion satisfies the Director's Section 413(b) obligation. Director's Letter Brief at 2; *Newman*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985)); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge permissibly concluded that the evidence of record does not establish total disability, claimant has not met his burden of proof under the Act and regulations. *See* 20 C.F.R. §718.204(b)(2). As claimant has failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In view of our disposition of this case, we need not address claimant's argument that the administrative law judge erred in failing to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1), (4).

Accordingly, the administrative law judge's Decision and Order – Denial of 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