BRB No. 07-0524 BLA

M. R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLENN'S TRUCKING COMPANY	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	DATE ISSUED: 03/14/2008
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Phillip J. Reverman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (05-BLA-6080) of Administrative Law Judge Donald W. Mosser rendered on a subsequent 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 his claim for benefits on July 15, 2004. Director's Exhibit 3. The administrative law judge credited claimant with at least ten years of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the medical opinion evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against claimant. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, however, the administrative law judge found that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs did not participate in this appeal.

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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[1] Claimant's previous claim, filed on May 16, 2000, was denied by Administrative Law Judge Joseph E. Kane in a Decision and Order dated July 30, 2002, based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1. The Board affirmed the denial of benefits. [*M.R.*] *v. Glenn's Trucking Co.*, BRB No. 02-0782 BLA (June 20, 2003)(unpub.). *Id.*

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 4, 6, 7. 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*).

[3] Because claimant does not challenge the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's report, which was the only medical report submitted with the current claim, and the ten written medical reports and one deposition that were submitted with the previous claim. Dr. Baker examined and tested claimant and, based on "normal" pulmonary function studies and blood gas studies, diagnosed a minimal impairment. Director's Exhibit 18. The administrative law judge read Dr. Baker's report as a diagnosis of no impairment, and found that this new report failed to establish total disability. The administrative law judge noted further that none of the previously submitted reports concluded that claimant was totally disabled. The administrative law judge concluded:

> The newly submitted evidence combined with the evidence from the miner's previous claims must be considered together in making my decision on total disability. I find that the miner has again failed to prove total disability as the record contains no qualifying arterial blood gas studies or pulmonary function tests, and no narrative opinion that the claimant is totally disabled.

Decision and Order at 8.

Claimant contends that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's specific argument, however, is that:

> It can be reasonably concluded that [claimant's coal mining] 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. Glen Baker (who did diagnose a minimal 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.

Claimant's Brief at 3. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP,* 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge reasonably interpreted Dr. Baker's diagnosis of minimal impairment to mean essentially no impairment. *See Anderson*, 12 BLR at 1-113. Thus, the administrative law judge did not err in failing to match the exertional requirements of claimant's usual work as a coal truck driver against Dr. Baker's opinion, as Dr. Baker's opinion cannot support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 569, 22 BLR at 2-107.

Additionally, claimant argues that, since pneumoconiosis is a progressive disease, it must have worsened, thus affecting his ability to perform his usual coal mine employment. Claimant's Brief at 4. An administrative law judge's findings regarding total disability must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n. 8. We therefore reject claimant's argument, and affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, substantial evidence supports the administrative law judge's finding that all the evidence weighed together did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). It is therefore affirmed. *See Budash v. Bethlehem Mines Corp.*,16 BLR 1-27 (1991)(*en banc*).

Because the administrative law judge properly found that the evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2), a necessary element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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