BRB No. 08-0555 BLA

W.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/30/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John M. Vittone, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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 CURIAM:

Claimant appeals the Decision and Order (06-BLA-5887) of Administrative Law Judge John M. Vittone (the administrative law judge) denying benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1] Claimant filed his first claim on June 20, 1994. Claimant's Exhibit 1. It was finally denied on January 11, 2000. *Id*. Claimant filed this claim on February 5, 2001. Director's Exhibit 3. On October 29, 2004, Administrative Law Judge Thomas F. Phalen, Jr. issued a Decision and Order denying benefits, because claimant failed to establish total disability. The Board vacated Judge Phalen's denial of benefits and remanded the case to the district director to allow for a complete pulmonary evaluation at no expense to claimant and for reconsideration of the merits of the claim. [*W.C.*] *v.*

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with two years of coal mine employment based on the parties' stipulation,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted the parties' stipulation that claimant has pneumoconiosis. Consequently, the administrative law judge found that the medical evidence submitted since the prior denial of benefits established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, however, the administrative law judge found that the evidence did not establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Further, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

Director, OWCP, BRB No. 05-0265 BLA (Sept. 28, 2005)(unpub.).

[2] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 6, 7, 10. 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*).

[3] Because the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§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 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Hussain, Baker, and Mettu. Based on claimant's smoking history, his symptoms, his test results, and the findings on physical examination, Dr. Hussain opined that claimant has a severe respiratory impairment and that claimant does not retain the respiratory capacity to do his previous work or work requiring similar effort. Director's Exhibit 13. Dr. Baker considered claimant's coal mine employment and smoking histories, his symptoms, his test results, and the findings on physical examination. Director's Exhibit 15. Noting the results of claimant's pulmonary function study, Dr. Baker found that claimant has a Class 2 impairment of the whole person under the Guide to the Evaluation of Permanent Impairment, Fifth Edition. *Id*. Dr. Baker also opined that claimant has an occupational disability for work in the coal mining industry or similar dusty occupations because he developed pneumoconiosis. *Id*. Lastly, after considering claimant's coal mine employment and smoking histories and his test results, Dr. Mettu opined that claimant has the respiratory capacity to perform comparable work in a dust-free environment. Director's Exhibit 27.

The administrative law judge gave little weight to Dr. Hussain's opinion, because it was based on non-conforming objective tests and because Dr. Hussain was not aware of the exertional requirements of claimant's usual coal mine work.[4] Decision and Order at 7-8; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge then found that the opinions of Drs. Baker and Mettu did not support a finding of total disability at Section 718.204(b)(2)(iv), because they advised claimant to avoid further coal dust exposure. Decision and Order at 8-9. Consequently, the administrative law judge concluded that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv).

Claimant argues that the exertional requirements of his usual coal mine employment must be compared with the assessments of his respiratory impairment by Drs. Hussain and Baker, and that it would be error for the administrative law judge to find that he could perform his usual coal mine employment without considering the physical requirements of such work. However, the administrative law judge permissibly discounted Dr. Hussain's diagnosis of a severe respiratory impairment because it was based on non-conforming objective tests. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13

[4] The administrative law judge found that "[c]laimant's only coal mine job was working as a truck driver." Decision and Order at 7. The administrative law judge also noted that claimant stated that "his job as a truck driver required him to sit for 10 or 12 hours per day." *Id*.

BLR 2-259 (3d Cir. 1990). Further, because Dr. Baker failed to explain the severity of a Class 2 impairment or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 2 impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Consequently, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of his usual coal mine employment with the respiratory impairment assessments of Drs. Hussain and Baker.[5]

Claimant also argues that the administrative law judge erred in finding that Dr. Baker's opinion was insufficient to establish total disability. Specifically, claimant asserts that he is totally disabled because his usual coal mine employment involved exposure to heavy concentrations of dust on a daily basis and his respiratory condition would preclude him from being exposed to a dusty environment. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), we reject claimant's assertion that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability.

Claimant additionally asserts that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[6] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR

[5] We reject claimant's assertion that Dr. Baker's opinion is sufficient to invoke the presumption of total disability. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. Claimant's Brief at 3. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

[6] Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has recognized that this

2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed *supra*, the administrative law judge properly found that Dr. Baker's opinion is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv). Thus, we reject claimant's assertion that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as claimant's treating physician.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. A finding of total disability must be based on medical evidence. 20 C.F.R. §718.204(b)(2)(iv). The record contains no credible medical evidence that claimant is totally disabled from a respiratory impairment. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718.[7] *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

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provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

[7] Moreover, we note that claimant does not contest the administrative law judge's finding with regard to disease causality, an essential element of entitlement under 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c). Consequently, the administrative law judge's disease causality finding at Section 718.203(c) is an additional ground in support of his decision to deny benefits.

Accordingly, the administrative law judge's Decision and Order denying 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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JUDITH S. BOGGS
Administrative Appeals Judge