BRB No. 08-0557 BLA

R.C. Claimant-Petitioner v. MANALAPAN MINING COMPANY, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5669) of Administrative Law Judge William S. Colwell rendered on a subsequent claim[1] 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). This case involves a claim filed on April 5, 2002. After crediting claimant with twenty-two and three-quarter years of coal mine employment,[2] the administrative law judge found that the new biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and therefore established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Reviewing the record *de novo*, the administrative law judge further found that claimant did not establish the existence of a totally disabling respiratory impairment at 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). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response in this appeal.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[1] Claimant's initial claim, filed on December 19, 2000, was denied by the district director on April 3, 2001, for failure to establish any element of entitlement. Director's Exhibit 37.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 37.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-two and three-quarter years of coal mine employment, and that the evidence did not 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, 1-711 (1983).

Claimant contends that the administrative law judge erred in finding that he does not have a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).[4] Specifically, claimant asserts that the administrative law judge erred in failing to "identify the exertional requirements of . . . claimant's usual coal mine employment and compare said requirements to the medical reports assessing a disability." Claimant's Brief at 3. In support of this position, claimant contends:

> [C]laimant's usual coal mine work included being a shuttle car operator and roof bolt 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, 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 contention lacks merit. A physician's 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 & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Further, contrary to claimant's assertion, the administrative law judge identified the exertional requirements of claimant's usual coal mine employment and considered them in conjunction with the medical opinion evidence. The administrative law judge found that claimant last worked as a roof bolter, a shuttle car driver, and a ram car operator; and that these jobs involved heavy manual labor. Decision and Order at 5. Because Dr. Echeverria's report did not contain any description of claimant's coal mine employment, and, because Dr. Echeverria failed to support his conclusion that claimant was totally disabled with any objective data, the administrative law judge discounted his opinion. Decision and Order at 28; Claimant's Exhibit 2. This was rational. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983).

In analyzing Dr. Simpao's opinion, the administrative law judge stated that Dr. Simpao provided three bases for his opinion of total disability. The first basis Dr. Simpao cited was positive x-ray evidence. Director's Exhibit 12 at 26. The administrative law judge discredited Dr. Simpao's reasoning as flawed, because "the

[4] The record contains four medical opinions. Drs. Echeverria and Simpao opined that claimant is totally disabled, Director's Exhibit 12; Claimant's Exhibit 2, while Drs. Dahhan and Rosenberg opined that claimant retains the respiratory capacity to return to his usual coal mine employment. Employer's Exhibits 1, 6.

mere presence of pneumoconiosis on chest x-ray does not prove [the] presence of total disability." Decision and Order at 28. The administrative law judge observed that Dr. Simpao also relied on symptoms and physical findings. Insofar as Dr. Simpao's opinion relied on symptoms and physical findings, the administrative law judge found that it is entitled to "some weight." *Id*. However, upon review of the stated symptoms and physical findings of cyanosis, crepitations, and wheezes, the administrative law judge permissibly determined that Dr. Simpao's opinion was not well-founded because it was not corroborated by claimant's treatment records and it was contradicted by the examination findings of Dr. Dahhan two years later. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 29; Director's Exhibit 12; Employer's Exhibits 1, 6. The administrative law judge also found it noteworthy that Dr. Simpao reported claimant's objective test results as normal. Director's Exhibit 12 at 24. Thus, review of the administrative law judge's decision reveals that he carefully considered all of the bases Dr. Simpao identified to support his opinion and determined that none could provide support for a determination that claimant is currently totally disabled. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, it was unnecessary for the administrative law judge to compare Dr. Simpao's opinion with the exertional requirements of claimant's coal mine employment.

We also reject claimant's argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant's Brief at 3. The Act provides no such presumption, and an administrative law judge's findings 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). As claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(b)(2)(iv), we affirm his determination that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2).

Thus, because claimant has failed to establish total disability, a requisite element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge