BRB No. 04-0829 BLA

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| JOE ROBERTS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| SHAMROCK COAL COMPANY, | ) | |
| INCORPORATED | ) | DATE ISSUED: 05/11/2005 |
| | ) | |
| and | ) | |
| | ) | |
| SUN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-<br>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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2003-BLA-5382) of Administrative Law Judge Daniel J. Roketenetz 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 seventeen years of coal mine employment and considered the claim, filed on February 12, 2001, under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found, however, that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv). Claimant also maintains that the administrative law judge erred in admitting evidence in excess of the limitations set forth in 20 C.F.R. §725.414(a)(3)(i). Finally, claimant contends that remand to the district director is required, as he did not receive a complete, credible pulmonary evaluation as is required by 20 C.F.R. §725.406. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation, has also responded and contends that remand for a complete pulmonary evaluation is not warranted in this case.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 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. 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] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Regarding the issue of total disability pursuant to Section 718.204(b)(iv), claimant argues that Dr. Baker's opinion is sufficient to establish total disability. Claimant alleges specifically that the administrative law judge ignored Dr. Baker's status as a treating physician and erred in failing to compare the exertional requirements of this work to the finding of impairment set forth in the opinion of Dr. Baker. Claimant also suggests that the administrative law judge erred in according less weight to Dr. Baker's diagnoses because he relied upon nonconforming and/or nonqualifying objective studies. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant also maintains that the administrative law judge erred in failing to address claimant's age or work experience in determining that claimant is not totally disabled.

Claimant's contentions are without merit. In considering the medical opinion evidence, the administrative law judge acknowledged Dr. Baker's status as claimant's treating physician and noted that Dr. Baker recorded claimant's occupational and smoking histories and the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order at 8-9; Director's Exhibit 12; Claimant's Exhibit 5; Employer's Exhibit 13. The administrative law judge rationally determined, however, that Dr. Baker did not opine that claimant is totally disabled, as he answered in the affirmative when asked if claimant is able to do his usual coal mine work or "similar arduous manual labor." Decision and Order at 9; Employer's Exhibit 13 at 9; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). The administrative law judge also acted rationally in finding that Dr. Baker's statement that claimant should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988).

We also find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with Dr. Baker's assessment of claimant's physical limitations. In this case, this comparison was not required. Such a comparison is necessary only to establish that the doctor understands the exertional requirements when he opines that claimant is capable of performing his usual coal mine employment. Claimant does not dispute that Dr. Baker, his treating physician, was familiar with his usual coal mine work when the doctor stated that claimant can engage in his usual coal mine work or "similar arduous manual labor."[2] Employer's Exhibit 13 at 9. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); s*ee also Gee v. W.G. Moore and Sons,* 9 BLR 1-4 (1986)(*en banc);*

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[2] In his report, Dr. Baker stated that claimant operated a roof bolting machine, worked on belt lines, and performed long wall utility. Director's Exhibit 10. Moreover, he obviously considered claimant's work to be arduous. Employer's Exhibit 13 at 9.

*Onderko v. Director, OWCP,* 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.,* 9 BLR 1-201 (1986).[3]

Finally, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[4] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co*., 19 BLR 1-18 (1994). We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), as all of the physicians of record indicated that claimant is capable of performing his usual coal mine employment.

Because claimant has not raised any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we must affirm the administrative law judge's finding and the denial of benefits. *Trent*, 11 BLR 1-26, 1-27; *Perry*, 9 BLR 1-1, 1-2. We must also reject claimant's assertion that remand to the district director is required because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge under Section 718.202(a)(4).[5]

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment took place in the Commonwealth of Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), is misplaced. In *Bentley,* the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

[5] Dr. Hussain examined claimant at the request of the Department of Labor on April 18, 2001. Director's Exhibit 10. He obtained an x-ray, pulmonary function study, and a blood gas study and recorded claimant's occupational, social, and medical histories. Dr. Hussain diagnosed clinical pneumoconiosis, based upon a positive chest x-ray interpretation and claimant's history of coal dust exposure, and coronary artery disease. He stated that claimant had a mild impairment and retained the respiratory capacity to perform the work of a miner. *Id*.; Claimant's Exhibit 4.

With respect to the issue of total disability, the administrative law judge did not find that Dr. Hussain's opinion was incomplete or lacking credibility. Rather, he described Dr. Hussain's opinion as supported by the objective evidence and rationally determined that because Dr. Hussain explicitly indicated that claimant is able to perform coal mine work, his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 16. Thus, Dr. Hussain's opinion regarding total disability - the element of entitlement upon which the administrative law judge based the denial of benefits - was complete and credible. In light of this fact, remand to the district director is not required. 20 C.F.R. §725.406(a); *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).

Because we have affirmed the denial of benefits based upon the administrative law judge's appropriate finding that claimant did not prove that he is totally disabled pursuant to Section 718.204(b)(2), we decline to reach the arguments concerning the administrative law judge's admission of medical reports pursuant to Section 725.414(a)(3)(i) and his weighing of the evidence under Section 718.202(a)(4). Error, if any, in the administrative law judge's findings on these issues is harmless in light of our affirmance of his findings under Section 718.204(b)(2). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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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REGINA C. McGRANERY
Administrative Appeals Judge