

BRB No. 04-0835 BLA

MICHAEL BRUMLEY )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SANDY FORK MINING COMPANY, ) DATE ISSUED: 05/23/2005  
 INCORPORATED )  
 )  
 and )  
 )  
 KENTUCKY COAL PRODUCERS SELF- )  
 INSURANCE FUND )  
 )  
 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2003-BLA-5536) of Administrative Law Judge Robert L. Hillyard 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 ten years of coal mine employment and found that employer is the proper responsible operator. The administrative law judge considered the claim, filed on March 12, 2001, under the regulations set forth in 20 C.F.R. Part 718.<sup>1</sup> The administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability 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)(1), (a)(4) and 718.204(b)(2)(iv). Claimant also maintains 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.<sup>2</sup>

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'Keefe 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. *Gee v. W.G. Moore*

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<sup>1</sup> There is evidence in the record suggesting that claimant previously filed an application for benefits which was denied on September 27, 1991. Director's Exhibits 1, 31. Neither the administrative law judge nor the parties have addressed the issue of whether the claim filed on March 12, 2001, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).

<sup>2</sup> 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).

*and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

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 erred in failing to compare the exertional requirements of his work to the finding of impairment set forth in the opinion of Dr. Baker. Claimant also contends 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 and work experience in determining that claimant is not totally disabled.

In considering the medical opinion evidence, the administrative law judge noted that Dr. Baker recorded claimant's smoking history and the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies in addition to his occupational history. Decision and Order at 6; Director's Exhibit 13. The administrative law judge determined that Dr. Baker's opinion is insufficient to establish total disability because Dr. Baker "failed to make a definitive diagnosis of total disability or to explain how the normal objective testing applied to his diagnosis." *Id.*

Although the administrative law judge's summary of Dr. Baker's opinion is not entirely accurate, we affirm the administrative law judge's findings as they are rational and supported by substantial evidence.<sup>3</sup> *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 properly found that Dr. Baker did not make a "definitive diagnosis of total disability," as Dr. Baker merely reported that claimant "has a Class I impairment based on Table 5-12, Page 107, Chapter Five, *Guides to the Evaluation of Permanent*

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<sup>3</sup> The administrative law judge stated that Dr. Baker opined that claimant's Class I impairment would "imply" a finding of total disability. Decision and Order at 13. Rather, Dr. Baker diagnosed a Class I impairment and "a second impairment based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*," which provides that persons who have pneumoconiosis should avoid further coal dust exposure. Director's Exhibit 13. Dr. Baker reported that this second impairment "would imply the patient is 100% occupationally disabled for work in [the] coal mining industry or other similar dusty occupations." *Id.*

*Impairment, Fifth Edition.*”<sup>4</sup> Director’s Exhibit 13. In addition, the administrative law judge rationally found that Dr. Baker’s statement that claimant should limit further exposure to coal dust is not equivalent to a finding of total disability. Decision and Order at 13; *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). The administrative law judge also acted within his discretion in finding that even if Dr. Baker’s opinion is interpreted as containing a diagnosis of impairment, it was entitled to little weight because Dr. Baker did not explain how the underlying objective data supported his conclusion. Decision and Order at 13; see *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000).<sup>5</sup>

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 to Dr. Baker’s assessment of claimant’s physical limitations. In this case, a comparison was not required, as the administrative law judge rationally determined that Dr. Baker’s opinion did not contain an unequivocal diagnosis of a respiratory or pulmonary impairment which the administrative law judge could compare to the exertional requirements of claimant’s coal mine work. *Cornett*, 227 F.3d 569, 577, 22 BLR 2-107, 2-124; see also *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

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. See 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Claimant’s reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is also misplaced. In *Bentley*, the Board held that age, work experience, and education are relevant only 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). We affirm, therefore, the

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<sup>4</sup> The table to which Dr. Baker refers indicates that a Class I impairment corresponds to a 0% impairment of the whole person. *Guides to the Evaluation of Permanent Impairment* 107, Table 5-12 (5th ed. 2001).

<sup>5</sup> 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*).

administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv).

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 at 1-27; *Perry*, 9 BLR at 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).<sup>6</sup>

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, the administrative law judge described Dr. Hussain's opinion as supported by the objective evidence and 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 13; Director's Exhibit 11. Based upon these determinations, which claimant has not challenged, the administrative law judge found that 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 claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a)(1) and (a)(4). Error, if any, in the administrative law judge's findings 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).

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<sup>6</sup> Dr. Hussain examined claimant on June 27, 2001 and obtained an x-ray, a pulmonary function study, and a blood gas study. Director's Exhibit 11. Dr. Hussain diagnosed mild pneumoconiosis and chronic obstructive pulmonary disease. He indicated that claimant had a mild impairment, but retained the respiratory capacity to perform the work of a miner. *Id.*

Accordingly, the administrative law judge's Decision and Order-Denial of 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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BETTY JEAN HALL  
Administrative Appeals Judge