BRB No. 05-0843 BLA

WILLARD H. SHOPE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CONSTRUCTION COMPANY	)	DATE ISSUED: 05/26/2006
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

H. Kent Hendrickson (Rice, Hendrickson & Williams), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6644) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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 eleven years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

Further, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also states that the administrative law judge erred in finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The relevant evidence at Section 718.204(b)(2)(iv) consists of two reports from Dr. Baker. In a report dated November 12, 2001, Dr. Baker opined that claimant's impairment is minimal. Director's Exhibit 11. In an attached form, Dr. Baker checked both a box indicating that claimant has no impairment and a box indicating that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. In considering claimant's hearing testimony regarding his usual coal mine work, the administrative law judge stated:

> The [c]laimant stated that his primary jobs included loading and pushing coal as well as preparing unit trains. (TR11). He indicated [that] both the loader and dozer that he operated had open cabs. *Id*. He also repaired tipples and ran sewer lines through the mines. *Id*. The [c]laimant testified that his jobs involved dusty work. *Id*.

Decision and Order at 3. Claimant has offered no evidence to establish that the minimal impairment diagnosed by Dr. Baker would prevent him from performing his primary work as a heavy equipment operator. Thus, claimant has failed to prove that this diagnosis would support a finding of total disability. *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

[1]Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In a subsequent report dated February 5, 2003, Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 23. 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), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability.

Dr. Baker also opined in his February 5, 2003 report that:

> [Claimant] has a Class 2 impairment with the FEV1 and vital capacity being between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 23. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine work, Dr. Baker's finding of a Class 2 impairment is insufficient to support a finding of total disability. *Budash*, 9 BLR 1-51. Further, in view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability at Section 718.204(b)(2)(iv), we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.[2] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

[2]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.

Claimant also asserts that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as claimant's treating physician.[3] 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.[4] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 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 not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Further, as claimant raises no other argument at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under

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[3]Claimant also asserts that the administrative law judge erred in rejecting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study. Contrary to claimant's assertion, the administrative law judge merely noted that Dr. Baker's November 12, 2001 opinion that claimant has no impairment was based upon a negative x-ray reading, a non-qualifying pulmonary function study, and a non-qualifying arterial blood gas study. Decision and Order at 8.

[4]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 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).

20 C.F.R. Part 718.[5] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[5]In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's general assertion at 20 C.F.R. §718.204(c). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).