BRB No. 03-0316 BLA

ELMER B. MCGRANER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 11/10/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Rita A. Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-0309) of Administrative Law Judge Joseph E. Kane rendered on a duplicate 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).[1] The administrative law judge found 3.66

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

years of coal mine employment, and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 6.[2] In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203, elements of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In considering all the evidence of record on the merits of the claim, however, the administrative law judge found that it failed to establish that claimant suffered from a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), as well as his entitlement to benefits, and asserts that the administrative law judge's contrary findings are erroneous. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.

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 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 the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

Claimant contends that the administrative law judge provided invalid reasons for according less weight to the opinions of Drs. Odom, Pigman, Clarke, and Baker at 20

[2] Claimant filed his first claim for benefits in 1972, which was denied by the district director on January 7, 1980. Director's Exhibit 18. The instant duplicate claim was filed on December 26, 1994. Director's Exhibit 1. The procedural history of this case is set forth in the administrative law judge's Decision and Order at 3.

C.F.R. §718.204(b)(2)(iv).[3] Drs. Odom, Pigman, Clarke, and Baker found claimant totally disabled and unable to perform his usual coal mine employment due to a pulmonary or respiratory impairment. Director's Exhibits 9, 18-24, 18-27, 18-28, 60. Drs. Dahhan and Wicker found no impairment and that claimant had the capacity to perform his coal mine employment. Director's Exhibits 10, 11, 22, 55. Contrary to claimant's contention, the administrative law judge rationally accorded little weight to Dr. Odom's finding of total disability as it was not supported by the underlying objective evidence and because the physician failed to explain his conclusion that claimant was unable to perform his usual coal mine employment. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (explaining that in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Likewise, the administrative law judge properly accorded little weight to Dr. Pigman's finding of total disability as it was poorly reasoned and the physician failed to document the objective tests upon which he based his conclusions. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 149; *Tackett*, 12 BLR at 11; *Fields*, 10 BLR at 19. Further, the administrative law judge permissibly accorded less weight to the opinions of Drs. Odom and Pigman as they are the oldest opinions of record; their exams were performed in 1973, while the remaining physicians performed exams in 1994, 1995 and 2000. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985).

Further, the administrative law judge accorded less weight to Dr. Clarke's opinion as the physician "made no explicit finding of the tension between the exertional requirements of Claimant's job and his *mild* impairment." Decision and Order at 23 (emphasis in original).[4] Claimant contends that the administrative law judge's analysis was erroneous because Dr. Clarke was aware of claimant's coal mine work and based his opinion on "the entire examination." *See* Director's Exhibit 9.

Claimant's contention lacks merit. The administrative law judge properly accorded little weight to Dr. Clark's opinion as the physician failed to explain how claimant's mild ventilatory impairment prevented him from performing coal mine

[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The administrative law judge considered the exertional requirements of claimant's usual coal mine employment. Decision and Order at 7.

employment or comparable work. *Cornett v. Benham Coal Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Claimant further relies on the opinion of Dr. Baker. Dr. Baker found a "borderline Class I impairment" based on a pulmonary function study whose results were "[w]ithin normal limits." Director's Exhibit 60. The physician also found:

> Patient does have an impairment based on the presence of Pneumoconiosis, which is based on Table 10, Page 164, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fourth Edition, which states that even though pneumoconiosis may cause no physiological effect, its presence usually requires the patient to be removed from the dust causing the condition. This would make him 100% occupationally disabled for working in any type of dusty occupation.

Id. The record thus shows that Dr. Baker diagnosed a "borderline Class I impairment" based on the pulmonary function study underlying his report. *Id*. The results of this pulmonary function study were, however, "[w]ithin normal limits" and non-qualifying. *Id*. Moreover, Dr. Baker's opinion, that claimant's impairment based on the presence of pneumoconiosis "would make him 100% occupationally disabled for working in any type of dusty occupation," *id*., amounts to no more than a recommendation against further exposure to coal mine dust and is inadequate to establish total pulmonary or respiratory disability under the Act. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Claimant next argues that the administrative law judge was required to consider claimant's age, education and work experience in determining whether claimant established that he is totally disabled, *citing Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 488-90 (6th Cir. 1995).

Lastly, claimant argues that, inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that claimant's pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected claimant's ability to perform his usual coal mine employment. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that his pneumoconiosis has worsened over time, however, is unsupported by any evidence and thus, we decline to address it further.

As the administrative law judge properly found that claimant failed to establish a totally disabling pulmonary or respiratory impairment, an essential element of

entitlement, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge