BRB No. 04-0367 BLA

JAMES WAGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 11/30/2004
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, PSC), Pikeville, 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-5533) of Administrative Law Judge Rudolf L. Jansen 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). After crediting claimant with eleven years of coal mine

employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.20(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 brief.[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 pursuant to 20 C.F.R. §718.204(b)(2)(iv). Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant initially contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. 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 Virginia 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 contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. 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 25. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see*

[1] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. Decision and Order at 12.

Dr. Baker also opined that:

> Patient has a Class I impairment with the FEV1 and the vital capacity both being greater than 80% 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 25.

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 employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

Claimant also argues that the administrative law judge erred in finding Dr. Simpao's opinion insufficient to establish total disability. Dr. Simpao indicated that claimant did not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 10. However, the administrative law judge properly discredited Dr. Simpao's opinion because the doctor failed to provide any reasoning or rationale for his conclusion.[2] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12.

[2] Despite characterizing claimant's pulmonary function and arterial blood gas studies as normal, Dr. Simpao diagnosed a mild pulmonary impairment. Director's Exhibit 10. Dr. Simpao also checked a box indicating that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.* Although Dr. Simpao indicated that this finding was based upon claimant's x-ray, symtomatology and unspecified physical findings, the doctor failed to explain how this information supported his opinion that claimant was totally disabled from a pulmonary standpoint.

The administrative law judge also properly found that Drs. Rosenberg,[3] Broudy[4] and Vuskovich[5] opined that claimant retained the respiratory capacity to perform his usual coal mine employment.[6] Decision and Order at 12-13. Because it is based upon substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.[7]

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[3] In a report dated June 25, 2003, Dr. Rosenberg also opined that, from a pulmonary perspective, claimant could perform his previous coal mine employment. Employer's Exhibit 7. Dr. Rosenberg reiterated his opinion during an August 7, 2003 deposition. Employer's Exhibit 14.

[4] In a report dated August 28, 2003, Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner. Employer's Exhibit 10.

[5] In a report dated September 11, 2003, Dr. Vuskovich opined that there was no evidence of a pulmonary or respiratory impairment. Employer's Exhibit 12. During an October 10, 2003 deposition, Dr. Vuskovich opined that claimant retained the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 17.

[6] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, because there is no medical opinion evidence that supports a finding of total disability, the administrative law judge's failure to make such findings constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Claimant argues that the administrative law judge erred in not identifying claimant's usual coal mine work or the physical requirements of that work. The administrative law judge, however, noted that claimant worked as a bridge carrier behind a continuous miner. Decision and Order at 4. The administrative law judge noted that this work involved "sitting for eight to ten hours a day and lifting twenty-five to fifty pounds several times a day." *Id.* Moreover, contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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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).