BRB No. 05-0305 BLA
and 05-0305 BLA-A

ORPHUS SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/22/2005
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., 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.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits (03-BLA-5649) of Administrative Law Judge Thomas F. Phalen, Jr., 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 fourteen and one-half years of coal mine employment and adjudicated this case pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject claimant's arguments regarding the complete, credible pulmonary evaluation. In employer's cross-appeal, it asserts that the administrative law judge erred in excluding several exhibits and it argues that the limitations on the admission of evidence are invalid. The Director responds to employer's cross-appeal, urging the Board to reject employer's arguments raised therein. Employer has filed a reply brief, restating its position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

We first turn to claimant's assertions regarding the administrative law judge's total disability findings. Claimant contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient

[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).

to invoke the presumption of total disability. The *Meadows* decision addresses invocation of the interim presumption 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 if the Part 727 regulations were applicable, the United States Supreme Court has determined 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. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant argues that the administrative law judge erred in rejecting Dr. Baker's opinion. Dr. Baker opined that claimant:

> has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on FEV1 and vital capacity being greater than 80% of predicted . . . . Patient has a second impairment based on the presence of Pneumoconiosis which is based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply that the patient is 100% occupationally disabled for work in coal mining industry or other similarly dusty occupations.

Director's Exhibit 13. The administrative law judge "infer[red] that a class I impairment is not equivalent to total disability," and found that Dr. Baker's opinion regarding the inadvisability of returning to coal mine employment because of pneumoconiosis is "not the equivalent of a finding of total disability." Decision and Order at 14. The administrative law judge, thus, found that Dr. Baker's opinion is "not entitled to probative weight." Decision and Order at 14.

Because Dr. Baker does not explain the severity of his diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class I impairment is insufficient to 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*). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability. Decision and Order at 14. Further, in view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge

erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Claimant further contends that the administrative law judge "made no mention of claimant's age or work experience in conjunction with his assessment that the claimant is not totally disabled." Claimant's Brief at 9. 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, 7 BLR 2-124 (6th Cir. 1985). In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. 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 he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further.

Because claimant does not raise any further specific allegations of error in the administrative law judge's findings regarding total disability pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant has not established total disability pursuant to Section 718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

We now consider claimant's assertion that the Director has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant alleges that since the administrative law judge determined that Dr. Simpao's opinion is poorly reasoned, the Director has not fulfilled his statutory duty. The Director responds, asserting that he has provided claimant with a pulmonary evaluation that complies with the requirements of Section 413(b).

The Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner, pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Simpao to perform his pulmonary evaluation. Dr. Simpao diagnosed coal workers' pneumoconiosis due to multiple years of coal dust exposure. Dr. Simpao also opined that claimant has a mild impairment, and he stated that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment. Director's Exhibit 14.

The Director notes that Section 413(b) requires him to provide claimant with "a complete credible examination, not a dispositive one." Director's Letter dated February 23, 2005 at 3. The Director states that "[t]he fact that other evidence of record may

outweigh the diagnosis contained in the Section 413(b) examination does not mean that the Director failed to satisfy his statutory obligation." Director's Letter dated February 23, 2005 at 3. The Director contends that the administrative law judge erred in finding that Dr. Simpao's diagnosis of pneumoconiosis is unreasoned, but notes that the administrative law judge "could fairly find Dr. Simpao's diagnosis of pneumoconiosis outweighed by the contrary conclusion of Dr. Scott . . . ." Director's Letter dated February 23, 2005 at 4. In addition, the Director challenges claimant's contention that Dr. Simpao's disability assessment is insufficient to satisfy Section 413(b). The Director asserts that Dr. Simpao's assessment is "at least, minimally supported by the objective indications that he described . . . ." Director's Letter dated February 23, 2005 at 4. The Director notes that a Section 413(b) opinion would be legally insufficient if the examination is incomplete because it fails to address all elements of entitlement using proper documentation, or if the opinion, viewed in isolation, is inherently not credible. Director's Letter dated February 23, 2005 at 3.

The administrative law judge noted Dr. Simpao's failure to explain his findings, and therefore found that this opinion is not well documented or well reasoned, *see* Decision and Order at 14. However, this does not render Dr. Simpao's opinion incomplete. *See generally Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990). The Director's obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). We, therefore, agree with the Director that Dr. Simpao's opinion satisfies the Director's obligation under Section 413(b) of the Act, and reject claimant's contrary position.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the denial of benefits. Therefore, we need not address claimant's challenges to the administrative law judge's findings at 20 C.F.R. §718.202(a). Further, notwithstanding employer's arguments in support of its cross-appeal, we decline to address employer's cross-appeal in view of our disposition of this case.

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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JUDITH S. BOGGS
Administrative Appeals Judge