BRB No. 05-0556 BLA

WOODROW GRUBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 11/22/2005
	)	
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 Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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 the Decision and Order Denying Benefits (03-BLA-6570) of Administrative Law Judge William S. Colwell 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). Claimant filed his claim for benefits on January 7, 2002. Director's Exhibit 2. Following a hearing held on August 4, 2004, the administrative law judge determined that the evidence was insufficient to establish the existence of coal

workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by not excluding one of the three x-ray readings submitted by employer as having been proffered in excess of the evidentiary limitations at 20 C.F.R. §725.414.[1] Claimant's Brief at 3-4. On the merits of entitlement, claimant argues that the administrative law judge erred in weighing the x-ray evidence relevant to whether he established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 2-4. Claimant contends that, insofar as the administrative law judge found Dr. Bakers' opinion "inadequate" to establish his entitlement to benefits, the administrative law judge erred by not remanding the case for the Department of Labor to satisfy its obligation to provide him with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b).[2] Claimant's Brief at 4. Claimant also challenges the administrative law judge's finding that he was not totally disabled. Claimant's Brief at 5-6. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief, arguing that the Department of Labor satisfied its obligation to provide claimant was a complete, credible pulmonary evaluation. The Director specifically maintains that the administrative law judge permissibly assigned Dr. Baker's diagnosis of pneumoconiosis less probative weight, and that "a remand would be unnecessary since [claimant] still could not prevail because Dr. Bakers' conclusions do not support an essential element of entitlement – total pulmonary disability." Director's Brief at 3.

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

[1] Pursuant to Section 725.414(a)(3)(i), a responsible employer shall be entitled to obtain and submit in support of its affirmative case, no more than two chest x-ray interpretations. *See* 20 C.F.R §725.414(a)(3)(i). Claimant maintains that employer submitted three x-ray readings in support of its affirmative case. Employer's Exhibits 2, 5; Director's Exhibit 35; Claimant's Brief at 3.

[2] The Department of Labor (DOL) has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, Dr. Baker conducted the DOL-sponsored examination of claimant on March 21, 2002. Director's Exhibits 13-15.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically, we affirm the administrative law judge's finding that claimant is not totally disabled.

Under Section 718.204(b)(2)(iv), the administrative law judge considered the four medical opinions of Drs. Baker, Chaney, Repsher, and Rosenberg.[3] Director's Exhibits 12, 13; Claimant's Exhibit 2; Employer's Exhibits 5, 7; Decision and Order at 17-18. The administrative law judge found that Dr. Baker diagnosed a minimal impairment, while Drs. Chaney, Repsher, and Rosenberg opined that claimant had no respiratory impairment. The administrative law judge permissibly concluded that claimant had no respiratory impairment based on the opinions of Drs. Repsher and Rosenberg because the administrative law judge found their opinions to be better supported by the objective evidence. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 17-18.

Although claimant argues that the administrative law judge erred in failing to consider the medical opinions in light of the exertional requirements of his usual coal mine employment, *see generally Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*), claimant's argument is without merit. Claimant's Brief at 5-6. Since Drs. Chaney, Repsher, and Rosenberg specifically found that claimant had no respiratory impairment whatsoever; it was not necessary for the administrative law judge to consider claimant's exertional work requirements. *See Cornet v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).[4] Furthermore, since Dr. Baker diagnosed, at most, a

[3] The administrative law judge found that all of the pulmonary function study and arterial blood gas study was non-qualifying for total disability, and that the record was devoid of evidence that claimant suffered from cor pulmonale with right-sided congestive heart failure, which would entitle him to a presumption of total disability. Thus, the administrative law judge determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 17. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Claimant's coal mine employment was in the Commonwealth of Kentucky; therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

"minimal respiratory impairment with bronchitis," and when given a choice of: no impairment, mild impairment, moderate impairment, severe impairment or totally disabled, Dr. Baker chose no impairment, the administrative law judge reasonably found Dr. Baker's opinion insufficient to satisfy claimant's burden of proof. *See Cornett*, 227 F.3d at 569, 22 BLR at 2-107; Director's Exhibit 13.

We further reject claimant's assertion that the administrative law judge erred because he "made no mention of the claimant's age or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 6. These factors 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). Because the physicians of record were in agreement that claimant was not totally disabled, it was unnecessary for the administrative law judge to independently assess the requirements of claimant's usual coal mine employment.

Consequently, as we affirm the administrative law judge's denial of benefits based on his finding at 20 C.F.R. §718.204(b)(2), we decline to address claimant's arguments with respect to the evidentiary limitations, the administrative law judge's finding at 20 C.F.R. §718.202(a), and his assertion that he did not receive a complete pulmonary evaluation. We note, however, that any error committed by the administrative law judge with respect to his finding on the existence of pneumoconiosis is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), given that the administrative law judge properly determined that claimant does not have a totally disabling respiratory or pulmonary impairment. Because claimant failed to carry his burden of proof to establish his total disability, benefits are precluded. *See Trent v. Director, OWCP*, 9 BLR 1-1 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge 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