BRB No. 06-0413 BLA

LONNIE BREWER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILVERADO TRUCKING, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 11/30/2006
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	DECISION and ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

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

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Denying Benefits (04-BLA-5562) of Administrative Law Judge Joseph E. Kane 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 twenty-five years of coal mine

employment and adjudicated this claim 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 therefore, he found that the question of causation, pursuant to 20 C.F.R. §718.203, was moot. The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

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. Employer responds, urging the Board to affirm the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

As an initial matter, we consider claimant's challenges to the administrative law judge's total disability findings. Claimant contends that the administrative law judge erred in finding that the medical opinion evidence is insufficient to 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 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 asserts that Dr. Simpao's opinion supports claimant's position that he is totally disabled from performing his usual coal mine employment. Dr. Simpao opined that claimant suffered a mild impairment, and he concluded that claimant is "totally disabled due to the combination of his pulmonary status, heart condition, and back problems." Director's Exhibits 10, 34. The administrative law judge found that Dr. Simpao failed to provide a basis for his

[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. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

conclusion and failed to state how his examination and objective test results support his finding. The administrative law judge therefore found this opinion unreasoned and undocumented and the administrative law judge accorded it little weight at Section 718.204(b)(2)(iv). Decision and Order at 18.

We affirm the administrative law judge's determination that Dr. Simpao's opinion regarding disability is unreasoned, as the physician has not explained his conclusions regarding the extent of claimant's disability. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Therefore, the administrative law judge permissibly accorded little weight to Dr. Simpao's opinion at Section 718.204(b)(2)(iv).

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

> has a Class 1 impairment with the FEV1 and 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. . . . 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 the patient is 100% occupationally disabled for work in the coal mining industry or similar occupations.

Director's Exhibit 12. The administrative law judge stated that an 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 18. Therefore, the administrative law judge accorded little weight to Dr. Baker's opinion regarding disability.

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 1 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 18.

Further, in view of our holdings that Dr. Baker's opinion is insufficient to support a finding of total disability, and that Dr. Simpao's opinion is not well reasoned, 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 the opinions of Drs. Baker and Simpao.

In addition, claimant argues that because 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).

In view of our affirmance of the administrative law judge's finding that claimant has not established the existence of total disability pursuant to Section 718.204(b)(2), one of the essential elements of entitlement pursuant to 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 assertions regarding the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge