

BRB No. 07-0231 BLA

L. A.)
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 Claimant-Petitioner)
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 v.)
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 MOUNTAIN CLAY, INCORPORATED) DATE ISSUED: 11/14/2007
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 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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.
Feldman, 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 (05-BLA-5604) of
Administrative Law Judge Robert D. Kaplan 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

eighteen years of coal mine employment based on a stipulation of the parties. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis and total disability. Claimant further argues that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory duty to provide claimant with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director responds by letter, contending that he satisfied his obligation to provide claimant with a complete pulmonary evaluation.¹

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability. 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. Claimant's reliance on *Meadows* is misplaced. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the regulations at 20 C.F.R. Part 718, which require claimant to affirmatively establish each element of entitlement, the Part 727 presumption regulations are not relevant.

¹ The administrative law judge's length of coal mine employment finding, and his finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are not challenged on appeal. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Additionally, we reject claimant's argument that the administrative law judge erred in finding that Dr. Baker's opinion did not establish total disability. Dr. Baker opined that, because a person who develops pneumoconiosis should limit further exposure to the offending agent, in this case, coal dust, claimant is 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 16. Because 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 did not support a finding of total disability.

Dr. Baker also opined that:

Patient has a Class 2 impairment based on the FEV1 between 60% and 79% 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 16 at 4. The administrative law judge discounted this opinion because Dr. Baker characterized the impairment overall as mild, and did not address the non-qualifying blood gas study results he obtained. Additionally, the administrative law judge found that, by contrast, the opinions of Drs. Hussain, Broudy, and Rosenberg that claimant retains the respiratory capacity to perform his previous coal mine work, were well-reasoned and documented, and therefore merited "substantial weight." Decision and Order at 14. These were reasonable credibility determinations by the administrative law judge, and substantial evidence supports his findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Therefore, 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.²

We therefore affirm the administrative law judge's finding that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Because claimant did not establish total disability, an essential element of entitlement pursuant to Part 718, we affirm the administrative law judge's denial of benefits, and we need not address claimant's arguments regarding the

² Claimant further asserts that because pneumoconiosis is a progressive disease, it has worsened and thus, adversely affected his ability to perform his usual coal mine work. Claimant's Brief at 8. We reject claimant's argument, "as an administrative law judge's findings must be based solely on the medical evidence contained in the record." *White v. New White Coal Co.*, 23 BLR 1-1, 1-7, n.8 (2004).

administrative law judge's findings pursuant to Section 718.202(a). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Finally, claimant asserts that because the administrative law judge found that Dr. Hussain's diagnosis of pneumoconiosis was based on an erroneous x-ray interpretation, the Director failed to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 5-6. The Director responds that he met his obligation because Dr. Hussain's opinion was complete and the administrative law judge fully credited Dr. Hussain's opinion that claimant is not totally disabled. Director's Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibits 10, 41; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Initially, in 2001, Dr. Hussain diagnosed pneumoconiosis and a moderate impairment. Director's Exhibit 10. The Director requested clarification from Dr. Hussain, and in a 2004 follow-up report, Dr. Hussain stated that claimant has a mild impairment, and retains the respiratory capacity to perform his usual job duties. Director's Exhibit 41-4.

As the Director notes, the administrative law judge credited, as "well documented and reasoned," Dr. Hussain's opinion that claimant is not totally disabled. Decision and Order at 14. We have affirmed the denial of benefits based on the administrative law judge's finding that the evidence did not establish total disability. We therefore agree with the Director that, regardless of the administrative law judge's decision not to credit Dr. Hussain's diagnosis of pneumoconiosis, the Director met his obligation to claimant.³ *See Hodges*, 18 BLR at 1-87.

³ Moreover, the administrative law judge did not completely discredit Dr. Hussain's diagnosis of pneumoconiosis; he chose to accord it "little weight." Decision and Order at 10. That determination does not establish a violation of the Director's statutory duty. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 n.3 (1994).

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