BRB No. 07-0234 BLA

H.C. Claimant-Petitioner v. PREMIER ELKHORN COAL COMPANY c/o ACORDIA EMPLOYERS SERVICES/ Self-Insured through GATLIFF COAL COMPANY c/o ACORDIA EMPLOYERS SERVICES Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/21/2007 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (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 (2004-BLA-06473) of Administrative Law Judge Richard K. Malamphy 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 found that the record supported the parties' stipulation to a coal mine employment history of at least twenty-five years. The administrative law judge found that the claim was timely filed pursuant to 20 C.F.R. §725.308, but found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge further found that because claimant could not establish the existence of pneumoconiosis or total disability, he could not establish that pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), or that total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a), because the administrative law judge discounted the opinion of Dr. Simpao. Employer has filed a response brief in support of affirming the administrative law judge's Decision and Order denying benefits. The Director has filed a limited response, arguing that claimant was provided with a pulmonary evaluation that complies with the requirements of Section 413(b) of the Act.[2]

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,

[1] Although claimant refers to the provisions at 20 C.F.R. §718.204(c), *see* Claimant's Brief at 6, under the amended regulations, total respiratory or pulmonary disability is established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), or total respiratory disability pursuant to §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Turning first to the issue of total respiratory disability, claimant asserts that the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Baker's assessment of disability at Section 718.204(b)(iv).[4] Claimant's Brief at 6-7. Contrary to claimant's arguments, however, Dr. Baker did not assess any physical limitations which the administrative law judge could compare with the exertional requirements of claimant's former job duties as a heavy equipment operator. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Rather, the administrative law judge accurately determined that Dr. Baker did not state that claimant was disabled, but indicated that claimant's objective test results were within normal limits, and concluded that the degree of severity of claimant's respiratory impairment was "minimal or none." Director's Exhibit 13; Decision and Order at 5, 8. As substantial evidence supports the administrative law judge's finding that Dr. Baker's opinion was insufficient to establish total disability, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gee*, 9 BLR at 1-6, and claimant has not challenged the administrative law judge's determination that the

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2-6.

[4] We reject claimant's general contention that the inadvisability of claimant's return to work in dusty conditions is sufficient to establish a totally disabling respiratory impairment. Claimant's Brief at 7; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Claimant also asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 7. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

remaining medical opinions of Drs. Simpao, Broudy and Rosenberg also did not support a finding of total respiratory or pulmonary disability, we affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(b)(2)(iv).[5] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Because claimant has failed 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. Consequently, we need not reach claimant's arguments on the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *See Anderson*, 12 BLR at 1-114.

Lastly, claimant argues that the Director violated his statutory duty to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim, because the administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was not as well reasoned as the contrary opinions of Drs. Broudy and Rosenberg. Claimant's Brief at 5. Claimant's argument is rejected. The Act requires that claimants be provided with a complete pulmonary evaluation, but not necessarily a dispositive one. *See generally Smith v. Martin County Coal Corp.*, 233 Fed. App. 507 (6th Cir. 2007)(unpub.). The administrative law judge determined that Dr. Simpao diagnosed "CWP 2/1" and a mild impairment related to coal mine employment, after conducting a physical examination, recording claimant's symptoms, obtaining medical, social, and employment histories, a positive x-ray, an electrocardiogram, as well as pulmonary function studies and blood gas studies that were interpreted as normal. Director's Exhibit 11; Decision and Order at 5. The administrative law judge did not reject Dr. Simpao's opinion as not credible *per se*, but merely found that it was outweighed by the contrary evidence. Decision and Order at 4-6, 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Thus, as the Director argues, in these circumstances, where the physician's pulmonary evaluation was inherently credible and documented, but his diagnosis of pneumoconiosis was found to be outweighed by the conflicting evidence of record, the Director's statutory obligation is discharged. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406(a); *see generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

[5] The administrative law judge determined that Dr. Simpao reported a similar level of disability as that reported by Dr. Baker, and that Drs. Broudy and Rosenberg had concluded that claimant's impairment would not prevent his return to coal mine work. Decision and Order at 8.

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