

BRB No. 07-0286 BLA

E.B.)
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 Claimant-Petitioner)
)
 v.)
)
 WELLS COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 11/30/2007
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (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 (04-BLA-6344) of Administrative Law Judge Adele Higgins Odegard 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 on February 27, 2001. Director's Exhibit 2. The administrative law judge determined that the evidence was insufficient to establish that claimant suffered from pneumoconiosis arising out coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(c). He further found that claimant failed to establish total disability due to pneumoconiosis pursuant to §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(b)(2)(iv).¹ Claimant further asserts that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that he has satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation. *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).

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis

¹ Although claimant contends that the administrative law judge erred by not finding that he was totally disabled, he references the regulation at 20 C.F.R. §718.204(c). Claimant's Brief at 6. We note, however, that under the revised regulations, Section 718.204(c) is the regulation pertaining to disability causation while 20 C.F.R. §718.204(b)(2) is the regulation pertaining to total respiratory or pulmonary disability.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits. We specifically affirm the administrative law judge's finding that the evidence is insufficient to establish total disability.³

Section 718.204(b)(2)(iv) provides for a finding of total disability "if a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge correctly determined that there was no medical opinion evidence from which to conclude that claimant was totally disabled. Decision and Order at 22.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered four medical opinions. Decision and Order at 16-17. Dr. Baker reported that, insofar as claimant had an FEV1 and vital capacity greater than 80% of predicted capacity, claimant had a Class I respiratory impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Chapter 5, p. 107, Table 5-12 (5th ed. 2001). Director's Exhibit 6. Dr. Baker did not offer an opinion as to whether claimant was disabled for work. *Id.* Dr. Hussain diagnosed a mild respiratory impairment but he responded "Yes" to the question posed on the Department of Labor examination form asking whether claimant retained the capacity to perform the work of a miner. Director's Exhibit 14. Dr. Rosenberg opined that claimant's objective test results were normal and claimant retained the ability to perform his previous coal mining job or other similarly arduous labor. Director's Exhibit 47. Dr. Dahhan similarly diagnosed that claimant had no respiratory impairment and opined that he could continue to work in his usual coal mine job. Employer's Exhibit 1.

In weighing these medical opinions, the administrative law judge concluded that

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Dr. Baker's opinion failed to satisfy claimant's burden of proof because he did not address the issue of total disability. In contrast, the administrative law judge credited the opinions of Drs. Hussain, Rosenberg, and Dahhan, that claimant was not totally disabled, since he determined that these physicians understood the exertional requirements of claimant's usual coal mine work. Decision and Order at 22.

Claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion. Claimant specifically contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's diagnosis of a Class I respiratory impairment. Claimant's Brief at 9. We disagree. Dr. Baker's assessment of a Class I impairment under the A.M.A., *Guides*, Chapter 5, p. 107, Table 5-12 corresponds to a rating of no impairment. *See Gamble v. Penn Allegheny Coal Co.*, 5 BLR 1-457, 1-459-60 (1983). Because Dr. Baker did not identify a respiratory impairment, the administrative law judge properly determined that his opinion did not establish total disability, and he was not required to consider Dr. Baker's opinion in conjunction with the exertional requirements of claimant's last coal mine job. Because none of the physicians of record has opined that claimant has a totally disabling respiratory or pulmonary impairment, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).⁴ We also affirm the administrative law judge's overall finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Claimant also contends that, insofar as the administrative law judge discredited Dr. Hussain's opinion regarding the existence of pneumoconiosis,⁵ the Board must conclude that the Director has failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges*, 18 BLR at 1-87; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); Claimant's Brief at 6. We disagree. Inasmuch as the administrative law judge credited Dr. Hussain's reasoned

⁴ We also reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 9. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

⁵ Dr. Hussain performed an evaluation of claimant at the request of the Department of Labor on May 30, 2001. Director's Exhibit 14.

opinion that claimant was not totally disabled, and denied the claim on this basis, we conclude that it is unnecessary to remand this case for a complete and credible pulmonary evaluation concerning the issue of pneumoconiosis, as claimant would still be unable to establish his entitlement to benefits based on the administrative law judge's finding that claimant was not totally disabled. Decision and Order at 22. Since the administrative law judge properly found that claimant failed to establish total disability, claimant could not prevail in his claim even if Dr. Hussain's diagnosis of pneumoconiosis were given full weight.

Thus, because the administrative law judge properly determined that claimant failed to establish total disability, a requisite element of entitlement, we affirm the denial of benefits.⁶ *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

⁶ In view of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we do not need to address claimant's arguments with respect to the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).