

BRB No. 08-0245 BLA

T.C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SHAMROCK COAL COMPANY )  
 )  
 and )  
 )  
 JAMES RIVER COAL COMPANY ) DATE ISSUED: 11/26/2008  
 )  
 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 on Remand Denying Benefits of Administrative Law Judge Alan L. Bergstrom, 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

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2006-BLA-05357) of Administrative Law Judge Alan L. Bergstrom with respect to a claim for benefits 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). Director's Exhibit 3. The administrative law judge determined that the case before him presented a request for modification of the denial of a claim filed on December 1, 1998.<sup>1</sup> The administrative law judge credited claimant with twenty-one years of coal mine employment, based on the record and employer's stipulation. The administrative law judge weighed the newly submitted evidence, in conjunction with the previously submitted evidence, and determined that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability under 20 C.F.R. §718.204(b)(2). The administrative law judge concluded, therefore, that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).<sup>2</sup> Accordingly, the administrative law judge denied claimant's request for modification.

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<sup>1</sup> Claimant initially filed a claim for benefits on December 1, 1998, which was denied by Administrative Law Judge Joseph E. Kane. Judge Kane found the evidence insufficient to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed Judge Kane's Decision and Order-Denying Benefits in [*T.C.*] *v. Shamrock Coal Co.*, BRB No. 00-0657 BLA (Apr. 10, 2001) (unpub.). On October 22, 2001, claimant filed a second claim for benefits. Director's Exhibit 3. Administrative Law Judge Daniel J. Roketenetz determined that claimant's application was a request for modification and denied it. Director's Exhibit 30. On appeal, the Board vacated Judge Roketenetz's Decision and Order and remanded the case to the district director for a complete pulmonary evaluation and for reconsideration of the case. [*T.C.*] *v. Shamrock Coal Co.*, BRB No. 04-0769 BLA (Jun. 9, 2005) (unpub.). On October 10, 2005, Dr. Baker performed the pulmonary evaluation. Director's Exhibit 30. The case was subsequently assigned to Administrative Law Judge Alan L. Bergstrom for hearing.

<sup>2</sup> The Department of Labor has amended the regulations set forth in 20 C.F.R. Part 718. The amended regulations became effective on January 19, 2001. The revised version of 20 C.F.R. §725.310 does not apply in this case, however, as the relevant claim was still pending on the effective date of the regulations. 20 C.F.R. §725.2.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(b)(2)(iv).<sup>3</sup> 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 responded, urging the Board to affirm the administrative law judge's denial of benefits, and asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.<sup>4</sup>

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.<sup>5</sup> 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.204(b)(2), the administrative law judge considered both the previously submitted evidence and the evidence developed in conjunction with claimant's request for modification. The administrative law judge determined that the

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<sup>3</sup> In asserting that the administrative law judge erred by not finding that he was totally disabled, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 5. Under the revised regulations, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had twenty-one years of coal mine employment, that claimant's request for modification was timely filed, and that claimant was unable to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(2)-(4), 718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

evidence of record, as a whole, was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 15-16. Because the administrative law judge rendered his finding based upon a consideration of all of the evidence of record, it was equivalent to a determination that claimant did not establish total disability on the merits.

Claimant challenges the administrative law judge's finding under Section 718.204(b)(2), asserting that the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 5, citing *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.*, 7 BLR 1-469 (1984). The only specific argument that claimant sets forth, however, is that:

The claimant's usual coal mine work included being a mine foreman. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. Because a miner's inability to withstand further exposure to coal dust does not establish the presence of a totally disabling respiratory or pulmonary impairment, claimant's argument is without merit. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge properly found that the medical opinions of record do not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge rationally determined that Dr. Baker's 1993 opinion, that claimant should avoid further dust exposure and may have difficulty performing sustained manual labor, was insufficient to establish total disability. *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988) (an administrative law judge may discredit a physician's opinion that is equivocal); Decision and Order at 16; Director's Exhibit 1. The administrative law judge also acted within his discretion as fact-finder in determining that Dr. Baker's 1998 and 2005 opinions, that claimant is able to perform the work of a coal miner, do not support a finding of total disability at Section 718.204(b)(2)(iv). See *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*); Decision and Order at 16; Director's Exhibit 30. Finally, the administrative law judge rationally concluded that

the opinions of Drs. Myers, Broudy, and Rosenberg, that claimant retains the respiratory capacity to perform his last job as a foreman, do not assist claimant in satisfying his burden of proof under Section 718.204(b)(2)(iv). *Id.* We affirm, therefore, the administrative law judge's determination that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that claimant did not establish total disability at Section 718.204(b)(2)(i)-(iii) as unchallenged on appeal, slip op. at 3 n.4, we also affirm the administrative law judge's determination that claimant did not prove that he is totally disabled by any of the methods set forth in Section 718.204(b)(2). Because claimant has failed to establish that he is totally disabled, an essential element of entitlement, we must affirm the denial of benefits under Part 718.<sup>6</sup> *See Perry*, 9 BLR at 1-2.

Finally, we find no merit in claimant's argument that this case must be remanded to the district director for a complete pulmonary evaluation because the administrative law judge discredited Dr. Baker's 2005 opinion under Section 718.202(a)(1). 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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The Director correctly asserts that with respect to the issue of total disability, Dr. Baker's report of his October 20, 2005 examination, which was performed at the request of the Department of Labor, was fully credited by the administrative law judge under Section 718.204(b)(2)(iv). Decision and Order at 16. Because claimant was provided with an evaluation that was complete and credible on the issue that defeated entitlement, we conclude that remand for a complete pulmonary evaluation is not required under the facts of this case. *See* 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-88 n.3. (1994).

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<sup>6</sup> We need not reach, therefore, the administrative law judge's findings regarding modification pursuant to Section 725.310 (2000). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand 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