BRB No. 08-0298 BLA

L.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/25/2008
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Steven K. Robison (Montgomery, Elsner & Pardieck), Seymour, Indiana, for claimant.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (06-BLA-5778) of Administrative Law Judge Larry S. Merck rendered 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). In a Decision and Order dated December 10, 2007, the administrative law judge credited claimant with nine years of coal mine employment[1] and found that the evidence failed to establish the existence of

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his length of coal mine employment determination, and in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and the cause of claimant's totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits. Claimant has filed a reply brief reiterating his contentions.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 a finding of 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).

Claimant initially contends that the administrative law judge erred in crediting him with less than ten years of coal mine employment, and thus erred in failing to presume

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States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(1)-(3), but established, as stipulated by the parties, the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

that his chronic lung disease arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).[3] Claimant's argument lacks merit.

As the Director asserts, the presumption at 20 C.F.R. §718.203(b) does not relieve claimant of his burden to establish legal pneumoconiosis. Director's Brief at 4-5. Rather, to establish legal pneumoconiosis, claimant must affirmatively establish, through medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), that his chronic lung disease or respiratory impairment arose out of coal mine employment.[4] *See* 20 C.F.R. §718.201(a)(2); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76; *see also Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-1-7 (1999)(*en banc*).

In considering the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Kilpatrick, who is a Board-certified family practitioner and claimant's treating physician, opined that claimant suffers from legal pneumoconiosis, in the form of a severe obstructive lung defect due to coal dust exposure. Decision and Order at 11; Claimant's Exhibit C. By contrast, Drs. Powell and Repsher, both Board-certified pulmonary specialists, opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease, but suffers from a respiratory impairment that is due entirely to smoking.[5] Decision and Order at 9-10, 13-15; Director's Exhibits 9, 20.

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[3] The regulation claimant cites provides that "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment." 20 C.F.R. §718.203(b).

[4] "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Thus, the inquiry at 20 C.F.R. §718.203(b) is necessarily subsumed within the administrative law's inquiry as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[5] The administrative law judge indicated that although he could not determine claimant's exact smoking history, the record reflected that it "exceeds fifty pack years . . . ." Decision and Order at 3. Claimant has not challenged this aspect of the administrative law judge's decision.

The administrative law judge recognized that Dr. Kilpatrick is claimant's treating physician, but found that Dr. Kilpatrick's opinion, that despite claimant's smoking history, claimant's coal mine work "is the more likely cause of his underlying respiratory problems," was equivocal and not well-reasoned. Decision and Order at 13, 15. Specifically, the administrative law judge found that Dr. Kilpatrick failed to provide sufficient rationale for the "causal link" between claimant's coal mine dust exposure and his obstructive pulmonary impairment. Decision and Order at 13, 15. Thus, the administrative law judge permissibly concluded that the opinion of Dr. Kilpatrick, the only physician to diagnose the existence of pneumoconiosis, was not sufficient to meet claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 8. Contrary to claimant's argument, an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Nor did the administrative law judge err in focusing on the cause of claimant's respiratory impairment, rather than simply accepting Dr. Kilpatrick's diagnosis of pneumoconiosis, which, claimant asserts, was not equivocal. Claimant's Brief at 3. As noted above, the determination as to the existence of legal pneumoconiosis requires that the administrative law judge inquire into the cause of the miner's respiratory impairment. 20 C.F.R. §718.201(a)(2). In order to establish that he suffers from legal pneumoconiosis, claimant must prove that he suffers from a respiratory impairment "arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000).

Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under

20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27. We, therefore, need not address claimant's additional challenges to the administrative law judge's length of coal mine employment determination, or his finding that claimant failed to establish that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge