BRB No. 08-0331 BLA

J.L.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	DATE ISSUED: 11/26/2008
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (07-BLA-5030) of Administrative Law Judge Thomas F. Phalen, Jr., 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). This case involves a claim filed on January 15, 2002. After crediting claimant with eighteen years of coal mine employment,[1] the

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response in this appeal.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Claimant contends that the administrative law judge erred in finding that he does not have a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's last coal mine work with the disability assessments of Drs. Hussain, Baker, and Myers before discounting their opinions. In support of this position, claimant contends:

> [C]laimant's usual coal mine work . . . involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinions of Drs. Baker, Myers and Hussain, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established eighteen years of coal mine employment, and that claimant failed to establish the existence of 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, 1-711 (1983).

in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 8. Claimant's contention lacks merit. A physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Further, the administrative law judge rationally discounted Dr. Hussain's opinion because Dr. Hussain failed to explain the inconsistency between his original report, stating that claimant is not totally disabled, and his supplemental report, stating that claimant is totally disabled. *See Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). Contrary to claimant's contention, therefore, it was unnecessary for the administrative law judge to compare Dr. Hussain's opinion with the exertional requirements of claimant's coal mine employment. *See Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Further, with respect to the opinions of Drs. Baker and Myers, the administrative law judge accurately observed that both physicians explicitly stated that claimant's impairment is not disabling and that claimant is capable of performing his usual coal mine employment. Decision and Order at 7, 16; Director's Exhibit 10. Consequently, the administrative law judge rationally determined that the opinions of Drs. Baker and Myers did not support a finding of total disability. Decision and Order at 16. It was therefore unnecessary for him to compare their opinions with the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

We also reject claimant's argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant's Brief at 8-9. The Act provides no such presumption, and an administrative law judge's findings 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). As claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(b)(2)(iv), we affirm his determination that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2).

Thus, because claimant has failed to establish total disability, a requisite element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Therefore, we need not

address claimant's challenges to the administrative law judge's finding that the existence of pneumoconiosis was not established.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge