BRB No. 10-0196 BLA

ROBERT COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHAS COAL, LLC	)	DATE ISSUED: 11/10/2010
	)	
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 – Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2004-BLA-06224) of Administrative Law Judge Robert B. Rae rendered on a claim filed on March 13, 2003, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1] This case is before the Board for the second time. In the initial Decision and Order of December 5, 2006, Administrative Law Judge Paul H.

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed prior to January 1, 2005.

Teitler accepted the parties' stipulation to twenty-five years of coal mine employment,[2] and determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, Judge Teitler denied benefits, and subsequently denied the Motion for Reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director).

On appeal, claimant challenged Judge Teitler's denial of benefits, arguing that Dr. Baker's medical opinion established total disability. The Director responded, asserting that Dr. Baker's pulmonary evaluation was insufficient, for failure to include an opinion on the issue of total disability, and requested that the Board remand the case for a new pulmonary evaluation. Based on the Director's concession that he failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation under Section 413(b) of the Act, 30 U.S.C. §923(b), the Board granted the Director's request. The Board therefore vacated Judge Teitler's Decision and Order Denying Benefits and his Decision and Order Denying Motion for Reconsideration, and remanded the case to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his claim in light of the new evidence. *R.C.* [*Collett*] *v. Chas Coal, LLC*, BRB No. 07-0434 BLA (Feb. 29, 2008)(unpub.). On remand, following development of the new evidence, a formal hearing was held before Administrative Law Judge Robert B. Rae (the administrative law judge) on March 19, 2009. The administrative law judge determined that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but failed to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. In the present appeal, claimant contends that the administrative law judge erred in failing to credit Dr. Baker's medical opinion on the issue of total disability at Section 718.204(b)(2)(iv). Employer has not filed a response, and the Director has declined to participate in this appeal.[3]

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3 at 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, but insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant's sole argument is that the administrative law judge should have found total disability established based on Dr. Baker's medical opinion, that claimant "should have no further exposure to coal dust, rock dust, or similar noxious agents and would be 100% disabled for performing that type of work." Claimant's Brief at 4. Claimant's argument is without merit. At Section 718.204(b)(2)(iv), the administrative law judge rationally found that Dr. Baker's initial report of January 27, 2006 failed to adequately discuss the level of the claimant's impairment caused by his pneumoconiosis and, therefore, was insufficient to support a finding of total disability.[4] Decision and Order at 10; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge accurately summarized the medical evidence developed on remand, consisting of Dr. Baker's letter of May 12, 2008, claimant's second pulmonary evaluation of June 6, 2008 performed by Dr. Baker, and Dr. Baker's letter of July 14, 2008. The administrative law judge acted within his discretion in discounting Dr. Baker's May 12, 2008 assessment of total disability, as he found that it was based on the results of the sole qualifying blood gas study of record dated May 20,

[4] With respect to the two remaining medical opinions contained in the original record, the administrative law judge found that Dr. Powell did not offer an opinion as to the disabling effects of claimant's pneumoconiosis, and that Dr. Jarboe concluded that claimant has no disabling respiratory impairment. Decision and Order at 9; Director's Exhibit 11. Substantial evidence therefore supports the administrative law judge's determination that the medical opinions of Drs. Powell and Jarboe failed to support a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(iv); *see 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).

2003, when the administrative law judge had determined that earlier and later studies produced non-qualifying values, and that the weight of the blood gas study evidence did not establish total disability. Decision and Order at 9, 10; *see Minnich v. Pagnotti Enterprises*, 9 BLR 1-89, 1-90 n.1 (1986); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge determined that, following his June 6, 2008 pulmonary evaluation of claimant, Dr. Baker indicated that claimant "does have the respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment . . . . based on his normal pulmonary function studies with the vital capacity and FEV_1 greater that 80% of predicted, which would be only a class one impairment or a 0% of the whole person." Claimant's Exhibit 3 at 5; Decision and Order at 10. While Dr. Baker also stated that claimant would be "100% disabled" by his pneumoconiosis, since it was a disease caused by an irritant in his work environment and, therefore, claimant "should have no further exposure to coal dust, rock dust or similar noxious agents," the administrative law judge properly found that Dr. Baker's opinion did not support a finding of total disability under Section 718.204(b)(2)(iv), as a medical recommendation against further exposure to coal mine dust is not equivalent to a finding of total respiratory disability. *Id.*; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *W.C.* [*Cornett*] *v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-29-30 (2008); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). Likewise, the administrative law judge determined that Baker's report of July 14, 2008 advised against further exposure to coal dust, and therefore was not supportive of claimant's burden of proof. Decision and Order at 11; Claimant's Exhibit 1. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), they are affirmed.

Because claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement under 20 C.F.R. Part 718, entitlement to benefits is precluded. *See Anderson*, 12 BLR at 1-112.

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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JUDITH S. BOGGS
Administrative Appeals Judge