BRB No. 05-0256 BLA

MICHAEL L. CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAVID CALDWELL TRUCKING, INCORPORATED	)	DATE ISSUED: 10/24/2005
	)	
and	)	
	)	
INSURANCE COMPANY of NORTH AMERICA	)	
	)	
Employer/Carrier-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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Philip J. Reverman, Jr. (Boehl, Stopher and Graves), Louisville, Kentucky for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order –Denial of Benefits (2003-BLA-6057) of Administrative Law Judge Daniel J. Roketenetz 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 the instant claim on June 21, 2001, which was denied by the district director on February 19, 2003.[1] At claimant's request, a hearing was held before Judge Roketenetz on June 4, 2003.[2] The administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in considering x-ray readings submitted by employer in excess of the evidentiary limitations provided at 20 C.F.R. §725.414.[3] Claimant's Brief at 3-4. On the merits of entitlement, claimant argues that the administrative law judge erred in not finding the x-ray and medical opinion evidence sufficient to establish that he has coal workers' pneumoconiosis. Claimant's Brief at 2-5. Claimant further argues that, insofar as the administrative law judge rejected Dr. Hussain's diagnosis of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as being "neither well-reasoned nor well documented," then the Board must conclude that the Department of Labor failed to satisfy its obligation to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30

[1] Claimant filed an earlier claim on July 20, 2000, which was withdrawn at his request. Director's Exhibit 1.

[2] At the hearing, employer was given thirty days to submit rebuttal evidence to Claimant's Exhibits 1-3. Employer subsequently submitted the deposition transcript of Dr. Baker dated April 19, 2004, admitted as Employer's Exhibit 3. By Order dated June 22, 2004, the administrative law judge granted employer's motion to strike a portion of Dr. Baker's report referencing an October 19, 2002 x-ray reading, noting that employer had been denied the opportunity to have that film read by one of its experts.

[3] Pursuant to Section 725.414(a)(3)(i), a responsible employer shall be entitled to obtain and submit in support of its affirmative case, no more than two chest x-ray interpretations. *See* 20 C.F.R §725.414(a)(3)(i). Claimant contends that employer submitted three readings in support of its affirmative case, including readings by Drs. Wicker, Sargent, and Dahhan. Claimant's Brief at 3-4. Claimant maintains that the administrative law judge was obligated to strike one of the readings from the record. Claimant's Brief at 4.

U.S.C. §923(b).[4] Claimant's Brief at 6; *see* Decision and Order at 10-11. Lastly, claimant challenges the administrative law judge's finding that he failed to establish a totally disabling respiratory or pulmonary impairment. Claimant's Brief at 11.

Employer responds, urging affirmance of the denial of benefits. Employer maintains that it did not proffer the x-ray readings cited by claimant in support of its affirmative case, and thus requests that the Board reject claimant's evidentiary argument. Employer's Brief at 5. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief, arguing that the administrative law judge erred in finding Dr. Hussain's diagnosis of pneumoconiosis to be unreasoned, and therefore, that "there is no support for [claimant's] argument that the Director failed to provide the miner with a complete pulmonary examination." Director's Brief at 2. The Director suggests that the administrative law judge improperly considered x-ray readings developed in conjunction with claimant's prior, withdrawn claim, without first determining whether good cause existed for admitting those readings in excess of the evidentiary limitations. *Id*. The Director, however, maintains that the administrative law judge's evidentiary error can be deemed harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), insofar as the error was pertinent only to one element of entitlement, the existence of pneumoconiosis, and since the administrative law judge properly determined that claimant is not totally disabled. *Id*.

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.[5] 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 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 he is totally disabled due to

[4] The Department of Labor (DOL) has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *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). In this case, Dr. Hussain conducted the DOL-sponsored examination of claimant on September 26, 2001. Director's Exhibit 10.

[5] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

After consideration of the issues presented, and the briefs and arguments of the parties on appeal, we affirm the administrative law judge's Decision and Order as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding that claimant failed to establish total disability, a requisite element of entitlement.

Claimant generally contends that the administrative law judge erred in denying benefits because he failed to give proper consideration to Dr. Baker's opinion relevant to the issue of total disability.[6] We disagree. Contrary to claimant's contention, the administrative law judge's finding at Section 718.204(b)(2)(iv) is supported by substantial evidence since there were no physicians of record who opined that claimant was totally disabled by a respiratory or pulmonary impairment. As noted by the administrative law judge, Drs. Hussain, Baker, Wicker and Dahhan specifically opined that claimant was not totally disabled. With regard to Dr. Baker, the administrative law judge properly noted that Dr. Baker diagnosed a Class I respiratory impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, and that Dr. Baker opined that claimant was totally disabled because he felt that "claimant should not return to [work in] a dusty environment so as not to exacerbate his pneumoconiosis." Decision and Order at 13; Claimant's Exhibit 3. Because an opinion advising a miner against further coal dust exposure due pneumoconiosis does not equate with a finding of total disability, the administrative law judge permissibly found this portion of Dr. Baker's opinion to be insufficient to carry claimant's burden of proof. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). More importantly, however, the administrative law judge reasonably turned to Dr. Baker's deposition testimony to further explain the statements made in his report, and thus found that Dr. Baker's opinion overall was that claimant was not totally disabled since "Dr. Baker conceded in his deposition testimony that [c]laimant did not have a pulmonary impairment and could return to his coal mine work." Decision and Order at 13; *see* Employer's Exhibit 3. Because the administrative law judge reasonably relied on

[6] The administrative law judge noted that none of the pulmonary function or arterial blood gas studies were qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge further found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence of record that claimant suffered from cor pulmonale with right-sided congestive heart failure. Decision and Order at 12-13. We affirm the administrative law judge's findings under these subsections as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Dr. Baker's deposition testimony as establishing that claimant could return to work, despite the presence of a Class I respiratory impairment,[7] we affirm the administrative law judge finding at 20 C.F.R. §718.204(b)(2)(iv) that claimant failed to establish his total respiratory disability.

We further reject claimant's assertion that the administrative law judge erred because he "made no mention of the claimant's age or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 8. These factors have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Because all of the physicians of record were in agreement that claimant was not totally disabled, it was unnecessary for the administrative law judge to independently assess the requirements of claimant's usual coal mine employment.

Consequently, as we affirm the administrative law judge's denial of benefits based on his finding at 20 C.F.R. §718.204(b)(2), we decline to address claimant's arguments with respect to the evidentiary limitations, the administrative law judge's finding at 20 C.F.R. §718.202(a), and his assertion that he did not receive a complete pulmonary evaluation.[8] We note, however, that any error committed by the administrative law judge with respect to his finding on the existence of pneumoconiosis is harmless, *see Larioni*, 6 BLR at 1-1278, given that the administrative law judge properly determined that claimant does not have a totally disabling respiratory or pulmonary impairment. Because claimant failed to carry his burden of proof to establish his total disability, benefits are precluded. *See Trent*, 11 BLR at 1-26 (1987); *Perry*, 9 BLR at 1-1.

[7] Dr. Baker responded "No" to a question posed by employer's counsel as to whether claimant had any pulmonary impairment that would prevent him from returning to his work as a coal miner. Employer's Exhibit 3 (Dr. Baker's Deposition Transcript at 9-10).

[8] Claimant does not challenge the weight accorded Dr. Hussain's opinion relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge credited Dr. Hussain's reasoned opinion that claimant was not totally disabled for his usual coal mine work. Decision and Order at 9, 13.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge 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