BRB No. 05-0269 BLA

DAVID BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK COAL RESOURCES C/O ACORDIA EMPLOYERS SERVICES	)	
	)	DATE ISSUED: 10/27/2005
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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 (03-BLA-6161) 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).[1] The administrative law judge credited claimant with at least sixteen years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found the record evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and in finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) in this case. Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), did not provide claimant with a complete, credible pulmonary evaluation, where the administrative law judge found that the opinion of Dr. Hussain, who evaluated claimant at the Director's request, was neither reasoned nor documented on the issue of the existence of pneumoconiosis. The Director responds, and urges the Board to affirm the decision below. Employer has not filed a substantive brief in the appeal.[2]

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. 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 that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

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[1]Claimant filed the instant claim on February 14, 2002. Director's Exhibit 2.

[2]By letter dated February 8, 2004, employer's counsel, Baird & Baird, P.S.C., of Pikeville, Kentucky, indicated that it withdrew as employer's counsel of record. The Director, Office of Workers' Compensation Programs (the Director), indicates in his February 17, 2005 Response Brief that employer is a subsidiary of Horizon Natural Resources, which was dissolved by order of the Bankruptcy Court on September 30, 2004. Director's Response Brief at 1. The Director further indicates that he has determined that a surety bond issued by Aetna Casualty and Surety Company covers this case and thus, employer's surety and bankruptcy estate in the form of "Horizon Liquidating Trust" would be liable for any benefits awarded against employer herein. *Id.*

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv).[3] Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant argues that a finding of total disability is a determination to be made by an administrative law judge through consideration of the exertional requirements of claimant's usual coal mine employment in conjunction with a medical opinion assessing claimant's level of impairment. Claimant's Brief at 5. Claimant does not, however, identify any medical opinion upon which he relies to meet his burden at 20 C.F.R. §718.204(b)(2)(iv). Rather, claimant argues that, taking into consideration his condition and the exertional requirements of his usual coal mine employment as a motor man, "it is rational to conclude that the claimant's condition prevents him from engaging in his usual coal mine employment." Claimant's Brief at 5. Considering the relevant medical opinions of record rendered by Drs. Hussain, Broudy, and Fino, the administrative law judge properly found that each of these three physicians credibly opined that claimant retains the respiratory capacity to perform his usual coal mine work or comparable work. Decision and Order at 14; *Cornett*, 227 F.3d at 569, 22 BLR at 2-107; *see* Director's Exhibit 14; Employer's Exhibits 4, 9. Claimant does not dispute the administrative law judge's characterization of the opinions of Drs. Hussain, Broudy, and Fino and alleges no error in his consideration thereof.[4] Substantial evidence in the record thus supports the

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[3]We affirm the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]By report dated April 17, 2002, Dr. Hussain considered claimant's history of coal mine employment and indicated that claimant has a mild impairment, but has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 14. By report dated October 2, 2002, Dr. Broudy considered claimant's usual coal mine work running a continuous miner and scoop and "all types of work, and opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous work. Employer's Exhibit 4. By report dated March 8, 2004, Dr. Fino considered claimant's usual coal mine employment running machinery and performing all types of mining work, and opined that, from a pulmonary standpoint, claimant is neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort. Employer's Exhibit 9.

administrative law judge's finding that the medical opinions of record do not meet claimant's burden to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant also contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 6. These factors, however, 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).

Claimant next asserts that "pneumoconiosis is proven to be a progressive and irreversible disease," and because a considerable amount of time has passed since he was first diagnosed with pneumoconiosis, it can be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 6. Claimant's assertion lacks merit. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Inasmuch as claimant does not otherwise take issue with the administrative law judge's treatment of the medical opinions of record at 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Because claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. We, therefore, need not address claimant's arguments regarding the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as any error therein could not change the outcome of the case.[5] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[5]Claimant contends that, given the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) that Dr. Hussain's diagnosis of pneumoconiosis based on a positive x-ray reading and claimant's history of coal dust exposure, is neither reasoned nor documented, *see* Decision and Order at 11, the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). The Director asserts, in pertinent part, that even if Dr. Hussain's diagnosis of clinical pneumoconiosis were questionable, "he clearly found no totally disabling pulmonary impairment." Director's Brief at 5. The Director thus argues that "claimant could not prevail even if Dr. Hussain provided a supplemental opinion addressing the existence of pneumoconiosis." *Id.*

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

JUDITH S. BOGGS
Administrative Appeals Judge

Our affirmance of the administrative law judge's denial of benefits in this case is based upon his finding that the record evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). On this dispositive issue, the administrative law judge, at 20 C.F.R. §718.204(b)(2)(iv), relied, *inter alia*, on Dr. Hussain's opinion, which he properly determined did not support a finding of total disability. Decision and Order at 14. As discussed, *supra*, claimant does not take issue with the administrative law judge's treatment of Dr. Hussain's opinion at 20 C.F.R. §718.204(b)(2)(iv).