

BRB No. 05-0405 BLA

JERRY BAKER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 10/31/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-5737) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits 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

¹Claimant filed a claim on June 23, 1994. Director's Exhibit 1. On July 30, 1996, Administrative Law Judge J. Michael O'Neill issued a Decision and Order denying benefits based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id.* The Board affirmed Judge O'Neill's denial of benefits. *Baker v. Director, OWCP*, BRB No. 96-1450 BLA (July 11, 1997)(unpub.). Claimant filed a request for modification on October 22, 1997. Director's Exhibit 1. On April 22, 1999, Administrative Law Judge

claimant with at least sixteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. The Director responds, urging the Board to affirm the administrative law judge's denial of benefits. The Director also argues that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.³

Thomas F. Phalen, Jr. issued a Decision and Order denying benefits based on claimant's failure to establish modification. *Id.* The Board affirmed Judge Phalen's denial of benefits. *Baker v. Director, OWCP*, BRB No. 99-0816 BLA (May 3, 2000)(unpub.). Claimant filed a request for modification on February 8, 2001. *Id.* On March 30, 2001, the district director denied claimant's request for modification. *Id.* Claimant filed a request to voluntarily withdraw his claim on April 19, 2001. *Id.* On April 23, 2001, the district director granted claimant's request to withdraw his claim pursuant to 20 C.F.R. §725.306. *Id.* As noted by Administrative Law Judge Joseph E. Kane (the administrative law judge), "[t]he claim was withdrawn and is considered to not have been filed, pursuant to 20 C.F.R. §725.306." Decision and Order at 2. Claimant filed his most recent claim on June 11, 2001. Director's Exhibit 3.

²The administrative law judge further stated, "as [c]laimant has not established that he is totally disabled, he cannot establish that he is totally disabled due to pneumoconiosis." Decision and Order at 9.

³Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the

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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant argues that the administrative law judge erred in finding the opinions of Drs. Baker and Chaney insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 11. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 9.

Dr. Baker also opined that:

[Claimant] has a Class 1 impairment based on the FEV1 and FVC being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 11.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 1 impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

Dr. Chaney opined that claimant suffers from a pulmonary impairment. Director's

permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

Exhibit 13. Further, Dr. Chaney opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* Because Dr. Chaney failed to indicate the severity of the diagnosed pulmonary impairment, Dr. Chaney's finding that claimant suffers from a pulmonary impairment is insufficient to support a finding of total disability.⁴ *Budash*, 9 BLR at 1-51. In addition, the administrative law judge permissibly discounted Dr. Chaney's opinion that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment on the grounds that Dr. Chaney was not aware of the type of work claimant performed.⁵ *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

We also reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Baker and Chaney based upon their status as claimant's treating physicians. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record."⁶ 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial

⁴In view of our holding that the opinions of Drs. Baker and Chaney are insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with the opinions of Drs. Baker and Chaney. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

⁵The administrative law judge also discounted Dr. Chaney's opinion that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment on the grounds that Dr. Chaney was unaware of what part of the mine claimant performed his job duties or what amount of coal dust claimant was exposure to during his coal mine employment. Decision and Order at 9. Since claimant provided a valid alternate basis for discounting Dr. Chaney's opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he discounted Dr. Chaney's opinion because Dr. Chaney was not aware of the type of work claimant performed, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124, we hold that any error by the administrative law judge in this regard is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). In the instant case, the administrative law judge did not explicitly apply the criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion with regard to the issue of total disability. Nonetheless, because the administrative law judge permissibly discounted the opinions of Drs. Baker and Chaney, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Budash*, 9 BLR at 1-51, we hold that any error by the administrative law judge in failing to apply the criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion with regard to the issue of total disability is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Moreover, the administrative law judge's consideration of the opinions of Drs. Baker and Chaney is consistent with *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (the opinions of treating physicians should be given the deference they deserve based upon their power to persuade).

The administrative law judge additionally found that Dr. Hussain's opinion does not support a finding that claimant is totally disabled from a pulmonary standpoint.⁷ Decision and Order at 9. Claimant alleges no error in regard to the administrative law judge's consideration of Dr. Hussain's opinion. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁸

⁷In a report dated August 24, 2001, Dr. Hussain opined that claimant suffers from a mild impairment. Director's Exhibit 8. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.*

⁸Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Finally, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Specifically, claimant argues that the administrative law judge accorded “little weight” to Dr. Hussain’s disability opinion on the grounds that Dr. Hussain was not aware of the type of work claimant performed. *See* Claimant’s Brief at 5; *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. The Director, in the instant case, maintains that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled.

As set forth by Section 413(b) of the Act, 30 U.S.C. §923(b), the Department of Labor (the Department) has a statutory obligation to provide each miner who files a claim for benefits with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Section 413(b) of the Act is implemented by 20 C.F.R. §725.406. Therein, the Department is charged with making arrangements for the miner to be given a complete pulmonary evaluation and assessing the adequacy of the evaluation provided. *See* 20 C.F.R. §725.406. As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director’s duty to ensure the proper enforcement and fair administration of the Black Lung program. *See generally* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order); *Capers v. The Youghioghny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). Thus, we defer to the Director on the issue of whether the statutory obligation of the Department to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d 1166, 7 BLR 2-31; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). We therefore decline to remand this case for a complete pulmonary evaluation.

In light of our affirmance of the administrative law judge’s finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge’s denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge