BRB No. 06-0412 BLA

TINSLEY HUBBARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY, c/o ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 10/23/2006
	)	
Employer/Carrier-Respondents	)	
	)	
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.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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[1] appeals the Decision and Order – Denial of Benefits (04-BLA-5111) of Administrative Law Judge Daniel J. Roketenetz in a miner's 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). Initially, the administrative law judge credited the miner with thirty-one years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 8. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required by the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, asserting that remand for a credible pulmonary evaluation is not needed in this case.[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).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in failing to find total respiratory disability based on Dr. Baker's opinion. Specifically, claimant contends that "it is error to reject a medical opinion solely because it is based on nonconforming pulmonary function studies" and that "nonqualifying test results, standing alone, do not establish the absence of respiratory impairment."

[1]Claimant filed his claim for benefits on July 24, 2002. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of thirty-one years of coal mine employment and his findings that the evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant's Brief at 4. Claimant further contends that the administrative law judge erred in finding that claimant is able to perform his usual coal mine employment "without considering the physical requirements of such work." *Id.*

We hold that claimant's assertions lack merit[3] and affirm, as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is non-supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). In a report dated April 12, 2002, Dr. Baker indicated that claimant's pulmonary function studies demonstrated a "mild restrictive ventilatory defect" and that claimant has a "Class 2 impairment with the FEV1 less than 79% of predicted and greater than 60% of predicted." Director's Exhibit 13. Dr. Baker also noted that claimant "has a second impairment based on the presence of severe pneumoconiosis based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply [claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.* Because Dr. Baker does not explain the severity of his diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class 2 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*). Moreover, since a physician'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); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to establish total disability under Section 718.204(b)(2)(iv).

The administrative law judge additionally considered the opinions of Drs. Simpao, Dahhan, and Fino. In his September 26, 2002 report, Dr. Simpao opined that claimant has a moderate pulmonary impairment and is unable to perform his coal mine

[3]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 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 Virginia 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.

employment. Director's Exhibit 12. The administrative law judge accorded "less weight" to Dr. Simpao's opinion because he found this physician's opinion to be "unreasoned." Decision and Order at 10. In doing so, the administrative law judge noted that the pulmonary function and blood gas studies performed by Dr. Simpao were non-qualifying[4] and the administrative law judge found that "Dr. Simpao failed to clearly explain how his physical findings and symptomatology were supportive of a finding of total disability." *Id.* The administrative law judge further stated that Dr. Simpao also "neglected to indicate how the Claimant's prior job demands would render him totally disabled with only a moderate impairment." *Id.* Conversely, the administrative law judge found that both Drs. Dahhan and Fino[5] gave "well-reasoned and well-documented" opinions regarding claimant's respiratory capacity. *Id.* at 11. Specifically, the administrative law judge noted that Dr. Dahhan relied on the non-qualifying results of the pulmonary function and blood gas studies that he performed on claimant and also his review of the evidence of record. The administrative law judge further noted that in his consultative report, Dr. Fino "relied on the medical evidence of record that he reviewed including the medical reports and objective testing of Drs. Dahhan, Baker, and Simpao." *Id.* Because claimant does not allege error in the administrative law judge's weighing of the opinions of Drs. Simpao, Dahhan, and Fino, we affirm the administrative law judge's findings regarding these opinions. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, we also affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).[6] *See Director,*

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[5]Dr. Dahhan opined that claimant has a mild respiratory impairment due to "his obesity and previous smoking habit with no evidence of total or permanent pulmonary disability." Employer's Exhibit 1. At his deposition, Dr. Dahhan testified that claimant's "pulmonary impairment is mild and not disabling" and that claimant retains the capacity to return to his previous coal mine employment. Employer's Exhibit 2 at 10. Dr. Fino found no respiratory impairment and he found that from a respiratory standpoint, claimant is able to return to his last mining job. Employer's Exhibit 3. In accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the record reflects that Drs. Dahhan and Fino had knowledge of claimant's usual coal mine employment as a scoop operator. Specifically, Drs. Baker and Dahhan referenced claimant's usual coal mine work as a scoop operator in their reports. Employer's Exhibits 1, 3.

[6]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

OWCP v. Greenwich Collieries [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant next argues that, given the administrative law judge's finding at Section 718.204(b)(2)(iv) that Dr. Simpao's opinion is "not well reasoned," the Director failed to provide him with a credible pulmonary evaluation, as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[7] Claimant's Brief at 5. In considering Dr. Simpao's opinion pursuant to Section 718.204(b)(2)(iv), the administrative law judge accorded "less weight" to it because he found that this physician "failed to clearly explain how his physical findings and symptomatology were supportive of a finding of total disability." Decision and Order at 10. In response to claimant's assertion that the Director failed to provide him with a credible pulmonary evaluation, the Director asserts that "[t]he mere fact that an ALJ may find other reports more persuasive does not mean that the Director failed to satisfy his statutory obligation." Director's Brief at 2. The Director states that "[w]hile the ALJ found [Dr. Simpao's] report unreasoned because [this physician] failed to explain his conclusion, the ALJ did not wholly discredit that opinion. Rather, he gave it 'less weight' than the contrary opinions of Drs. Dahhan and Fino." *Id.* The Director maintains that he has failed to meet his statutory obligation only if the pulmonary evaluation he provided is found to be incomplete or "not entitled to any weight at all." *Id.* Moreover, the Director notes that the administrative law judge stated that even if he had found Dr. Simpao's opinion to be well-reasoned, he still would have found this

---

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).

[7]Claimant selected Dr. Simpao to perform a pulmonary evaluation. Director's Exhibit 11. By report dated September 26, 2002, Dr. Simpao diagnosed pneumoconiosis and opined that claimant suffers from a moderate impairment due to pneumoconiosis and is unable to perform the work of a coal miner. Director's Exhibit 12.

opinion outweighed by the contrary opinions of record.[8] *Id.* We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990). Therefore, we decline to remand this case on that basis.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total respiratory 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. *See 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*).

[8]The administrative law judge stated that "the preponderance of the evidence of record would not support a finding [of] total disability even if [Dr. Simpao's] report was well-reasoned and well-documented." Decision and Order at 10 n.9. Thus, the administrative law judge found that claimant "would not prevail" even if this case were remanded for the Director, Office of Workers' Compensation Programs, to provide a reasoned and documented opinion regarding disability. *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