BRB No. 07-0179 BLA

J.E.H. Claimant-Petitioner v. GREAT WESTERN COAL, INCORPORATED GREAT WESTERN RESOURCES Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/17/2007 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Jonathan L. Snare, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-6233) of Administrative Law Judge Richard K. Malamphy 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). In a decision dated October 5, 2006, the administrative law judge credited the miner with at least fourteen years of coal mine employment,[1] and found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer has not submitted a brief on appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.[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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that in analyzing the medical opinion evidence relevant to the issue of total disability, the administrative law judge improperly accorded diminished weight to Dr. Clarke's opinion. Claimant's Brief at 3-4. Claimant further asserts that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine employment as a mechanic, in conjunction with the opinions of Drs. Baker, Mettu, and Clarke, before determining that claimant is not totally disabled. Claimant's Brief at 4-5. We disagree.

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

In weighing the medical opinion evidence of record, the administrative law judge properly found that Dr. Clarke was the only physician to opine that claimant is totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 5-6; Director's Exhibit 13. The administrative law judge correctly stated that Dr. Bushey did not address whether claimant is totally disabled. Decision and Order at 5-6; Director's Exhibit 14. The administrative law judge also found, correctly, that Dr. Mettu opined that claimant does not have a respiratory impairment and, from a respiratory standpoint, is capable of performing his usual coal mine work. Decision and Order at 5-6; Director's Exhibit 27. Further, the administrative law judge properly found that Dr. Baker's opinion, that the results of claimant's objective tests were within normal limits, and that the degree of severity of claimant's impairment was "minimal or none," is insufficient to establish total disability. Decision and Order at 5-6; Director's Exhibit 11. Contrary to claimant's assertion, such opinions, diagnosing no impairment, need not be discussed in terms of claimant's former job duties. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Finally, the administrative law judge properly weighed the medical opinion of Dr. Clarke, that claimant is totally disabled, together with the contrary medical opinions of Drs. Baker and Mettu, and the pulmonary function and blood gas study results of record, all of which were non-qualifying,[3] to conclude that the preponderance of the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR at 1-113; Decision and Order at 6. Thus, there is no merit to claimant's contention that the administrative law judge erred in finding Dr. Clarke's opinion insufficient to establish claimant's entitlement to benefits.

Lastly, claimant asserts that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable gainful work. Claimant's Brief at 5. There is no merit to claimant's assertion. Claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

[3] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Based on the foregoing, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). Because the evidence of record fails to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. A finding of entitlement is precluded. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge