BRB No. 08-0108 BLA

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| J.B. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 10/17/2008 |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2005-BLA-05328) of Administrative Law Judge Donald W. Mosser rendered 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). This case involves a subsequent claim filed on May 20, 2003. The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and accepted the parties' stipulation of 14.69 years of coal mine employment. Because the administrative law judge determined that the newly submitted medical opinion evidence is sufficient to establish that claimant has pneumoconiosis, the administrative law judge found that claimant demonstrated a change in one of the applicable conditions of entitlement since the denial of his prior claim pursuant to 20

C.F.R. §725.309. Addressing the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). However, the administrative law judge also found the medical evidence insufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray evidence under Section 718.202(a)(1). Claimant also argues that the administrative law judge erred in failing to find that he established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). In addition, claimant asserts that because the administrative law judge rejected the diagnosis of pneumoconiosis provided by Dr. Simpao, who conducted an examination of claimant at the request of the Department of Labor (DOL), the Board must conclude that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). The Director responds to claimant's appeal, urging the Board to affirm the administrative law judge's denial of benefits as supported by substantial evidence. The Director maintains that claimant received a complete pulmonary evaluation as required under the Act.[1] Director's Letter Brief at 4.

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.[2] 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 in a living miner's claim pursuant to 20

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding of 14.69 years of coal mine employment and his findings that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and thus, a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, we affirm the administrative law judge's findings that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that the medical evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id*.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant asserts that in addressing the issue of total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 4-5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant also contends that, in light of the job duties and his respiratory condition, "it is rational to conclude that [his] condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 5. These arguments are rejected as without merit.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Simpao and Mettu, both of whom examined claimant at the request of DOL. Dr. Simpao performed the first DOL examination of claimant on November 21, 2003 and diagnosed a severe respiratory impairment based on his objective testing and physical findings. Director's Exhibit 11. In a supplemental report dated August 5, 2004, Dr. Simpao reviewed his examination findings and opined that the chest x-ray and subjective tests showed claimant's limited performance and minimal capacity to walk and climb stairs. Director's Exhibit 22. Dr. Simpao noted that claimant's muscular skeleton condition may contribute in some way to his ability to walk or climb, and that claimant's electrocardiogram correlates with mild cardiomegaly. *Id*. In conclusion, Dr. Simpao opined that "the above reasons and overall assessment shows inability to perform the regular job of coal miner." *Id*.

Dr. Mettu performed the second DOL examination of claimant on June 22, 2006. Director's Exhibit 29. Dr. Mettu indicated that claimant was only mildly impaired based on the results of the pulmonary function test. *Id*.

In weighing the conflicting medical opinions as to the degree of claimant's respiratory impairment, the administrative law judge credited Dr. Mettu's diagnosis of a mild pulmonary impairment over Dr. Simpao's diagnosis of a severe impairment, because Dr. Mettu performed the most recent examination and the administrative law judge found Dr. Mettu's conclusions to be better supported by the underlying documentation. Decision and Order at 10; Director's Exhibits 11, 22, 29. However, the

administrative law judge also determined that Dr. Mettu's diagnosis of a mild respiratory impairment is insufficient to prove that claimant is totally disabled in light of claimant's testimony regarding his work requirements. *Id*. Consequently, the administrative law judge found that claimant failed to establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv).

We reject claimant's argument that the administrative law judge erred in failing to consider the exertional requirements of his last coal mine job in determining whether he is totally disabled. Contrary to claimant's contention, the administrative law judge provided a comparison of Dr. Mettu's opinion with claimant's testimony that his last coal mine employment, as a scoop operator, "required much less manual labor of him because of better equipment." Decision and Order at 10; Hearing Transcript at 15-16. Based on claimant's testimony, the administrative law judge rationally concluded that Dr. Mettu's diagnosis of a mild impairment is insufficient to establish that claimant is not capable of performing his last coal mine employment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc);see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); Decision and Order at 3, 10; Director's Exhibit 29; Hearing Transcript at 15-16.

Thus, because the administrative law judge properly considered the medical opinion of Dr. Mettu in conjunction with claimant's last coal mine job, we affirm his finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Furthermore, we affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant failed to satisfy his burden to establish total disability pursuant to Section 718.204(b)(2).[3]

Furthermore, we reject claimant's assertion that he failed to receive a complete

[3] Claimant argues that because pneumoconiosis "is proven to be a progressive and irreversible disease . . . [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 3-4. This argument is without merit since claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at Section 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).

pulmonary evaluation.[4] Although the administrative law judge gave no weight to Dr. Simpao's opinion pursuant to Section 718.202(a)(4), the administrative law judge nonetheless found that claimant established the existence of pneumoconiosis based on Dr. Mettu's report. More importantly, the administrative law judge did not find that the opinion of Dr. Simpao lacked credibility on the issue of whether claimant was totally disabled, the element of entitlement upon which the administrative law judge based his denial of benefits. In considering the issue of total disability, the administrative law judge found that Dr. Simpao's diagnosis of a severe impairment was outweighed by Dr. Mettu's finding that claimant had only a mild respiratory impairment because Dr. Mettu performed the most recent pulmonary function testing. Decision and Order at 10. Because we affirm the administrative law judge finding that claimant is not totally disabled pursuant to Section 718.204(b)(2), we consider claimant's request that we remand the case to the district director for a complete pulmonary evaluation, on the issue of the existence of pneumoconiosis, to be moot. Moreover, as noted by the Director, because Dr. Mettu examined claimant at the request of the Department of Labor, and the administrative law judge found that Dr. Mettu's opinion was credible on all the issues of entitlement, we conclude that a remand for a complete pulmonary evaluation is not required under the facts of this case. See 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); Director's Brief at 3-4.

Since claimant has failed to establish total disability, a requisite element of entitlement, benefits are precluded. *Hill*, 123 F.3d at 415-16; 21 BLR at 2-196-7; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] In light of our affirmance of the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), it is not necessary that we address claimant's argument that the administrative law judge erred in weighing the x-ray evidence at Section 718.202(a)(1). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Claimant's Brief at 2-3.

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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BETTY JEAN HALL
Administrative Appeals Judge