BRB No. 08-0201 BLA

D.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/22/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, 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 - Denying Benefits (2006-BLA-5880) of Administrative Law Judge Joseph E. Kane on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended, 30 U.S.C. §901 *et seq*. The administrative law judge credited claimant with 14.62 years of qualifying coal mine employment, and accepted the stipulation of the Director, Office of Workers' Compensation Programs (the Director), that claimant has pneumoconiosis. The administrative law judge found, therefore, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that the evidence of record was sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), but insufficient to establish total respiratory or pulmonary

disability under any of the regulatory criteria set forth in 20 C.F.R. §718.204(b)(2)(i)-(iv). Therefore, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the weight of the medical evidence was insufficient to establish total disability. The Director responds, urging affirmance of the denial of benefits.[1]

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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). As the Director submits, only the issues of total disability and total disability due to pneumoconiosis remain at issue in the instant claim.

Based on our review of the administrative law judge's findings and conclusions, and our review of the record, we reject as meritless claimant's challenge to the determination that the evidence failed to establish total disability. Claimant's arguments are three-fold. First, he asserts that the administrative law judge failed to identify the exertional requirements of claimant's usual coal mine work and compare them to the

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding respecting claimant's length of coal mine employment, and his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202, 718.203(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We also affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 5, 9-10; *see Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 1; Director's Exhibit 1 at 408, 411.

disability assessments provided by Drs. Khoura, Baker and Simpson.[3] Next, he asserts: "it is rational to conclude that claimant's 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 3. Finally, claimant submits that because pneumoconiosis is a progressive and irreversible disease, "during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work." *Id*.

With respect to the medical opinions of record, the administrative law judge determined that Dr. Baker described claimant's impairment in a report of May 16, 2006 as "minimal or none," with pulmonary function studies showing a "class 1 or 0% impairment." Decision and Order at 7; Director's Exhibit 24 at 8, 12. Dr. Baker opined that claimant's pneumoconiosis and chronic bronchitis had a material adverse effect on his respiratory condition, but that "no significant impairment is present." *Id*. He concluded that claimant has the respiratory capacity to "perform the work of a coal miner or comparable work in a dust free environment." *Id*.

Based on his November 21, 2003 pulmonary examination of claimant, Dr. Simpao assessed claimant's impairment as "mild," reporting a normal arterial blood gas study and a pulmonary function study showing a "mild degree of obstructive airway disease," Director's Exhibit 11 at 22-23. By subsequent letter of March 27, 2006, Dr. Simpao reported normal arterial blood gas study results and non-qualifying pulmonary function study results, and again described claimant's pulmonary impairment as "mild," adding that "he is not totally disabled." Director's Exhibits 11, 24 at 28; Decision and Order at 6. Dr. Simpao opined that claimant "has the respiratory capacity to perform comparable work in a dust free environment, but should abstain from working in a dusty environment." Director's Exhibit 24 at 28.

[3] The record reflects that claimant's last coal mine employment was as a roof bolter. Hearing Transcript April 3, 2007 at 9-11. While both Drs. Simpao and Baker reflect claimant's job as "roof bolter," Director's Exhibits 11 at 21, 24 at 8, Dr. Khoura's report contains no occupational information. Claimant's Exhibit 2. Claimant's hearing testimony indicated that the work involved in running the roof bolter was dusty but described no exertional requirements, *see* Hearing Transcript April 3, 2007 at 10-11, while his previous hearing testimony asserted that the machine is operated with hydraulic levers, and the combined weight of the roof bolt and plate he handled was three to four pounds. Hearing Transcript Oct. 16, 1990, at 32-33. Claimant identifies no specific evidence of exertional requirements of the roof bolter job, in support of his arguments on appeal.

Finally, Dr. Khoura's medical report of November 3, 2006, stated that claimant "has COPD, but his symptoms are worse than expected [due] to exposure [to] coal mine dust." Claimant's Exhibit 2. The administrative law judge noted that Dr. Khoura checked "yes" on a form asking whether claimant is totally disabled, and wrote "[patient] should not be exposed to coal dust." Decision and Order at 8; Claimant's Exhibit 2.[4]

Claimant does not contest the administrative law judge's summary of the medical evidence. In weighing the conflicting medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge contrasted the medical opinions of Drs. Baker and Simpao, that claimant was not totally disabled, with the contrary opinion of Dr. Khoura, that claimant was totally disabled from performing his usual coal mine work. With respect to Dr. Khoura's opinion, the administrative law judge found that the only explanation for his diagnosis of total disability was his statement that claimant "should not be exposed to coal dust." Decision and Order at 10. The administrative law judge accurately observed, in accordance with the law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. Therefore, the administrative law judge properly found that Dr. Khoura's medical opinion is insufficient to establish total disability. Decision and Order at 10-11; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge determined that "in the absence of any additional information, Dr. Khoura's opinion, expressed by checking "yes" on a form, does not constitute a well-reasoned or well-documented medical opinion." Decision and Order at 11; s*ee Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As trier-of-fact, the administrative law judge is granted broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, when rational and supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this connection, we note that Dr. Khoury's medical opinion does not provide a specific exertional assessment, an occupational description, or an explanation of how his objective findings support his diagnosis of total disability. The administrative law judge's determination that the report was inadequately documented and reasoned was thus a permissible exercise of his discretion in evaluating the medical evidence of record.

[4] Dr. Khoura listed the bases for the diagnosis as: "x-ray, pulmonary function testing, and patient symptoms." Claimant's Exhibit 2.

See Tennessee Consolidated Coal Co. v. Crisp, 866 F.2d 1709, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see also Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).

As the remaining medical opinions of Drs. Baker and Simpao affirmatively found that claimant was not totally disabled, the administrative law judge properly found that claimant failed to meet his burden pursuant to Section 718.204(b)(2)(iv), and we affirm his findings thereunder, as supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that claimant is precluded from entitlement to benefits.[5] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp., and Triangle Enterprises*, 16 BLR 1-11(1991); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988).

[5] We also reject claimant's suggestion that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and pneumoconiosis is a progressive disease, which must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 3. Because an administrative law judge's findings must be based solely on the medical evidence of record, claimant's assertion fails to provide a valid basis for review. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Accordingly, the Decision and Order - Denying Benefits 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