BRB No. 03-0293 BLA

THOMAS REED Claimant-Petitioner v. CARBON RIVER COAL CORPORATION and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/26/2003 DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2001-BLA-0939) of Administrative Law Judge Daniel J. Roketenetz 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 claimant with twenty-one years of coal mine employment, based on the parties' stipulation, and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's May 12, 2000 filing date. Addressing the merits of entitlement, the administrative law judge accepted the parties' stipulation to the existence of simple coal worker's pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). However, he found the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment 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 failed to properly weigh the medical evidence of record, arguing that the administrative law judge failed to properly cite the medical evidence upon which he relied. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 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

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The parties do not challenge the administrative law judge's finding of twenty-one years of coal mine employment, his determination that Carbon River Coal Corporation is the properly named responsible operator, or his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b)(2)(ii), (iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In finding the medical evidence insufficient to establish a totally disabling respiratory or pulmonary condition, the administrative law judge found that the pulmonary function studies yielded non-qualifying values and, therefore, were insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i).[3] Decision and Order at 5. Contrary to claimant's contention, the administrative law judge was not required to determine whether the May 26, 2000 pulmonary function study was in "substantial compliance" with the regulations pursuant to 20 C.F.R. §718.103(c) (2000), as this study yielded non-qualifying results and, therefore, is not supportive of claimant's burden at Section 718.204(b)(2)(i). Consequently, error, if any, is harmless.[4] 20 C.F.R. §§718.103(c) (2000); 718.204(b)(2)(i); *see generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, since the administrative law judge considered all the relevant evidence and reasonably found that the preponderance of the pulmonary function study evidence yielded non-qualifying results, we affirm his finding that claimant has not established total respiratory disability pursuant to Section 718.204(b)(2)(i).

Moreover, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion as trier-of-fact in according little weight to the medical opinion of Dr. Baker, that claimant, from a respiratory

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[3] The administrative law judge stated that record contains three pulmonary function studies dated November 11, 2000, July 28, 2000 and May 26, 2000. Decision and Order at 5; Director's Exhibits 5, 8, 26. However, the record also contains a pulmonary function study dated April 24, 2000. Director's Exhibit 18. Error, if any, in the administrative law judge's failure to consider this pulmonary function study is harmless as the ventilatory study yielded non-qualifying values and is therefore supportive of the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i). *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] In considering the May 26, 2000 pulmonary function study in conjunction with Dr. Baker's report, the administrative law judge accorded less weight to the opinion of Dr. Baker based on the non-qualifying results of the pulmonary function study and blood gas study. Decision and Order at 7.

standpoint, is not capable of performing his usual coal mine employment, based on his determination that Dr. Baker did not adequately explain his diagnosis in light of the underlying documentation. Decision and Order at 7; Director's Exhibits 9, 17; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, contrary to claimant's contention, Dr. Baker's statement that "if Reed returned to the mines…his chronic bronchitis would be aggravated and his symptoms would exacerbate ...," Claimant's Brief at 3, citing Director's Exhibit 9, is insufficient to demonstrate total respiratory disability since such an opinion is not the equivalent of a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

Furthermore, we affirm the administrative law judge's decision to accord greater weight to the opinions of Drs. Broudy, Fino, Repsher and Rosenberg, based on his determination that these opinions are supported by the objective evidence of record. Decision and Order at 7-8. Contrary to claimant's contention, each of these physicians, in opining that claimant was capable, from a respiratory standpoint, of performing his usual coal mine employment, was aware that claimant's usual coal mine employment was as a driller in surface mining from 1981 until 2000. Director's Exhibit 26; Employer's Exhibits 1-3; 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Additionally, contrary to claimant's characterization of Dr. Broudy's opinion, the physician did not limit his opinion to claimant's ability to work one shift. Rather, Dr. Broudy opined that claimant retains the respiratory capacity to do his previous work, which Dr. Broudy noted was as a driller into the rock overburden and as an auger operator for a short time. Director's Exhibit 26. *See Cornett* , 227 F.3d 569, 22 BLR 2-107; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254*; see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

We also reject claimant's contention that Dr. Repsher's opinion was severely undermined because he relied upon evidence not in the formal record. Contrary to claimant's contention, the regulations do not require that all evidence upon which a physician bases his opinion be included in the formal record. *See generally* 20 C.F.R. §§718.104, 718.204(b)(2)(iv). Rather, it is within the administrative law judge's discretion to determine whether an opinion is reasoned and documented, by determining whether the opinion sets forth the data and facts upon which the physician based his conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *see also Clark*, 12 BLR 1-149.

The remainder of claimant's contentions seek a reweighing of the evidence, which the Board is not empowered to do nor is the Board empowered to substitute its inferences for those of the administrative law judge when they are 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). We, therefore, affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence. Decision and Order at 6-8; *see Fields*,10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Since claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits in this miner's claim is precluded. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed .

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge