

BRB No. 04-0210 BLA

CLOYD HOSKINS )  
 )  
 Claimant-Petitioner )  
 ) DATE ISSUED: 09/08/2004  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Stuart A Levin, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 (03-BLA-5437) of Administrative Law Judge Stuart A. Levin 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). The administrative law judge determined, on the basis of the concession by the Director, Office of Workers' Compensation Programs (the Director), that the newly submitted evidence of record established a material change in conditions pursuant to 20

C.F.R. §725.309(d).<sup>1</sup> On the merits, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge further found, however, that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of Dr. Baker's opinion pursuant to Section 718.204(b)(2)(iv). In response, the Director urges the Board to affirm the denial of benefits as the administrative law judge's findings are supported by substantial evidence.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the issue of total disability pursuant to Section 718.204(b)(2)(iv), claimant argues that Dr. Baker's opinion is well-reasoned and documented, and is sufficient for "invoking the presumption of total disability." Claimant's Brief at 3 – 4. Claimant contends that the non-qualifying nature of the pulmonary function studies relied upon by Dr. Baker do not establish the absence of a respiratory impairment. Claimant's Brief at 4. Claimant also argues that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Dr. Baker's opinion of total disability and did not consider claimant's age, education or work experience in conjunction with his assessment that claimant was not totally disabled. Claimant's Brief at 4, citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). These contentions are without merit.

In a report prepared for the Kentucky Department of Workers Claims, Dr. Baker stated that a blood gas study dated March 24, 2001 revealed that claimant had mild

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<sup>1</sup> Claimant's first claim, filed on October 17, 1997, was denied for failing to establish any element of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on March 14, 2001.

<sup>2</sup> We affirm, as unchallenged, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2)(i)-(iii) and 725.309. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm the administrative law judge's consideration of Dr. Hussain's opinion as this, too, is unchallenged on appeal. *Id.*

resting arterial hypoxemia and that a pulmonary function study obtained on the same date produced normal values. Director's Exhibit 10. With respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. This is based on both vital capacity and FEV1 being greater than 80% of predicted." *Id.* Dr. Baker then stated that:

Patient has a second impairment 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 the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 10.

Upon weighing the evidence relevant to Section 718.204(b)(2)(iv), the administrative law judge acknowledged that Dr. Baker is claimant's treating physician and considered whether his opinion was entitled to controlling weight under 20 C.F.R. §718.104(d). The administrative law judge determined that Dr. Baker's opinion does not support a finding of total disability under Section 718.204(b)(2)(iv), despite his status as a treating physician, as the doctor "did not conclude that claimant is unable to perform his usual coal mine employment." Decision and Order at 6. We affirm this finding as it is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker did not render a diagnosis of a totally disabling respiratory or pulmonary impairment, as Dr. Baker's report and progress notes do not include an assessment of claimant's physical limitations.<sup>3</sup> Director's Exhibits 10, 25; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). The administrative law judge also properly determined that Dr. Baker's statement that claimant should avoid further coal dust exposure does not constitute a diagnosis of total respiratory or pulmonary disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

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<sup>3</sup>As the Director notes, the *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class 1 impairment as involving no impairment to the whole person. Director's Response Brief at 4 n.2. Dr. Baker diagnosed the presence of mild hypoxemia based on the March 24, 2001 blood gas study, but did not indicate the extent to which, if any, this created any physical limitations. Director's Exhibit 10.

Furthermore, contrary to claimant's assertion, the administrative law judge did not err by failing to compare the exertional requirements of claimant's coal mine employment with claimant's physical limitations. This analysis is required in situations where a physician details a claimant's physical limitations, but does not provide an opinion regarding the extent of any disability from which the claimant suffers. *Cornett*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *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). As indicated above, Dr. Baker did not provide an assessment of claimant's physical limitations. Director's Exhibits 10, 25. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.<sup>4</sup> See 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Lastly, there is no presumption of total disability to which claimant is entitled as there is no evidence suggesting that claimant has complicated pneumoconiosis and the relevant claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e). We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv).

Because the administrative law judge properly found that Dr. Baker's opinion is insufficient to establish the existence of total disability at Section 718.204(b)(2)(iv), we also affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.202(b)(2)(i)-(iv), an essential element of entitlement. We must also affirm, therefore, the denial of benefits under Part 718.<sup>5</sup> *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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<sup>4</sup> Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. See also 20 C.F.R. §718.204(b)(1), (b)(2).

<sup>5</sup> In rendering this finding, the administrative law judge did not address the previously submitted evidence of record. Remand is not required, however, as the medical opinion and objective tests proffered with the 1997 claim are devoid of evidence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1; see *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983). Dr. Wicker examined claimant at the request of the Department of Labor, and determined that pneumoconiosis was not present and stated that claimant's "respiratory capacity appears to be adequate to perform his previous occupation in the

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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coal mining industry.” Director’s Exhibit 1. The pulmonary function study and blood gas study obtained by Dr. Wicker produced nonqualifying values. *Id.*