BRB No. 04-0969 BLA

JOHNNY RAY BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CYPRUS CUMBERLAND MOUNTAIN COAL	)	DATE ISSUED: 09/23/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (04-BLA-5369) of Administrative Law Judge Edward Terhune Miller 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 found that the evidence established at least ten years of coal mine employment but noted the district director's finding of fifteen years of coal mine employment. Decision and Order at 6; *see* Director's Exhibit 47. Based on the date of filing, the administrative law judge

[1]Claimant filed his claim for benefits on February 1, 2002, which was denied by the district director on August 15, 2003. Director's Exhibits 1, 47. Claimant filed a request for a formal hearing, which was held on April 13, 2004. Director's Exhibit 51.

adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203, but insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) – (iv). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant requests that the Board reverse, or, alternatively, vacate the decision below and remand the case for a proper evaluation of the evidence. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a substantive brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 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 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. Failure to establish any 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*).

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[2] By letter dated October 25, 2004, counsel for employer, Bonnie Hoskins, of Hoskins Law Offices PLLC, notified the Board that her office was withdrawing as employer's counsel. By Order dated November 18, 2004, the Board noted the withdrawal of Bonnie Hoskins as counsel for employer. *Brock v. Cyprus Cumberland Mountain Coal*, BRB No. 04-0969 BLA (Nov. 18, 2004) (Order) (unpublished). On November 30, 2004, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to hold this case in abeyance. By Order dated December 9, 2004, the Board granted the Director's motion and held the case in abeyance for sixty days pending the Director's determination of whether a surety bond covers the claim. *Brock v. Cyprus Cumberland Mountain Coal*, BRB No. 04-0969 BLA (Dec. 9, 2004) (Order) (unpublished). On February 7, 2005, the Director filed a Status Report indicating that a surety bond had been issued by Aetna Casualty and Surety Company that covers the claim in this appeal. No response to the Director's Status Report was received. By Order dated March 1, 2005, the Board lifted its abeyance. *Brock v. Cyprus Cumberland Mountain Coal*, BRB No. 04-0969 BLA (Mar. 1, 2005) (Order) (unpublished). Ms. Hoskins subsequently filed a Limited Appearance of Counsel dated April 22, 2005.

Claimant contends that the administrative law judge erred in his weighing of the medical opinions of record pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Claimant initially argues that the opinions of Drs. DeBusk and Simpao "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 3. Claimant's assertion lacks merit. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable to this claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to this claim, filed on February 1, 2002. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 1.

Claimant next contends that "[i]t can be concluded that the reports and opinions of Drs. DeBusk and Simpao are well reasoned and well documented and should not have been rejected by [the administrative law judge] for the reasons he provided."[4] Claimant's Brief at 4. Claimant's contention lacks merit. With regard to Dr. DeBusk's report, the administrative law judge found, within his discretion, that "Dr. Debusk [sic] conclusively declares that Claimant has a pulmonary impairment and is incapable of returning to work in a coal mine but he offers little evidence to corroborate his conclusion." Decision and Order at 7; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Mosley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985). The administrative law judge also found that the rationale given in Dr. DeBusk's medical report, namely a low vital capacity in claimant's pulmonary function test, is contrary to the pulmonary function tests of record that show that claimant's vital capacity "is well above the disability standards for a man of Claimant's height and age."[5] Decision and Order at 7;

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[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Dr. DeBusk, indicating that he relied on a physical examination, claimant's symptoms and work history, opined that claimant did not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust free environment. Claimant's Exhibit 2. Dr. Simpao, indicating that he relied on symptomalogy and physical examination, also opined that claimant did not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust free environment. Claimant's Exhibit 1.

[5] All three pulmonary function studies of record produced non-qualifying values. Director's Exhibits 16, 18; Claimant's Exhibit 1. The pulmonary function study dated March 28, 2000, that Dr. DeBusk refers to in his report dated October 27, 2003, is not included in the record. *See* Claimant's Exhibit 2. To the extent that claimant relies on the non-qualifying pulmonary function studies of record, *see* Claimant's Brief at 4, his argument is unavailing.

s*ee* Director's Exhibits 16, 18; Claimant's Exhibit 1; *Fuller v. Gibraltar Coal Co.,* 6 BLR 1-1291 (1984). Moreover, the administrative law judge properly found that Dr. DeBusk's opinion is not automatically entitled to greater weight simply because of his status as claimant's treating physician. 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 22 BLR 22-625 (6th Cir. 2003).

Further, the administrative law judge rationally gave less weight to Dr. Simpao's opinion as the physician did not record any observations during the physical examination to justify his purported reliance on the physical examination. Decision and Order at 7; *see* Claimant's Exhibit 1. The administrative law judge also properly found that Dr. Simpao "further cited Claimant's symptomalogy as a basis for his decision, but failed to discuss what these symptoms were or how they related to Claimant's pneumoconiosis as opposed to his smoking history or preexisting asthmatic condition." *Id*.; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (the administrative law judge, in making credibility determinations, must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant, citing, *inter alia, Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), asserts that taking into consideration his condition, the exertional requirements of his usual coal mine employment, and "the medical opinions of Drs. DeBusk, Simpao and Baker (who did diagnose a mild pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual coal mine employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant Brief at 5. Claimant adds that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Drs. DeBusk, Baker and Simpao's opinions of disability." *Id.*

Claimant's contentions are unavailing. With regard to the opinions of Drs. DeBusk and Simpao on the issue of total disability, the administrative law judge rationally determined that they are not as well reasoned as the contrary opinions of Drs. Baker, Dahhan and Castle, which he found more persuasive at 20 C.F.R. §718.204(b)(2)(iv). *See* discussion, *supra*. Further, the inadvisability of returning to work in a dusty environment is not a basis for a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge was not required to further consider the opinions of Drs. DeBusk and Simpao at 20 C.F.R. §718.204(b)(2)(iv). *See Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 (1986)(*en banc*), *aff'd,* 9 BLR 1-104 (1986)(*en banc*); *see also Rowe,* 710 F.2d at 251, 5 BLR at 2-99. Further, the administrative law judge properly found that Dr. Baker opined that claimant has minimal to no impairment and retains the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibit 16; *Cornett,* 277 F.3d at 569, 22 BLR at 2-107. Moreover, Dr. Baker's report reflects his

consideration of claimant's usual coal mine employment as a continuous miner operator. *See* Director's Exhibit 16. We, therefore, reject claimant's assertion of error in this regard.[6]

Claimant, *citing Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), next argues that the administrative law judge was required to consider claimant's age, education and work experience in determining whether claimant established that he is totally disabled. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 488-90 (6th Cir. 1995).

Lastly, claimant states that pneumoconiosis is a progressive and irreversible disease, and asserts "[i]t can therefore be concluded" that his condition has worsened because a "considerable amount of time" has passed since he was initially diagnosed with pneumoconiosis. Claimant's Brief at 5. This assertion by claimant is not persuasive; an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Based on the foregoing, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv).

As the administrative law judge properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

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[6] At the hearing, claimant described the exertional requirements of his usual coal mine employment as a continuous miner operator. Hearing Transcript at 17-21.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge