BRB No. 05-0270 BLA

MOSES BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 09/23/2005
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6008) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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 April 3, 2001.[1] After crediting claimant with twenty years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(i)-(iv). The administrative law judge further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20

[1]The administrative law judge noted that claimant previously filed a claim for benefits on July 29, 1994. Decision and Order at 3. The administrative law judge, however, noted that the "previous claim appears to be at the Federal Records Center and was not requested by the Director." *Id.* Because the prior claim is not found in the record, the administrative law judge noted that he could not determine the basis for the previous denial of benefits. *Id.* at 6. The administrative law judge, therefore, addressed whether the evidence contained in the record, *i.e.*, the evidence submitted in connection with claimant's 2001 claim, was sufficient to establish any of the elements of entitlement.

C.F.R. §718.204(b)(2)(iv).[2] Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 10. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 18.

Dr. Baker also opined that:

> [Claimant] has a Class 1 impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 10.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class 1 impairment is insufficient to support a

[2]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

finding of total disability.[3] *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

The administrative law judge further found that Dr. Chaney's opinion that claimant was totally disabled from a pulmonary standpoint[4] was outweighed by the contrary opinions of Drs. Hussain,[5] Dahhan[6] and Fino.[7] Decision and Order at 18-19. Claimant alleges no error in regard to the administrative law judge's consideration of the opinions of Drs. Chaney, Dahhan, Fino, and Hussain. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119

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[3]In view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

[4]Dr. Chaney completed a questionnaire on March 19, 2002. Director's Exhibit 13. Dr. Chaney indicated that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.*

[5]In a report dated September 19, 2001, Dr. Hussain opined that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 19.

[6]In a report dated May 9, 2002, Dr. Dahhan opined that:

> [Claimant] retains the respiratory capacity to continue his previous coal mining work or job of comparable physical demand with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

Director's Exhibit 34.

During a July 9, 2002 deposition, Dr. Dahhan opined that claimant retained the respiratory capacity to perform his past coal mine employment. Director's Exhibit 34.

[7]In a report dated September 19, 2001, Dr. Fino opined that, from a respiratory standpoint, claimant was neither partially nor totally disabled from returning to his last coal mining job. Director's Exhibit 18. In a supplemental report dated February 17, 2004, Dr. Fino opined that his review of additional medical evidence did not cause him to change any of his opinions. Employer's Exhibit 2.

(1987). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8]

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4).[9] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[8]Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

[9]Claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Claimant notes that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis because it was based upon an erroneous x-ray interpretation. Claimant's Brief at 7. However, the Director notes that the administrative law judge did not discredit Dr. Hussain's opinion regarding the extent of claimant's pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Director's Brief at 3. Because our affirmance of the administrative law judge's denial of benefits in this case is based upon our affirmance of his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant could not prevail even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of pneumoconiosis. Thus, since the administrative law judge did not find that Dr. Hussain's opinion regarding the extent of claimant's respiratory

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

impairment lacked credibility, we agree with the Director that, under the facts of this case, remand is not required.