BRB No. 05-0303 BLA

WENDALL SHERMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 09/30/2005
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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:

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (03-BLA-6168) of Administrative Law Judge Daniel J. Roketenetz in a miner's 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 credited the miner with "at least" sixteen years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 8-9. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* at 7-11. The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 12-14. 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 Section 718.202(a)(1) and (a)(4). Claimant's Brief at 3-5. Additionally, claimant contends 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). *Id.* at 6-9. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the

[1]Claimant is Wendall Sherman, the miner, who filed his claim for benefits on August 27, 2001. Director's Exhibit 2.

Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 5-6. Employer and the Director respond, urging affirmance of the administrative law judge's denial of benefits.[2]

Claimant contends 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).[3] Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In a September 5, 2001 report, Dr. Baker opined that:

> Patient has a Class I 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 18. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from

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[2]We affirm the administrative law judge's finding of "at least" sixteen years of coal mine employment and his findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]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 Virginia 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.

performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Dr. Baker also 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 18. Because a physician'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 13.

The administrative law judge properly found that Drs. Hussain, Dahhan, and Rosenberg, the only other physicians to address the extent of claimant's respiratory impairment, opined that claimant retained the respiratory capacity to perform his usual coal mine employment.[4] Decision and Order at 13. Claimant does not contend that any

[4]In a report dated November 11, 2001, Dr. Hussain opined that claimant suffers from a moderate impairment. Director's Exhibit 16. However, Dr. Hussain also opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id.* In a report dated February 8, 2002, Dr. Dahhan opined that claimant has no respiratory impairment and that he retains the functional respiratory capacity to perform his last coal mining job. Director's Exhibit 19. Dr. Dahhan reiterated his opinions during a March 10, 2004 deposition. Employer's Exhibit 6 at 9. Dr. Rosenberg opined in his March 8, 2004 report and at his March 25, 2004 deposition that claimant has no respiratory impairment and retains the functional respiratory capacity to perform his last coal mine employment. Employer's Exhibit 7 at 24-25.

of these opinions is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because it is based upon substantial evidence,[5] we 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).

In light of our affirmance of 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)-(iv), 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 of error 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).[6] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[5]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).

[6]Claimant contends that the Director, Office of Workers' Compensation (the Director), failed to provide him with a complete and 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

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

SO ORDERED.

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1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Claimant accurately notes that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis because it was not sufficiently reasoned or documented. *See* Decision and Order at 10. 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 impairment lacked credibility, we hold that, under the facts of this case, the Director provided claimant with a complete and credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim.

Although claimant states in his brief that "[p]ursuant to §725.414, there are limitations to the amount of evidence that each party can submit," claimant does not allege any error committed by the administrative law judge with regard to 20 C.F.R.

§725.414. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).