BRB No. 06-0326 BLA

JIMMY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION LTD.	)	DATE ISSUED: 09/19/2006
	)	
and	)	
	)	
FRONTIER INSURANCE COMPANY, C/O EMPLOYERS RISK	)	
	)	
Employer/Carrier-Respondent	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson Law Offices), Pikeville, Kentucky, for claimant.

William E. Brown, II (Picklesimer, Pohl, Kiser & Aubrey, P.S.C.), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5563) of Administrative Law Judge Thomas F. Phalen, Jr. 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). In a Decision and Order dated December 15,

2005, the administrative law judge credited the miner with thirty years of coal mine employment,[1] and found that the evidence established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv), but failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, consequently, erred in finding that total disability due to pneumoconiosis was not established at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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 rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant challenges the administrative law judge's evaluation of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R.

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of thirty years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

§718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Baker and Forehand. We disagree.

In considering the medical opinion evidence, the administrative law judge properly noted that Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic bronchitis, chronic obstructive pulmonary disease (COPD), and moderate resting hypoxemia due to both coal dust exposure and cigarette smoking. Director's Exhibit 11; Decision and Order at 6. Contrary to claimant's arguments, the administrative law judge acted within his discretion in finding that as Dr. Baker expressly stated that his diagnosis of coal workers' pneumoconiosis was based on claimant's positive x-ray and history of coal dust exposure, Dr. Baker's diagnosis of coal workers' pneumoconiosis did not constitute a reasoned medical opinion. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Decision and Order at 15-16. The administrative law judge further permissibly accorded little weight to Dr. Baker's diagnosis of coal dust-related chronic bronchitis because the physician only relied on claimant's subjective complaints and failed to cite to any objective testing or medical data in support of his conclusion. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We further hold that the administrative law judge acted within his discretion in finding Dr. Baker's additional conclusions, that claimant suffers from chronic obstructive pulmonary disease and moderate resting hypoxemia, due to both coal dust exposure and cigarette smoking, to be conclusory and not well-reasoned because the physician failed to explain why these conditions were not wholly attributable to claimant's fifty-nine and one-half year smoking history. *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149.

Additionally, we reject claimant's assertion that the administrative law judge erred in his evaluation of Dr. Forehand's opinion. Claimant's Brief at 4-5. The administrative law judge properly noted that Dr. Forehand diagnosed clinical coal workers' pneumoconiosis, cor pulmonale, and chronic bronchitis. Claimant's Exhibit 1; Decision and Order at 7-8, 12. The administrative law judge further properly noted that because Dr. Forehand did not attribute claimant's chronic bronchitis to coal dust exposure, his opinion did not constitute a diagnosis of legal pneumoconiosis. Claimant's Exhibit 1; Decision and Order at 12. While the administrative law judge credited Dr. Forehand's diagnosis of clinical pneumoconiosis as well reasoned and well documented, contrary to claimant's arguments, the administrative law judge permissibly found it outweighed by the well reasoned and well documented opinion of Dr. Dahhan, that claimant did not suffer from either clinical or legal pneumoconiosis, on the grounds that Dr. Dahhan is a Board-certified pulmonologist and his opinion is better supported by the objective

evidence of record.[3] *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Employer's Exhibit 1; Decision and Order at 13.

The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and permissibly accorded the greatest probative value to the opinion of Dr. Dahhan, whose opinion he found better supported by the objective evidence of record, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120. Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's findings in determining that the evidence fails to establish that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

[3] Dr. Forehand is a B reader but his complete credentials are not contained in the record.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge