BRB No. 06-0343 BLA

ERNIE HOSKINS Claimant-Petitioner v. JAMES RIVER COAL COMPANY, aka SHAMROCK COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	 DATE ISSUED: 09/26/2006 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.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor, Allen H. Feldman, 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-Denial of Benefits (04-BLA-6085) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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 found that while the evidence established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(4), 718.203(b), it failed to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established at Section 718.202(a)(1) and (4) and that because the administrative law judge found the opinion of Dr. Simpao regarding the existence of pneumoconiosis to be unreasoned, the Director, Office of Workers' Compensation Programs, (the Director) failed to provide him with a complete, credible pulmonary examination on pneumoconiosis as required by Section 413(b) of the Act. Claimant also contends that the administrative law judge erred when he found that the medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director responds, asserting that Dr. Simpao's medical report satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim pursuant to Section 413(b) of the Act.[1]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, we note that inasmuch as the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(4) based on the opinion of Dr. Repsher, we need not address claimant's arguments that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray and medical opinion evidence. *See* 20 C.F.R. §718.202(a)(1), (4); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107, 2-119 (6th Cir. 2000)(Section 718.202 provides four different ways of establishing the existence of pneumoconiosis); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985)("Section 718.202 provides alternative methods by which a claimant may establish the existence of pneumoconiosis."). Furthermore, inasmuch as the administrative law judge found the existence of pneumoconiosis

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[1] The administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3), is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

established, we need not address claimant's argument concerning Dr. Simpao's finding of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We turn, therefore, to claimant's argument concerning total disability. Claimant contends that inasmuch as his usual coal mine employment included being a roof bolter, utility worker, long wall operator, and belt examiner, it could be reasonably concluded that such duties involved exposure to heavy concentration of dust on a daily basis and, taking into consideration his condition as well as the medical opinion of Dr. Baker, who diagnosed a pulmonary impairment, it would be rational to conclude that claimant's condition would prevent him from engaging in his usual employment since such employment occurred in a dusty environment and involves exposure to dust on a daily basis. Claimant further contends that the administrative law judge made no mention of claimant's usual coal mine employment in conjunction with Dr. Baker's opinion of disability.

In finding that total disability was not established, the administrative law judge found that none of the pulmonary function studies or blood gas studies of record were qualifying, nor was there evidence of cor pulmonale with right-sided congestive failure. 20 C.F.R. §718.204(b)(2)(i)-(iii). Additionally, the administrative law judge found that total disability could not be established at Section 718.204(b)(2)(iv) as none of the physicians of record found claimant to be totally disabled from a respiratory standpoint. Decision and Order at 14.

Contrary to claimant's contention, contraindication against further coal dust exposure is not sufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Further, inasmuch as Dr. Baker found that claimant had minimal to no respiratory impairment due to his coal workers' pneumoconiosis and bronchitis, the administrative law judge was not required to consider the doctor's opinion in conjunction with the exertional duties of claimant's usual coal mine employment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 45-46 (4th Cir. 1997). Further, contrary to claimant's contention, total disability cannot be presumed based on a diagnosis of pneumoconiosis. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Thus, as claimant has not otherwise challenged the administrative law judge's findings on total disability, his finding that the evidence fails to establish a total respiratory disability at Section 718.204(b)(i)-(iv) is affirmed. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge