BRB No. 08-0219 BLA

E.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/25/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2006-BLA-05763) of Administrative Law Judge Joseph E. Kane (the administrative law judge) rendered 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

[1] Claimant filed his application for benefits on August 4, 2003, which was denied by the district director. Director's Exhibits 2, 14. The case was transferred to the Office of Administrative Law Judges. Director's Exhibit 17. On November 18, 2005, Administrative Law Judge Thomas F. Phalen, Jr. remanded the case to the district

law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with thirty years of coal mine employment, in light of the stipulation by the parties. In addition, he found that the Director, Office of Workers' Compensation Programs (the Director), did not contest that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). However, the administrative law judge further found that the medical evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find Dr. Baker's opinion, considered in conjunction with the exertional requirements of his usual coal mine work, to be sufficient to establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv). In response, the Director urges affirmance of the denial of benefits as supported by substantial evidence.[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.[3] 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

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director, finding that the Director, Office of Workers' Compensation Programs, failed to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406(a). Director's Exhibit 20. On remand, the district director obtained a supplemental medical opinion by Dr. Baker and the case was then returned to the Office of Administrative Law Judges for adjudication. Director's Exhibit 21.

[2] The parties do not challenge the administrative law judge's decision to credit the miner with thirty years of coal mine employment, his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and his findings that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker and Burki. Dr. Baker, based on his examination of claimant, initially diagnosed a "mild [impairment] with chronic bronchitis, decreased PO2, and Coal Workers' Pneumoconiosis 2/1." Director's Exhibit 9. However, in a supplemental letter, Dr. Baker stated that claimant "retains the respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment." Director's Exhibit 20 at 3, 7-8. Dr. Burki, based upon a review of the physical examination and objective testing by Dr. Baker, opined that claimant had a mild to moderate impairment based on normal pulmonary function studies and blood gas studies, which showed a mild degree of hypoxemia. However, he further opined that claimant retains the respiratory functional capacity to perform his usual coal mine work. Director's Exhibit 20 at 42.

The administrative law judge found that this evidence did not support a finding of total respiratory disability, as "both physicians opined that Claimant is not disabled, and, from a respiratory standpoint, could resume his coal mining work or comparable employment." Decision and Order at 8. The administrative law judge further found that Dr. Baker's suggestion that claimant avoid further dust exposure, is not sufficient to establish total disability. *Id*. Accordingly, the administrative law judge found the medical opinion evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).

Claimant asserts that in addressing the issue of total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In support of this contention, claimant states:

> The claimant's usual coal mine work included being a miner and loader operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Glen Baker (who did diagnose a minimal

> pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge [Kane] made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

Claimant's Brief at 3. Claimant's argument is without merit, as the administrative law judge rationally determined that Dr. Baker opined that claimant "is not disabled, and, from a respiratory standpoint, could resume his coal mining work or comparable employment." Decision and Order at 8. Dr. Baker stated in a letter written subsequent to his examination of claimant:

> The patient's pulmonary function studies were within normal limits. While he does have a significant degree of Coal Workers' Pneumoconiosis on his x-ray, his pulmonary function studies reveal a FEV1 and vital capacity both greater than 80% of predicted. This would be a class 1 or 0% impairment of the whole person. This would suggest he retains the respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment.

Director's Exhibit 20 at 7-8. Thus, contrary to claimant's argument, Dr. Baker did not ultimately diagnose an impairment, or render an "opinion of disability," that the administrative law judge was required to compare to the exertional requirements of claimant's last coal mine job. Claimant's Brief at 3; *see Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997)("information regarding the miner's exertional requirements . . . is not relevant in a case where the physician finds no impairment at all"); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Moreover, the administrative law judge properly determined that Dr. Baker's statement, that claimant should avoid further coal dust exposure, is not equivalent to a diagnosis of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988); Decision and Order at 8. In light of claimant's failure to raise a meritorious allegation of error in the administrative law judge's consideration of the medical opinions of record, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

We also reject claimant's assertion that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable, gainful work. Claimant's Brief at 3-4. There is no merit to claimant's argument. Claimant bears the burden of

establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at Section 718.204(b)(2), based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Since claimant has failed to establish a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement under Part 718, an award of benefits is precluded. *Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-7; *Trent,* 11 BLR at 1-27; *Perry,* 9 BLR at 1-2.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge