BRB No. 06-0740 BLA

JAMES M. HACKER Claimant-Petitioner v. SHAMROCK COAL COMPANY, INCORPORATED c/o JAMES RIVER COAL COMPANY and SUN COAL COMPANY, INCORPORATED c/o ACORDIA EMPLOYERS SERVICE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2007 DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., 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 P.S.C.), Washington, D.C., for employer.

Helen H. Cox (Jonathan L. Snare, Acting 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 (04-BLA-5600) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a claim filed on February 12, 2001 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 claimant with sixteen years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 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) and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

[1] The administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] Specifically, claimant asserts that the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's findings regarding the extent of any respiratory impairment. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant is 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 13. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *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 is insufficient to support a finding of total disability. Decision and Order at 14-15.

Dr. Baker also opined that:

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

Director's Exhibit 13. Because Dr. Baker failed to explain the severity of such an impairment or to address whether it would prevent claimant from performing his usual

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[2] We reject claimant's assertion that Dr. Baker's opinion is sufficient to invoke the presumption of total disability. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that the Board has held that a single medical opinion may be sufficient to invoke the 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 if the Part 727 regulations were applicable, the United States Supreme Court has 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. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

coal mine employment, Dr. Baker's finding of a Class 1 impairment is insufficient to support a finding of total disability.[3] *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's findings regarding the extent of any respiratory impairment.

Claimant additionally asserts that the administrative law judge erred in discounting Dr. Baker's opinion because it is reasoned and documented. Because Dr. Baker's opinion is insufficient to establish a totally disabling respiratory impairment at Section 718.203(b)(2)(iv), *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we hold that any error by the administrative law judge in discounting Dr. Baker's opinion is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge additionally found that the opinions of Drs. Hussain,[4] Dahhan[5] and Rosenberg[6] support a finding that claimant is not totally disabled

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[3] Claimant also asserts that the administrative law judge erred in rejecting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study. Contrary to claimant's assertion, the administrative law judge merely noted that Dr. Baker's findings that claimant has a Class 1 impairment and is 100% occupationally disabled from returning to coal mine employment or similar dusty occupations is based on a pulmonary function study. Decision and Order at 7, 14.

[4] In a report dated May 16, 2001, Dr. Hussain opined that claimant had a mild impairment but retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12.

[5] In a report dated August 20, 2001, Dr. Dahhan opined that:

> From a respiratory standpoint, [claimant] retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand since he has no objective findings of any pulmonary impairment and/or disability.

Director's Exhibit 16.

During a July 14, 2003 deposition, Dr. Dahhan opined that claimant retained the respiratory capacity to perform his past coal mine employment. Director's Exhibit 2.

[6] In a report dated March 8, 2005, Dr. Rosenberg opined that claimant does not

from a pulmonary standpoint. Decision and Order at 15. Claimant alleges no error with regard to the administrative law judge's consideration of the opinions of Drs. Hussain, Dahhan, and Rosenberg. *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 (1987). Thus, as claimant raises no other argument at Section 718.204(b)(2)(iv), 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).[7]

Next, claimant contends that 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, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Specifically, claimant asserts that the Director has failed to fulfill his statutory obligation to provide him with a complete, credible pulmonary evaluation with regard to the issue of pneumoconiosis at 20 C.F.R. §718.202(a), because the administrative law judge found that Dr. Hussain's diagnosis of pneumoconiosis was based on an erroneous x-ray interpretation.

The Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), takes the position that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Specifically, the Director contends that "[e]ven if Dr. Hussain were to provide a reasoned diagnosis of pneumoconiosis, [claimant] still could not prevail because Dr. Hussain's opinion does not support an essential element of entitlement - total pulmonary disability." Director's Letter at 3. We agree.

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have a disabling respiratory impairment and that, from a respiratory perspective, claimant could perform his previous coal mining job or similar arduous types of labor. Employer's Exhibit 1.

During an April 1, 2005 deposition, Dr. Rosenberg opined that claimant does not have a respiratory impairment. Employer's Exhibit 2.

[7] We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge found Dr. Hussain's opinion regarding the issue of pneumoconiosis insufficient to constitute an opportunity to substantiate claimant's claim because Dr. Hussain's x-ray interpretation was not admitted into the record. Decision and Order at 15. However, the administrative law judge found that Dr. Hussain's opinion regarding the issue of total disability provided a sufficient basis to deny claimant's claim. *Id*. Therefore, the administrative law judge concluded that a remand of the case to the district director so that the Director could provide claimant with a complete and credible pulmonary evaluation concerning the issue of pneumoconiosis was futile. *Id*. at 16.

As discussed *supra*, the evidence in this case is insufficient to establish total disability on the merits. Dr. Hussain credibly opined that claimant has the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12. Therefore, because the Director provided claimant with a credible evaluation on the issue of total disability, the dispositive issue in this case, we decline to remand this case on that basis.[8] *Hodges*, 18 BLR at 1-89-90.

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 under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[9] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[8] *See Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

[9] In view of our disposition of the case on the merits at 20 C.F.R. §718.204(b), we need not address claimant's contentions at 20 C.F.R. §718.202(a)(1) and (4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying 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