BRB No. 06-0746 BLA

JERRY D. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RICHLAND COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 04/27/2007
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Denise Kirk Ash, Lexington, Kentucky, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5872) of Administrative Law Judge Rudolf L. Jansen with respect to 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 sixteen years of coal mine employment and considered the claim filed on February 20, 2003, under the regulations set forth in 20 C.F.R. Part 718. Although the administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he found that the evidence was insufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence does not establish that he is totally disabled pursuant to Section 718.204(b).[1] Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.

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, 363 (1965).

In order to establish entitlement to benefits pursuant to 20 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. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-197 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

In considering the issue of total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge evaluated the reports of Drs. Baker, Simpao, and Broudy. Dr. Baker examined claimant on January 15, 2003. Director's Exhibit 10. In describing

[1] Claimant's assertion of error on the issue of total disability is grounded in the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

claimant's coal mine employment, Dr. Baker said claimant "worked 15 years in the surface mines where he loaded coal, run [*sic*] a dozer and worked as a mechanic." *Id.* Dr. Baker described the results of claimant's pulmonary function test as "normal," but explained that, "[w]ith the FEV1 and vital capacity both being greater than 80% of predicted, the patient has a Class I impairment. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 10. Dr. Baker 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 10.

Dr. Simpao examined claimant on May 1, 2003, and described claimant's coal mine employment duties as a "mechanic operator." Director's Exhibit 9. The physician categorized the extent of claimant's pulmonary impairment as "mild," but indicated that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In reaching this diagnosis, Dr. Simpao referred to his physical examination, positive chest x-ray, "borderline" arterial blood gas study, and a non-qualifying pulmonary function study that he found indicated a mild degree of restrictive and obstructive airway disease. *Id*.

Dr. Broudy opined that claimant had no significant pulmonary disease or respiratory impairment arising from his occupation as a coal worker, and stated that claimant retains the respiratory capacity to perform his past coal mine employment. Director's Exhibit 11. In making this diagnosis, Dr. Broudy referred to his physical examination of claimant, as well as the non-qualifying arterial blood gas and pulmonary function studies. *Id*.

In considering the issue of total disability pursuant to Section 718.204(b), the administrative law judge found that the non-qualifying pulmonary function and arterial blood gas studies did not support a finding of total disability pursuant to Section 718.204(b)(2)(i)-(ii). Decision and Order at 13. Noting that Dr. Baker described claimant's pulmonary function tests as "normal," the administrative law judge found that the physician's opinion that claimant has a "Class I" impairment was equivocal and not well-reasoned or explained. *Id.* at 14. The administrative law judge determined that Dr. Baker never stated that claimant cannot return to his former coal mine duties from a physical standpoint, but instead the physician diagnosed an "occupational impairment" based on the recommendation that claimant avoid further exposure to coal dust. *Id.* The administrative law judge found that Dr. Baker's description of claimant's duties did not demonstrate that the physician was familiar with the physical exertional requirements of claimant's former coal mine employment. *Id.* The administrative law judge found that the physician's opinion as to claimant's ability or lack of ability to perform his last coal mine work did not support a finding of total disability under the black lung regulations,

and assigned little probative value to Dr. Baker's opinion as to whether claimant was disabled from a pulmonary standpoint. *Id.* at 14-15.

In evaluating Dr. Simpao's opinion, the administrative law judge noted that, with the exception of the chest x-ray, all of the tests conducted by Dr. Simpao produced normal results, and the physician failed to explain these findings in light of his conclusion that claimant did not retain the respiratory capacity to return to coal mine employment. *Id.* at 15. The administrative law judge determined that, like Dr. Baker, Dr. Simpao did not demonstrate that he was familiar with the exertional requirements of claimant's coal mine employment so that these requirements could be compared to claimant's current capabilities, and thus he assigned little probative weight to Dr. Simpao's diagnosis. *Id.* Instead, the administrative law judge relied on Dr. Broudy's opinion that claimant has no respiratory disability, finding it well-reasoned and documented regarding claimant's capability to return to his usual coal mine work. *Id.* Considering that none of the pulmonary function or arterial blood gas studies produced qualifying results, and that the only medical opinion he found well reasoned and documented concluded that claimant was not disabled from a pulmonary standpoint, the administrative law judge determined that claimant did not establish that he was totally disabled pursuant to Section 718.204(b).

Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 4, 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). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a mechanic on the mine site as well as a dozer 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. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual coal mine employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 4-5. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988). The administrative

law judge permissibly discounted Dr. Baker's opinion, noting that while Dr. Baker listed impairments, he never stated that claimant could not return to his former coal mine employment from a physical standpoint, and he was not familiar with the physical exertional requirements of claimant's former coal mine employment duties. *Cornett*, 227 F.3d at 578, 22 BLR at 2-108. The administrative law judge reasonably found that Dr. Baker's opinion was entitled to little probative value on the issue of whether claimant was totally disabled. *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

The administrative law judge also reasonably concluded that the medical opinion evidence does not support a finding that claimant is totally disabled from a respiratory standpoint. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985); *see Cornett*, 227 F.3d at 578, 22 BLR at 2-108; Decision and Order at 15. The administrative law judge found Dr. Baker's diagnosis to be equivocal and determined that it was outweighed by Dr. Broudy's well reasoned and documented medical opinion. *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's [sic] may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"); Decision and Order at 14-15. Likewise, the administrative law judge found that Dr. Broudy's opinion was more probative than the opinion provided by Dr. Simpao. *Id.* at 15. Because claimant alleges no error in regard to the administrative law judge's weighing of the other medical opinion evidence, *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987), we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment because the Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-6-7 (2004). We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2). Consequently, because we affirm the administrative law judge's finding pursuant to Section 718.204, an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27.

Lastly, however, we must address claimant's contention that the Director did not provide him with a complete pulmonary evaluation as is required under the Act. Claimant asserts that this case must be remanded to the district director because the administrative law judge concluded that Dr. Simpao's opinion, which was provided at the

request of the Department of Labor, "failed to discuss … the demands of claimant's particular coal mine work." Claimant's Brief at 5. Both the Director and employer urge the Board to reject claimant's argument.

The Act requires that "[e]ach miner who files a claim…be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105(8th Cir. 1990); *Newman v. Director, OWCP*, 745 F. 2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The administrative law judge permissibly assigned less weight to Dr. Simpao's opinion that claimant is totally disabled because the physician failed to explain how the non-qualifying pulmonary function and arterial blood gas studies or physical findings support the physician's conclusion that claimant could no longer perform the physical duties of his former coal mine employment. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47 (1985); *Peskie*, 8 BLR at 1-128; Decision and Order at 15. The administrative law judge determined that Dr. Simpao's report did not indicate that the physician is familiar with the exertional requirements of claimant's duties as a miner compared to his current capabilities. Decision and Order at 15. The administrative law judge did not find that Dr. Simpao's opinion lacked credibility, but the administrative law judge found that the diagnosis was outweighed by the contrary opinion of Dr. Broudy, which he found well reasoned and documented. *Gray*, 176 F.3d at 388, 21 BLR at 2-626; Decision and Order at 15. Because Dr. Simpao's opinion was merely found outweighed on the issue of total disability, we agree with the Director that there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Simpao's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-88 n.3; *accord Cline*, 917 F.2d at 11, 14 BLR at 2-105; *Newman*, 745 F. 2d at 1166, 7 BLR at 2-31.

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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BETTY JEAN HALL
Administrative Appeals Judge