BRB No. 06-0767 BLA

TOMMY RAY HITE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNOTT FLOYD LAND COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 04/11/2007
	)	
AMERICAN INTERNATIONAL SOUTH COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6211) of Administrative Law Judge Alice M. Craft 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). Claimant filed this claim on March 19, 2003.

Director's Exhibit 2. After crediting claimant with at least twenty-seven years of coal mine employment, as stipulated, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203. The administrative law judge also found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's opinion that claimant has a class 2 impairment, but nonetheless retains the capacity to perform his last coal mine employment.[2] The administrative law judge found

[1] The administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

[2] Dr. Baker initially evaluated claimant on April 28, 2003. He recorded claimant's usual coal mine employment as a foreman, and diagnosed claimant with a mild impairment. Director's Exhibit 8. Dr. Baker subsequently reviewed his 2003 evaluation of claimant, on April 30, 2005. Director's Exhibit 28. In his 2005 report, Dr. Baker stated that claimant has a class 2 impairment and that "[t]his is a non-disabling impairment for doing his usual coal mine employment or similar work in a dust free environment." *Id*. Dr. Baker concluded that claimant has "the ability to work in the coal

that Dr. Baker's opinion was "well-reasoned and well-documented, and consistent with the objective diagnostic testing that showed the presence of only a mild obstructive impairment," blood gas studies "that were within normal limits, and the exertional requirements of [c]laimant's job."[3] Decision and Order at 9. Noting that there was "no contrary evidence in the record," the administrative law judge found that total disability was not established. *Id.*

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 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant's specific argument is that:

> The claimant's usual coal mine work included being a foreman and 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 (who did diagnose a 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 Craft 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. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that 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, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the

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mines and is not impaired from his coal mine employment." *Id.* Dr. Baker added that claimant's "coal dust exposure is the primary cause of his condition but is not of a severe enough degree to cause any impairment." *Id.*

[3] As summarized by the administrative law judge, claimant's coal mine employment as a superintendent required him to stand in the coal pit to guide the end loader, and drive a water truck to keep the dust level down. Decision and Order at 3; Transcript at 11. Claimant supervised twenty men, and filled in for team members who were not at work. Decision and Order at 3; Transcript at 12.

administrative law judge considered the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Baker's opinion that claimant has a mild respiratory impairment but could perform his usual coal mine employment, and found credible Dr. Baker's opinion that claimant was not totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 9. We therefore reject claimant's argument.

We also reject claimant's argument that he must be totally disabled because he was diagnosed with pneumoconiosis a "considerable amount of time" ago, and, since pneumoconiosis is a progressive disease, it must have worsened, thereby affecting his ability to perform his usual coal mine employment. Claimant's Brief at 4. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.,* 23 BLR 1-1, 1-7 n.8 (2004). Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See White*, 23 BLR at 1-6, 1-7. Therefore, we affirm the denial of benefits, as claimant has failed to establish total disability, an essential element of entitlement. *Trent*, 11 BLR at 1-27.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge