BRB No. 06-0936 BLA

A. H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/30/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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 - Denial of Benefits (05-BLA-5297) of Administrative Law Judge Larry S. Merck rendered on a subsequent 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 law judge credited

[1] Claimant filed his first claim on September 29, 1976. Director's Exhibit 1. This claim was finally denied by a Department of Labor claims examiner on January 28, 1981, because claimant did not establish any of the elements of entitlement. Claimant's second claim was filed on March 8, 1988. *Id*. However, this claim was withdrawn. *Id*. Claimant filed his most recent claim on February 3, 2004. Director's Exhibit 3.

claimant with eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation. The Director responds, asserting that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.[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. 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).

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 a finding of 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), claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish a total respiratory or pulmonary disability. Claimant's Brief at 6-7. The administrative law judge considered the newly submitted medical opinions which consisted of Dr. Simpao's June 27, 2004 report and Dr. Baker's March 29, 2004 and

[2] Because no party challenges the administrative law judge's findings that the newly submitted evidence did not 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), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

September 7, 2004 reports. Director's Exhibits 15, 20, 21; Claimant's Exhibit 1. Dr. Simpao opined that claimant's impairment is mild, but also concluded that claimant does not have the respiratory capacity to perform his regular coal mining duties. Director's Exhibit 21. Dr. Baker opined that claimant's impairment is minimal or none, but did not explicitly indicate whether claimant has the respiratory capacity to perform his regular coal mine job duties. Director's Exhibit 15. The administrative law judge discounted the opinions of Drs. Simpao and Baker because he found that they were not reasoned.[3] Decision and Order at 13.

Claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion. Specifically, claimant argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment. Claimant's Brief at 6-7. The Director contends that "[b]ased on the doctor's assessment of the lack of any physical limitations and the absence of anything more than a minimal respiratory impairment, the [administrative law judge] erred by discrediting the doctor's opinion instead of drawing the clear inference that claimant's at most minimal respiratory impairment would not prevent claimant from performing the non-strenuous duties of his last coal mine job."[4] Director's Brief at 6. The Director therefore suggests that "the Board should vacate the [administrative law judge's] finding that Dr. Baker's disability opinion is unreasoned and hold that the doctor provided a credible opinion finding [claimant] did not have a totally disabling respiratory impairment." *Id*.

As discussed *supra*, the administrative law judge found that Dr. Baker's opinion is not reasoned. The administrative law judge specifically stated:

> Dr. Baker stated that [c]laimant's impairment was "minimal or none with bronchitis and Coal Worker's Pneumoconiosis 1/0." (DX 15). However, he made no express finding with respect to whether [c]laimant could return

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[3] Claimant does not challenge the administrative law judge's weighing of Dr. Simpao's opinion. The administrative law judge permissibly discounted Dr. Simpao's opinion because he found that "Dr. Simpao failed to explain how he found [c]laimant totally disabled when the objective testing produced non-qualifying results and he found only a mild impairment." Decision and Order at 13; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[4] Claimant was a bathhouse attendant and lamp repairman, which involved sweeping coal dust and disinfecting the area in the bathhouse, as well as changing bulbs and repairing headlamps for underground miners. Director's Exhibit 5.

> to his prior coal mine employment. (DX 15). Therefore, I find Dr. Baker's total disability opinion unreasoned and I give less weight to Dr. Baker's total disability opinion.

Decision and Order at 13.

We agree with the Director that the administrative law judge erred in discounting Dr. Baker's opinion on the ground that Dr. Baker did not address claimant's ability to perform his usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). The record indicates that Dr. Baker's opinion contains sufficient information to conclude that claimant was not totally disabled from a respiratory impairment.[5] Nonetheless, as argued by the Director, we hold that any error the administrative law judge made with respect to Dr. Baker's opinion is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because Dr. Baker's opinion, that claimant has a "minimal or none" respiratory impairment, is insufficient to establish that claimant has a disabling respiratory impairment, *Budash*, 9 BLR at 1-51-52. Consequently, we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment. *Id*. Thus, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §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. 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).

Furthermore, because there is no medical evidence that supports a finding that claimant has a totally disabling pulmonary or respiratory impairment and in light of the administrative law judge's determination that, excluding Dr. Baker, "the other evidence of record supports a finding that Claimant is not totally disabled," Decision and Order at 11, n. 5, claimant is unable to establish an essential element of entitlement under 20

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[5] Dr. Baker stated that claimant had no complaints of any limitations in physical activities like walking and climbing. Director's Exhibit 15. The administrative law judge noted that Dr. Baker reported that claimant's EKG, pulmonary function study and arterial blood gas study were normal. Decision and Order at 9. Dr. Baker concluded that claimant's respiratory impairment was minimal or none with bronchitis and coal workers' pneumoconiosis. Director's Exhibit 15.

C.F.R Part 718. 20 C.F.R. §718.204(b)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.[6] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Finally, 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); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Specifically, claimant argues that "the [administrative law judge] discredited Dr. Simpao's report because said physician based his conclusions solely upon an x-ray interpretation and because he did not express which objective results he relied upon to reach his CWP conclusion." Claimant's Brief at 5. The Director asserts that he has discharged his statutory obligation to provide claimant with a complete pulmonary evaluation by having Dr. Baker examine and test claimant.[7] Director's Brief at 7-8. The Director maintains that, contrary to claimant's assertion, he is not obligated to insure that Dr. Simpao's opinion is complete and credible. Further, the Director asserts that Dr. Baker's report credibly addresses each element of entitlement. *Id*. at 8. The Director specifically states that "Dr. Baker concluded that [claimant] has clinical and legal pneumoconiosis but minimal or no impairment due to any respiratory condition." *Id*.

As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete pulmonary evaluation of the miner. *Hodges*, 18 BLR at 1-89-90 (1994). Section 725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Further, Section 725.406(c) provides that "[i]f any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is

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[6] 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).

[7] The record indicates that claimant selected Dr. Baker to perform a complete pulmonary evaluation on him. Director's Exhibit 14.

eligible for benefits, the district director shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c).

The Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90 (1994); *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). We agree. As discussed *supra*, the evidence is insufficient to establish total disability on the merits. Dr. Baker credibly opined that claimant's impairment is minimal or none. Therefore, because the Director provided claimant with a complete pulmonary evaluation on the issue of total disability, the dispositive issue in this case, we decline to remand this case.[8]

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

BETTY JEAN HALL
Administrative Appeals Judge

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