BRB No. 05-0691 BLA

EMMITT FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/30/2006
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (04-BLA-5359) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge credited claimant with nineteen years of coal mine employment, based on a stipulation of the parties and adjudicated this claim pursuant to 20 C.F.R. Part 718 as claimant filed his current application for benefits on October 3, 2001.[1] Addressing the merits of

[1] The administrative law judge noted that claimant filed a prior claim, the denial of which was affirmed by the Board, based on its affirmance of Administrative Law Judge J.

entitlement, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits. In addition, the Director urges that the Board reject claimant's contention that DOL failed 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Michael O'Neill's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Farmer v. Director, OWCP*, BRB No. 94-2446 BLA (May 17, 1995)(unpub.); Decision and Order at 3; Director's Exhibit 1. The administrative law judge further found that the record did not otherwise contain evidence of this prior claim. Decision and Order at 3. However, he found that the issue of whether the instant claim is a subsequent claim subject to 20 C.F.R. §725.309(d) was not controverted by the Director, Office of Workers' Compensation Programs (the Director), or raised at the hearing. *Id*. Consequently, the administrative law judge found the issue waived and treated the current claim as an initial filing. *See* 20 C.F.R. §725.309(d)(providing that "the applicability of this paragraph may be waived by the operator or fund, as appropriate"). Since the parties do not challenge this finding, it is affirmed.

[2] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with nineteen years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3) and 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In order to establish entitlement to benefits in a living miner's claim 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; *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 Section 718.204(b)(2)(iv),[3] claimant contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish total disability. Claimant argues 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 employment in conjunction with Dr. Baker's medical assessments of claimant's respiratory impairment. Claimant's Brief at 8. Claimant also contends that it is error for the administrative law judge to reject a medical opinion merely because it is based on a nonconforming or non-qualifying pulmonary function study. Claimant's Brief at 7. Lastly, claimant contends that since pneumoconiosis is a progressive and irreversible disease, claimant's pneumoconiosis has worsened, and that such worsening would adversely affect his ability to perform his usual coal mine employment. Claimant's Brief at 8-9. These contentions are without merit.

With respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment with the FEV1 and FVC both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 13. Dr. Baker then stated that:

> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 13.

[3] The administrative law judge refers to 20 C.F.R. §718.204(c)(1)-(4) in his weighing of the evidence relevant to the issue of total disability. However, as the instant claim was filed after January 19, 2001, the proper regulatory citation is 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge acted within his discretion in determining that Dr. Baker did not diagnose a totally disabling respiratory or pulmonary impairment, as his report did not include an assessment of claimant's physical limitations nor did he diagnose an impairment which would prevent claimant from performing his usual coal mine employment.[4] Thus, contrary to claimant' assertion, the administrative law judge did not err by failing to compare the exertional requirements of claimant's coal mine employment with claimant's physical limitations. Decision and Order at 12; Director's Exhibit 13; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a physician's 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); *accord Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Claimant further alleges that the administrative law judge erred in according less weight to Dr. Baker's diagnosis because he relied upon nonconforming and/or non-qualifying objective studies. We disagree. As indicated above, the administrative law judge did not accord less weight to Dr. Baker's opinion because it was not documented, but rather, found that Dr. Baker did not provide an assessment of claimant's physical limitations or diagnose any functional impairment and therefore was not supportive of claimant's burden. Director's Exhibit 13. As claimant does not otherwise challenge the administrative law judge's weighing of Dr. Baker's opinion, we affirm his finding that Dr. Baker's opinion did not establish a total respiratory 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 an administrative law judge's findings 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). Moreover, as claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm the finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 11-12; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *see also 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).

[4] The *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class I impairment as involving no impairment to the whole person.

Claimant additionally contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's December 11, 2001 medical report provided by DOL, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5-6. The Director responds, urging the Board to reject claimant's contention. Director's Brief at 4-5.

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), 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, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 10; 20 C.F.R. §718.101(a), 718.104, 725.406(a). The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's opinion was incomplete. On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/0" was based on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior credentials. Decision and Order at 6, 8-9; Director's Exhibits 10, 12. This was the sole cardiopulmonary diagnosis in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for the diagnosis to be outweighed. *Id*. The administrative law judge additionally found that to the extent that Dr. Simpao may have based his diagnosis on claimant's objective tests and symptoms, he failed to state how these objective results supported his diagnosis. Decision and Order at 9. Consequently, 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 pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because we have affirmed the administrative law judge's findings that the medical evidence did not establish a totally disabling respiratory or pulmonary

impairment pursuant to Section 718.204(b)(2), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.202(a).

Accordingly, the administrative law judge's Decision and Order – Denial of 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