BRB No. 05-0698 BLA

DILLARD JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/27/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	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.

Rita Roppolo (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 - Denying Benefits (04-BLA-5161) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge found that claimant established twenty-two years of coal mine employment.[1] Decision and Order at 3-5. Based on the date of filing, the administrative law judge adjudicated the claim

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 1, 4, 6, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pursuant to 20 C.F.R. Part 718. Decision and Order at 8. After determining that this claim is a subsequent claim,[2] the administrative law judge found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d) in light of the parties' concession that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Decision and Order at 9; Director's Exhibit 19; Hearing Transcript at 9. Considering the entire record, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 10-12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits.[3]

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).

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 pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered two medical reports. In a December 6, 1993 report, Dr. Baker diagnosed claimant with a "minimal" impairment and did not state specifically whether claimant could perform his coal mine work. Director's Exhibit 1. In a November 3, 2001 report, Dr. Baker

[2] Claimant's initial claim for benefits filed on June 10, 1993, was finally denied on April 12, 1994 because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed his current claim on September 25, 2001. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment determination, as well as his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b), and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

diagnosed "minimal" or "No Impairment," and stated that claimant retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 10 at 4, 5. The administrative law judge gave "no probative weight" to Dr. Baker's 1993 report because it did not specifically discuss whether claimant was totally disabled. Decision and Order at 11. The administrative law judge found that Dr. Baker's 2001 report was "well-reasoned and documented and entitled to full weight." Decision and Order at 11. The administrative law judge concluded that "Dr. Baker's medical opinions do not support a finding that Claimant is totally disabled." Decision and Order at 11.

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); *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 shoveling belt lines, drilling and shooting coal and running a motor (DX 5, page 1). 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. Glen Baker (who did diagnose a minimal 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.

Claimant's Brief at 3. 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, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Moreover, claimant ignores that the administrative law judge found that Dr. Baker diagnosed no impairment, and that, in any event, Dr. Baker "considered the exertional requirements of Claimant's last coal mine employment before he opined Claimant was not totally disabled."[4] Decision and Order at 11; *see Cornett,* 227 F.3d at 578, 22 BLR at 2-124. Claimant's assertion that Dr. Baker's opinion is sufficient to establish total

[4] As summarized by the administrative law judge, "Dr. Baker . . . noted Claimant operated a drill, shot coal, and worked on the beltline during his last year of coal mine employment." Decision and Order at 11; Director's Exhibit 10.

disability is tantamount to a request that the Board reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988).

Further, we 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). Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv).

Because claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge