BRB No. 04-0855 BLA

WILLIE H. SCALF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 05/26/2005
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 (03-BLA-6281) of Administrative Law Judge Robert L. Hillyard on a claim[1] 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 initially credited claimant with fourteen years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and in failing to find total respiratory disability established by the medical opinion evidence under Section 718.204(b)(2)(iv). Claimant additionally contends that because the administrative law judge found the opinion of Dr. Baker to be "unsupported, undocumented, and unreasoned," the Director, Office of Workers' Compensation Programs, (the Director) failed to provide claimant with a complete and credible pulmonary examination sufficient to substantiate his claim as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response letter, arguing that claimant was afforded a complete, credible pulmonary examination as required by the Act because the administrative law judge did not conclude that Dr. Baker's report was incomplete or incredible, but rather found it outweighed by the contrary evidence.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a);

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[1] Claimant, Willie H. Scalf, filed his application for benefits on June 11, 2001. Director's Exhibit 2.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-712 (1983); Decision and Order at 4, 9-13.

O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge found that the opinion of Dr. Baker, a physician who conducted claimant's pulmonary evaluation at the behest of the Department of Labor, was "unsupported, undocumented, and unreasoned," and, therefore, the Director failed to provide him with a complete, credible pulmonary examination sufficient to substantiate his claim as required by the Act. The Director responds, asserting that he is only required to provide claimant with a complete and credible examination, not necessarily a dispositive one. The Director avers further that the administrative law judge's conclusion that other physicians' opinions contained in the record were more persuasive does not demonstrate that he abdicated his statutory obligation to provide claimant with a complete pulmonary evaluation.

Although claimant is correct that the Department of Labor (DOL) has a statutory duty to arrange and pay for a miner's complete pulmonary examination pursuant to 30 U.S.C. §923(b), and that DOL must provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, the Director's contention that the opinion of Dr. Baker was complete and credible, notwithstanding the administrative law judge's finding that it was less persuasive, has merit. *See* 20 C.F.R. §§718.101, 725.405(b); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*). In assessing the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that Dr. Baker's diagnosis of chronic bronchitis due to coal dust exposure and cigarette smoking may be sufficient to establish the existence of statutory pneumoconiosis as defined under Section 718.201. The administrative law judge concluded, however, that Dr. Baker's opinion was entitled to less weight than other opinions as it was insufficiently documented and reasoned. Decision and Order at 10-11. The administrative law judge accorded less weight to the chronic bronchitis diagnosis of Dr. Baker, who possessed no specialized medical qualifications, because Dr. Baker failed to explain how the normal, objective test results were indicative of chronic bronchitis, failed to discuss how coal dust exposure and cigarette smoking caused claimant's chronic bronchitis, and failed to document the precise nature of claimant's symptomotology history.[3] This was reasonable. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is

[3] The administrative law judge correctly found that while Dr. Baker diagnosed chronic bronchitis due to coal dust exposure and cigarette smoking, Dr. Baker also opined that claimant did not suffer from an occupational lung disease as indicated on a form accompanying his August 8, 2001 report. Decision and Order at 10; Director's Exhibit 12.

sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 10-11. The administrative law judge ultimately concluded that Dr. Baker's opinion was entitled to "less weight" and, in so doing, did not render a finding tantamount to a determination that Dr. Baker's opinion was worthy of no weight, and hence, lacking credibility altogether. *See Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992).

Moreover, with respect to the issue of total disability under Section 718.204(b)(2)(iv), the administrative law judge did not find that Dr. Baker's opinion, that claimant has no pulmonary or respiratory impairment, incomplete or lacking credibility but instead accorded it "some" weight to support a finding of an absence of total respiratory disability. Decision and Order at 13. Because Dr. Baker clearly rendered an opinion which addressed all elements of entitlement, and could, if credited, establish entitlement, *i.e.*, Dr. Baker addressed the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment, we reject claimant's argument that the Director failed to provide claimant with a complete, credible pulmonary examination. *See Cline*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); Decision and Order at 11.

Claimant also argues that, in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work as a miner operator in conjunction with the medical reports assessing a disability. Claimant also asserts that the administrative law judge erred by failing to consider his disability, age, limited education, and work experience, factors which would preclude him from obtaining gainful employment outside of the coal mine industry, when the administrative law judge determined that claimant was not totally disabled.

Because the administrative law judge correctly found that all three physicians of record, Drs. Baker, Dahhan, and Branscomb, opined that claimant retained the physiological capacity to continue his previous coal mine employment and did not suffer from any respiratory or pulmonary impairment, the administrative law judge properly concluded that the medical opinion evidence was insufficient to demonstrate that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997) (consideration of miner's exertional requirements not necessary where physician's opinion finding no impairment is credited); Decision and Order at13. Accordingly, we reject claimant's arguments and affirm the administrative law judge's determination that claimant failed to satisfy his burden of

demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

In addition, the administrative law judge properly considered the opinions of Drs. Baker, Dahhan, and Branscomb finding no totally disabling respiratory or pulmonary impairment, along with the two pulmonary function studies of record which were non-qualifying and the two arterial blood gas studies of record which were non-qualifying. Decision and Order at 12-13. Accordingly, after weighing all the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally found that the evidence of record failed to affirmatively establish total respiratory disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because claimant has not otherwise challenged the administrative law judge's credibility determinations, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2). *See Fields*, 10 BLR at 1-19; *Gee*, 9 BLR at 1-4; *see also White*, 23 BLR 1-1. Claimant's failure to establish total respiratory disability under Section 718.204(b), a requisite element of entitlement pursuant to Part 718, obviates the need to address claimant's arguments with respect to the existence of pneumoconiosis under Section 718.202(a)(1). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge