BRB No. 05-0140 BLA

TED COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREAT WESTERN COAL	)	DATE ISSUED: 08/30/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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 – Rejection of Claim (03-BLA-5854) of Administrative Law Judge Edward Terhune Miller 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).[1] The administrative law judge credited

[1] Claimant filed the instant claim on May 7, 2001. Director's Exhibit 2.

claimant with twenty years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the x-ray and medical opinion evidence establishes the existence of pneumoconiosis and that the pneumoconiosis arose out of claimant's coal mine employment. *See* 20 C.F.R. §§718.202(a)(1), (a)(4); 718.203(b). The administrative law judge also found, however, that the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director) responds, and urges affirmance of the decision below as supported by substantial evidence. Employer has not filed a brief in the appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant contends that the administrative law judge erred in finding Dr. Simpao's opinion insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] By report dated January 27, 2004, Dr. Simpao diagnosed coal workers' pneumoconiosis 1/1 by chest x-ray and indicated that "multiple years of coal dust exposure is medically significant in his pulmonary impairment." Claimant's Exhibit 3 at 7. Dr. Simpao opined that claimant has a mild impairment due to pneumoconiosis. *Id.* In a separate report also dated January 27, 2004, Dr. Simpao indicated, *inter alia*, that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment; he explained that this opinion was based on the objective findings on x-ray, "along with symptomatology and physical findings as noted in the

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

report." Claimant's Exhibit 3 at 8. In weighing Dr. Simpao's opinion at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Simpao did not provide a detailed basis for his conclusion that claimant does not have the respiratory capacity to return to work as a coal miner or to perform comparable work in a dust-free environment, and thus did not sufficiently document his reasoning "to allow Claimant to meet her burden of persuasion." Decision and Order at 6. The administrative law judge thus determined that Dr. Simpao's opinion was not reasoned. *Id.* Claimant states that Dr. Simpao's opinion was based on claimant's work and medical histories, on results from a pulmonary function study, blood gas study, and chest x-ray, and on a "thorough physical examination of the claimant." Claimant's Brief at 3. Claimant further notes that Dr. Simpao's January 27, 2004 medical report is the most recent of record, and states, "As such, it can be concluded that the report and opinion of Dr. Simpao is well reasoned and well documented and should not have been rejected by Judge Miller for the reasons he provided."[3] *Id*. at 4.

Claimant's contentions lack merit. It is within the purview of the administrative law judge, as fact finder, to examine the validity of a physician's reasoning in light of the studies conducted and the objective indications upon which the physician's report is purportedly based. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Substantial evidence in the record supports the administrative law judge's finding that Dr. Simpao did not list, or otherwise specify, what symptoms, physical findings, or objective test results he relied on to reach his opinion that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Claimant's Exhibit 3. The administrative law judge found to be critical Dr. Simpao's failure to explain his opinion "especially in light of pulmonary function tests and blood gas studies that were within the normal range." Decision and Order at 6; *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985). Therefore, the administrative law judge properly found Dr. Simpao's opinion to be inadequately explained and unreasoned, *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999); *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988), and thus insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant, citing, *inter alia, Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), asserts that taking into consideration his condition, the exertional

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[3] The record also contains Dr. Baker's report dated November 14, 2001. *See* Director's Exhibit 10. The administrative law judge found that Dr. Baker's opinion does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 6. Claimant does not challenge the administrative law judge's weighing of Dr. Baker's report.

requirements of his usual coal mine employment, and Dr. Simpao's medical opinion, "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 5. Claimant adds that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability."[4] *Id.*

In the instant case, the administrative law judge properly determined that Dr. Simpao's opinion on the issue of total disability is unpersuasive and thus insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See* discussion, *supra.* The administrative law judge was not required to further consider Dr. Simpao's opinion at 20 C.F.R. §718.204(b)(2)(iv), *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see also Rowe*, 710 F.2d at 251, 5 BLR at 2-99. We, therefore, reject claimant's assertion of error in this regard.[5]

Claimant next contends that the administrative law judge "made no mention of the claimant's age or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 5. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Lastly, claimant summarily asserts that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 5. Claimant's assertion lacks merit. Claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004); *see Ondecko*, 512 U.S. at 267, 18 BLR at 2A-1.

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[4] Claimant's assertion that Dr. Simpao's opinion "may be sufficient for invoking the presumption of total disability," Claimant's Brief at 3, is unavailing. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the instant claim, filed on May 7, 2001. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 2.

[5] The administrative law judge discussed claimant's usual coal mine employment in the "Background" section of his Decision and Order. Decision and Order at 2.

Based on the foregoing, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). Because the evidence of record fails to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits as a finding of entitlement is precluded in this case. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge