BRB No. 07-0394 BLA

D.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/30/2008
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Gregory F. Jacob, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5759) of Administrative Law Judge Joseph E. Kane denying benefits 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 twenty-six 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 that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director has filed a limited response, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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 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 entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Broudy, Dahhan, and Rasmussen. The administrative law judge correctly stated that "[a]ll of the physicians of record agree that [c]laimant is able to perform his

[1] Because the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

regular coal mine employment."[2] Decision and Order at 10. Contrary to claimant's contention, because Drs. Broudy, Dahhan, and Rasmussen opined that claimant has minimal or no impairment, and retains the pulmonary or respiratory capacity to perform the work of a coal miner, the administrative law judge was not required to compare their opinions with the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the physicians' opinions.

In addition, we reject claimant's suggestion that the administrative law judge erred in failing to conclude that claimant's condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no medical evidence that claimant is totally disabled by a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); *see 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 total disability was not established pursuant to Section 718.204(b)(2)(iv).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R Part 718. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits.[3] *Anderson*, 12 BLR at 1-112.

Finally, claimant contends that because the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was unreasoned, the Director failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act. The Director responds that he met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation, and states that a remand to the district director for Dr. Rasmussen to clarify

[2] Dr. Broudy opined that claimant has "minimal" impairment and retains the respiratory capacity to perform the work of an underground coal miner. Employer's Exhibit 1. Similarly, Dr. Dahhan opined that claimant has "no evidence of pulmonary disability." Employer's Exhibit 2. Lastly, Dr. Rasmussen opined that claimant "has normal lung function" and "retains the pulmonary capacity to perform his last regular coal mine job." Director's Exhibit 10.

[3] In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions that the administrative law judge erred in finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

his opinion regarding the existence of legal pneumoconiosis would be futile in view of Dr. Rasmussen's opinion that claimant is not totally disabled.

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; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Rasmussen 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).

Claimant does not assert any defect with respect to Dr. Rasmussen's opinion regarding total disability. On the issue of total disability, the administrative law judge credited, as well-reasoned and well-documented, Dr. Rasmussen's opinion that claimant retains the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 10. The administrative law judge then found that claimant failed to establish total disability. Based on the administrative law judge's consideration of Dr. Rasmussen's disability opinion, claimant was provided a complete and credible pulmonary evaluation regarding total disability at 20 C.F.R. §718.204(b)(2)(iv). *Cf. Hodges*, 18 BLR at 1-93. Further, because the administrative law judge's finding that the evidence did not establish total disability was sufficient to support his denial of benefits, we agree with the Director that a remand of the case to the district director for Dr. Rasmussen to better explain his diagnosis of legal pneumoconiosis would be futile. *See* Director's Letter at 2.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge