

BRB No. 01-0963 BLA

EMMETT FOSTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
)	
_____)	
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.

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

Sarah M. Hurley (Eugene Scalia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order B Denying Benefits (00-BLA-1087) of Administrative Law Judge Rudolf L. Jansen 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 This case is before the Board for the second time. The case was previously considered by Administrative Law Judge J. Michael O=Neill, who issued his

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Decision and Order B Denying Benefits on January 22, 1998. Judge O'Neill credited claimant with eight years, nine months and one and one-half days of coal mine employment and adjudicated the case pursuant to the regulations contained in 20 C.F.R. Part 718. Judge O'Neill found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(1)-(4)(2000), and insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. ' 718.204(c)(1)-(4)(2000). Accordingly, he denied benefits. Director's Exhibit 50.

On claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding, as well as his findings pursuant to Section 718.202(a)(1)-(3)(2000) and Section 718.204(c)(1)-(3)(2000). However, the Board vacated the administrative law judge's consideration of the medical opinion evidence pursuant to Sections 718.202(a)(4)(2000) and 718.204(c)(4)(2000). *Foster v. Director, OWCP*, BRB No. 98-0644 BLA (Feb. 3, 1999)(unpub.); Director's Exhibit 61.

On remand, the case was reassigned to Administrative Law Judge Stuart A. Levin who determined that he could not comply with the Board's instructions on remand without more medical evidence. Consequently, Judge Levin remanded the case to the district director to further develop the evidence. Director's Exhibit 63.

The case was considered by a claims examiner and the district director, both of whom denied benefits, *see* Director's Exhibits 66, 78, and, at claimant's request, the case was transferred to the Office of Administrative Law Judges, *see* Director's Exhibit 81.

After holding a hearing, Administrative Law Judge Rudolf L. Jansen (the administrative law judge) issued his Decision and Order B Denying Benefits on September 12, 2001. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4) and that claimant's pneumoconiosis arose out of his coal mine employment, but the administrative law judge found the evidence insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. ' 718.204(b)(2)(i)-(iv). Consequently, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that claimant is not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

We affirm the administrative law judge's finding that claimant has established the

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 into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge must consider the exertional requirements of claimant's usual coal mine employment in conjunction with the medical opinions of claimant's physical abilities. Claimant also contends that the administrative law judge should consider claimant's age, education and work experience in determining whether he is totally disabled. In addition, claimant asserts that the administrative law judge should have discussed whether Dr. Burki's opinion was entitled to less weight because he did not examine claimant. Finally, claimant asserts that since pneumoconiosis is progressive, it can be concluded that claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work. @ Claimant's Brief at 4.

In weighing the medical opinion evidence, the administrative law judge noted that Dr. Clarke is the only physician to opine that claimant is totally disabled from a respiratory standpoint, and that Drs. Baker, Burki and Myers opined that claimant is not totally disabled. The administrative law judge stated that claimant was examined by Drs. Baker and Clarke. Whose opinions the administrative law judge found the opinions of both of these physicians to be inadequately documented because they both relied upon exaggerated work histories and understated smoking histories. However, the administrative law judge found that both opinions were based upon accurate medical test results. The administrative law judge found that the opinion of Dr. Burki, who reviewed the medical evidence, was undocumented with respect to work and social histories, but adequately reasoned with respect to his interpretation of the pulmonary function studies and blood gas studies. The administrative law judge also found the opinion of Dr. Myers, who examined claimant, to be inadequately documented as it was based on an exaggerated employment history and an understated smoking history. The administrative law judge found Dr. Myers's opinion to be adequately supported by claimant's symptoms and x-ray. Decision and Order at 8-9.

existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202(a)(4), 718.203(b), and his finding that claimant has not demonstrated total respiratory disability pursuant to 20 C.F.R. §§ 718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge stated:

Of the physicians opining as to [claimant=s] level of disability, Drs. Baker, Burki, and Clarke=s opinions are due equal weight. None of the physicians based their opinions on accurate employment and social histories, but Drs. Baker, Burki, and Clarke explained their determinations of disability in terms of objective medical test results. I therefore accord these opinions equal weight, and find that Claimant has not satisfied his burden of demonstrating by a preponderance of the evidence that he is totally disabled.

Decision and Order at 9.

We affirm the administrative law judge=s finding that the medical opinion evidence does not establish total disability. The administrative law judge=s properly relied upon the preponderance of the medical opinions, *see 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), to find that claimant has not demonstrated total disability pursuant to Section 718.204(b)(2)(iv). In addition, we hold that claimant=s assertion that the administrative law judge must consider the exertional requirements of claimant=s usual coal mine employment, in conjunction with the medical assessments of claimant=s physical abilities, is misplaced inasmuch as the physicians have provided opinions that claimant is not disabled from a respiratory impairment. *See generally Gee v. W.G. Moore and Sons,*

Dr. Clarke, who examined claimant, is the only physician to opine that claimant is totally disabled from a ventilatory impairment. Director's Exhibit 31. Dr. Myers examined claimant and answered the question of whether claimant had any pulmonary impairment resulting from his exposure to coal dust, stating AN/A B class I@ Director's Exhibits 69, 77. Dr. Burki reviewed medical evidence and opined that claimant has no pulmonary impairment and that he has the respiratory capacity to perform the work of a coal miner. Director's Exhibit 65. Dr. Baker examined claimant and noted a minimal respiratory impairment. Director's Exhibit 10. Dr. Joshi examined claimant and opined that his pulmonary function study revealed some mild to moderate obstructive airway impairment with a mild diffusion impairment. Dr. Joshi noted that claimant=s cardiopulmonary exercise test reveals a Class I to Class II respiratory impairment by ATS criteria, and indicated that claimant could perform eight hours of active physical work. Director's Exhibit 44.

9 BLR 1-4 (1986). Moreover, we reject claimant=s assertion that the administrative law judge should have considered his age, education and employment. These issues are not relevant to the issue of the existence of a respiratory impairment pursuant to Section 718.204(b)(iv). *See* 20 C.F.R. ' 718.204(b)(2)(iv). We also reject claimant=s assertion that his condition has worsened because pneumoconiosis is a progressive disease. Claimant does not point to any evidence supportive of this assertion , and since the administrative law judge=s findings must be based solely on the medical evidence contained in the record, *see* 20 C.F.R. ' 725.477(b), we reject this assertion.

We now turn to claimant=s assertion that the administrative law judge erred by failing to accorded less weight to the opinion of Dr. Burki, because he did not examine claimant. Inasmuch as the administrative law judge noted that Dr. Burki=s opinion is based on the physician=s review of medical evidence, *see* Decision and Order at 5, 8, and since Dr. Burki=s opinion that claimant has no pulmonary impairment is supported by the opinion of Dr. Myers, who examined claimant, we reject claimant=s assertion that the administrative law judge erred by relying on Dr. Burki=s report. *See Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160, *aff'd on reh'g*, 877 F.2d 495, 12 BLR 2-303 (6th Cir. 1989).

Although the administrative law judge did not consider Dr. Joshi=s opinion on remand, claimant has not alleged error by the administrative law judge in this omission. We, therefore, affirm the administrative law judge=s consideration of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). *See generally Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge=s finding that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Inasmuch as we affirm the administrative law judge=s finding that the evidence is insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(i)-(iv), one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge=s denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge