BRB No. 05-0146 BLA

STEPHEN NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIZEMORE AND COUCH TRUCKING, INCORPORATED	)	
	)	
	)	
and	)	
	)	
REALM NATIONAL INSURANCE COMPANY	)	DATE ISSUED: 08/17/2005
	)	
	)	
Employer/Carrier-Respondent	)	
	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Norman E. Harned (Harned, Bachert & Denton), Bowling Green, Kentucky, for employer.

Jeffrey S. Goldberg (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-6094) of Administrative Law Judge Daniel J. Roketenetz 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 at least seventeen years of coal mine employment and found that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) and the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to comply with its statutory duty to provide claimant with a complete and credible pulmonary evaluation. Employer and the Director respond, urging affirmance.

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'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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge properly denied benefits based on his rational finding that claimant did not establish that he is totally disabled by a

[1] The administrative law judge's findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §718.204(b)(2)(i)–(iii) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27.

The administrative law judge correctly determined that Drs. Dahhan and Broudy opined that claimant has no respiratory impairment and retains the pulmonary capacity to perform his usual coal mine employment. Decision and Order at 12; Employer's Exhibits 2, 3. The administrative law judge also correctly found that Dr. Baker determined that although claimant has a mild impairment based upon his objective study results, he is able to perform the work of a coal miner or comparable work in a dust free environment. Decision and Order 13; Director's Exhibit 9. Thus, the administrative law judge accurately characterized the evidence of record in concluding that none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment.

Contrary to claimant's assertion, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's diagnosis of a mild impairment, as the administrative law judge acted within his discretion as fact-finder in determining that the doctor's own conclusion, that claimant's mild impairment would not prevent him from performing his usual coal mine employment or comparable employment, is reasoned and documented. *Id.*; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Furthermore, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co*, 23 BLR 1-1, 1-7 (2004). Lastly, claimant's assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant has not raised any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we must affirm the administrative law judge's finding and the denial of benefits.[2] *Trent*, 11 BLR 1-26, 1-27; *Perry*, 9 BLR 1-1, 1-2. In light of this holding, we

[2] Because we have affirmed the denial of benefits based upon the administrative law judge's appropriate finding that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we decline to reach claimant's arguments concerning the administrative law judge's weighing of the evidence under 20 C.F.R.

also reject claimant's assertion that remand to the district director is required because the administrative law judge discredited the opinion of Dr. Baker, who examined claimant at the request of the Department of Labor, under Section 718.202(a)(4).

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. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lack credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

With respect to the issue of total disability, the administrative law judge did not find that Dr. Baker's opinion was incomplete or lacking credibility. Rather, the administrative law judge found Dr. Baker's "opinion well-reasoned and well-documented" as to the issue of total disability. Decision and Order at 13. Because Dr. Baker explicitly indicated that claimant is able to perform his usual coal mine work, the administrative law judge found that his opinion did not support a finding of total respiratory disability under Section 718.204(b)(2)(iv). Decision and Order at 13; Director's Exhibit 9. Based upon these determinations, which claimant has not challenged on appeal, the administrative law judge found that Dr. Baker's opinion regarding total disability - the element of entitlement upon which the administrative law judge based the denial of benefits - was complete and credible. Because the Director fulfilled his statutory obligation with respect to the material issue in this case, remand to the district director is not required. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-88 n.3; *Newman*, 745 F.2d at 1166, 7 BLR at 2-31.

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§718.202(a)(1) and (a)(4). Error, if any, in the administrative law judge's findings is harmless in light of our affirmance of his findings under Section 718.204(b)(2). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge