

BRB No. 05-0167 BLA

WALTER COLLETT)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 08/05/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen Jr., Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (03-BLA-5797) of Administrative Law Judge Robert L. Hillyard 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 eleven years of coal mine employment,¹ and found that because Liberty Coal Company,

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 4; Director's Exhibits 1, 3.

the last employer for which claimant worked, was not required to carry insurance and did not carry insurance, any benefits awarded would be paid by the Black Lung Disability Trust Fund. Decision and Order at 4. Based on claimant's April 2, 2001 filing date, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 7. After determining that the instant claim was a subsequent claim,² the administrative law judge noted the proper standard and found that the newly submitted x-ray evidence supported the parties' stipulation of the existence of clinical pneumoconiosis and, thus, found that this subsequent claim would not be denied on the basis of the prior claim denial. Decision and Order at 9-10; *see* 20 C.F.R. §725.309(d). The administrative law judge then found that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 10. However, the administrative law judge found the medical evidence as a whole insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 10-12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.³

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

² Claimant filed his initial claim for benefits with the Social Security Administration (SSA) on January 3, 1972. Director's Exhibit 1. This claim was denied by a Decision and Order issued on February 6, 1976. Director's Exhibit 1. Following claimant's election of further review by SSA, the claim was again denied on February 8, 1979 and subsequently forwarded to the Department of Labor (DOL) where it was merged with claimant's April 27, 1976 DOL application for benefits. Director's Exhibit 1. By Decision and Order issued on December 27, 1983, Administrative Law Judge James L. Guill denied benefits because claimant failed to establish the existence of pneumoconiosis and total disability under 20 C.F.R. Part 410, Subpart D. Director's Exhibit 1. No further action was taken on this claim.

³ The parties do not challenge the administrative law judge's decision to credit claimant with eleven years of coal mine employment, his determination of Trust Fund liability, or his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iii). Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's coal mine employment with Dr. Baker's opinion. We disagree. Dr. Baker obtained "normal" pulmonary function and blood gas studies and diagnosed claimant with "[n]o [i]mpairment" or "minimal" impairment. Director's Exhibit 7 at 3, 4, 7. Dr. Baker therefore concluded that claimant retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 7 at 7. Because Dr. Baker diagnosed no impairment, it was unnecessary for the administrative law judge to compare the exertional requirements of claimant's usual coal mine employment as a loader and laborer with Dr. Baker's no-impairment opinion. See *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Furthermore, contrary to claimant's additional contention, 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). Claimant's further 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.

Because claimant does not otherwise challenge the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(iv), we affirm the finding that claimant has failed to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 10-12; see *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); see also *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Since claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 20 C.F.R. §718.204(b)(2), a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits in this miner's claim is precluded. See *Hill*, 123 F.3d at 415-416, 21 BLR at 2-196-197; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge