BRB No. 04-0556 BLA
and 04-0556 BLA-A

RONALD D. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/17/2005
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer and carrier.

Rita Roppolo (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 (2003-BLA-5257) of Administrative Law Judge Thomas F. Phalen, Jr., 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 eighteen years of qualifying coal mine employment as stipulated by the parties and supported by the record, and adjudicated this claim, filed on April 12, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the administrative law judge's denial of benefits, and cross-appeals, challenging the administrative law judge's application of evidentiary limitations pursuant to 20 C.F.R. §725.414 and the validity of the regulation. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal but has declined to address the merits of claimant's appeal.[2]

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 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 totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant

[1] Claimant's reference to "Section 718.204(c)(4)" is misplaced. *See* Claimant's Brief at 2-3. The regulation regarding establishing total disability by a reasoned medical opinion is now contained in 20 C.F.R. §718.204(b)(2)(iv).

[2] We affirm, as unchallenged, the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in finding the weight of the evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Specifically, claimant asserts that the opinions of Drs. Baker and Simpao are reasoned, documented and sufficient to establish total disability, and that the administrative law judge should not have rejected these opinions for the reasons provided. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge accurately reviewed the opinions of Drs. Baker and Simpao, and noted that both physicians interpreted the results of the pulmonary function studies and blood gas studies they conducted as normal. Decision and Order at 7-8, 15-16. The administrative law judge determined that Dr. Baker diagnosed a Class 1 impairment based on FEV1 and FVC values that were greater than 80% of the predicted value, which is equivalent to a 0% impairment as listed in Table 5-12 of the *Guides to the Evaluation of Permanent Impairment, Fifth Edition.* Decision and Order at 15; Director's Exhibit 14. The administrative law judge permissibly found that Dr. Baker's conclusion that claimant was "100% occupationally disabled" was insufficient to support a finding of total disability because Dr. Baker found no respiratory impairment but merely opined that claimant should limit his further exposure to coal dust. Decision and Order at 15-16; Director's Exhibit 14; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).[3] Thus, we affirm the administrative law judge's determination to accord Dr. Baker's opinion little weight on the issue of total disability.

In evaluating Dr. Simpao's opinion, that claimant had a mild respiratory impairment and lacked the respiratory capacity to perform his usual coal mine employment or comparable work, the administrative law judge determined that the opinion was based upon the physician's objective findings on x-ray along with symptomatology and physical findings as noted in his report. Decision and Order at 16; Director's Exhibit 12. The administrative law judge then acted within his discretion in finding that the opinion was not well reasoned and thus entitled to little weight, as Dr. Simpao failed to explain how a mild pulmonary impairment prevented claimant from performing his usual coal mine employment operating a shuttle car or a scoop, which required claimant to stand for eight to twelve hours per day and lift twenty-five pounds

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

several times per day, nor did the physician explain how the documentation he identified supported his conclusions. Decision and Order at 16; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). The administrative law judge's finding that the evidence of record is insufficient to establish that claimant is totally disabled by a respiratory or pulmonary condition pursuant to Section 718.204(b)(2)(iv) is supported by substantial evidence and is affirmed. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[4] *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland-Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995).

Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718.[5] *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26. Consequently, we affirm the administrative law judge's denial of benefits and need not reach employer's arguments on cross-appeal regarding the validity of Section 725.414 and the administrative law judge's exclusion of evidence thereunder.

[4] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which was not reached in that case since the administrative law judge found that the miner did not establish that he had any impairment which disabled him from performing his usual coal mine employment. *Id.*

[5] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), lay testimony along cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

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