BRB No. 09-0605 BLA

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| ERSHEL THORNSBERRY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BUBBER COAL, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA | ) | DATE ISSUED: 03/09/2010 |
| | ) | |
| 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 Denying Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ershel Thornsberry, Kite, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Living Miner's Benefits (08-BLA-5058) of Administrative Law Judge Kenneth A. Krantz rendered 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 twenty-four years of qualifying coal mine employment,[1] as stipulated by the parties and supported by the record, and adjudicated this claim, filed on January 29, 2007, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), but further found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Evaluating the evidence relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge properly found that the record contains one pulmonary study and one arterial blood gas study, both of which are non-qualifying[2] for total disability. Decision and Order at 9, 10; Director's Exhibit 10. Thus,

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

the administrative law judge correctly determined that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 9, 10. Furthermore, as there is no evidence of record that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10. Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found, correctly, that the record contains the opinions of Drs. Baker and Broudy. Decision and Order at 10; Director's Exhibit 10; Employer's Exhibit 1. Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant has a "class 1 or 0% impairment," based on his pulmonary function study results, and explained that, therefore, "[claimant] would have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment." Director's Exhibit 10 at 12. Dr. Baker concluded that "no impairment is present." Director's Exhibit 10 at 12. Dr. Broudy, who is also Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical records and concluded that the pulmonary function and blood gas study results were "well within the normal range" and did "not indicate any type of pulmonary impairment or disability." Employer's Exhibit 1. As neither physician diagnosed a respiratory impairment, the administrative law judge properly concluded that claimant did not meet his burden to establish total disability through medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 10. Therefore, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Claimant has the burden of submitting evidence to establish his entitlement to benefits. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because we have affirmed the administrative law judge's findings that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[3] a requisite element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[3] The record contains no evidence of complicated pneumoconiosis. Therefore, the administrative law judge correctly found that the irrebuttable presumption of total

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, is inapplicable. Decision and Order at 5 n.2. Thus, claimant cannot establish total disability by means of the irrebuttable presumption. *See* 20 C.F.R. §718.204(b)(1).