BRB No. 99-0702 BLA

DAVID B. BENTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANNE BROOKE COAL CORPORATION	)	DATE ISSUED: _____
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (98-BLA-0018) 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 found that Anne

Brooke Coal Corporation (employer) is the properly designated responsible operator. The administrative law judge also credited claimant with sixteen years of coal mine employment. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge further found that the evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish total disability under 20 C.F.R. §718.204(c). Employer responds, and seeks affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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 under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will result in the denial of benefits.

Claimant contends that when the exertional requirements of his usual coal mine work are compared with the medical opinions of Drs. Powell and Baker, it is rational to conclude that his condition prevents him from engaging in his usual coal mine work. Claimant asserts that the administrative law judge did not discuss his age and limited education and work experience or discuss his usual coal mine work in conjunction with these medical reports, in finding that claimant is not totally disabled. Lastly, claimant asserts that, given the amount of time that has passed since his initial diagnosis of pneumoconiosis, 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 5.[1]

[1]We affirm, as unchallenged on appeal, the administrative law judge's findings of the

existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), sixteen years of coal mine employment, and that employer is the properly designated responsible operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Notwithstanding claimant's contentions, we affirm the administrative law judge's finding that the evidence fails to establish total disability under 20 C.F.R. §718.204(c) as it is rational, supported by substantial evidence and consistent with applicable law. The administrative law judge properly found that the evidence favorable to claimant's case is outweighed by the contrary objective evidence and medical opinions of record. With regard to the objective evidence of record, the administrative law judge correctly determined that, inasmuch as all five of the pulmonary function studies produced non-qualifying values, as did all three of the blood gas studies of record,[2] Director's Exhibits 8-11, 14, 53, 54, the evidence is insufficient to establish total disability under 20 C.F.R. §718.204(c)(1) and (c)(2).[3]

[2]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] The administrative law judge also correctly found that there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure which would support a finding of total disability under 20 C.F.R. §718.204(c)(3).

With regard to the medical opinion evidence, the administrative law judge law judge properly found that no physician opined that claimant is totally disabled, and "indeed, the pulmonary specialists of record find that the Claimant is not totally disabled due to the disease." *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 9. With regard to Dr. Baker's diagnosis of a mild pulmonary impairment, upon which claimant relies, the administrative law judge found that the physician's opinion is contrary to the opinions of every other physician of record. Director's Exhibit 13; Decision and Order at 9. The administrative law judge specifically indicated that he did not find Dr. Baker's opinion sufficient to outweigh the opinions of the physicians who found no respiratory or pulmonary impairment. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). These contrary opinions consist of the opinions of Drs. Fino, Jarboe, Myers, Powell and Vuskovich, which the administrative law judge permissibly determined to be the better reasoned and better documented reports of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge found that the opinions of Drs. Fino, Jarboe, Myers, Powell and Vuskovich, are supported by the objective evidence of record and are thus well-supported. *Wetzel, supra*; Director's Exhibits 11, 12, 53, 54; Employer's Exhibit 1.[4]

Claimant's reliance on Dr. Powell's opinion is also unavailing. Dr. Powell opined that claimant "has category 2 silicosis and should not be further exposed to high concentration of rock dust." Director's Exhibit 11. As the administrative law judge noted, an opinion that a claimant should have no further exposure to coal mine dust is insufficient to support a finding of total disability under the Act. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 9. 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

[4]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), recently held in *Cornett v. Benham Coal Co.*, F.3d , BLR , 2000 WL 1262464 (6th Cir. Sep. 7, 2000), that it was error for the administrative law judge not to consider that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. In his Decision and Order in the instant case, which was issued more than five months prior to *Cornett*, the administrative law judge recognized that Dr. Baker's opinion, diagnosing a mild impairment, was favorable to claimant's case. As discussed *supra*, the administrative law judge properly found that Dr. Baker's opinion was outweighed by the contrary objective evidence and medical opinions of Drs. Fino, Jarboe, Myers, Powell and Vuskovich. Thus, remand pursuant to *Cornett* is unnecessary in this case.

compensable under the Act. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Thus, substantial evidence supports the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment at Section 718.204(c)(4), and is affirmed. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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).

In light of the foregoing, we further affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c), an essential element of entitlement, and the administrative law judge's denial of benefits in the instant case. *See Trent, supra; Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge