BRB No. 99-0803 BLA

DEWEY WAGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
C/O TRANSCO COAL COMPANY	)	
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
C/O ACCORDIA OF LEXINGTON	)	)
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Paul E. Jones (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0767) 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 found sixteen and three-quarter years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim

pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 4, 7. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Decision and Order at 8-12. Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 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 to establish any 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*).

[1]Claimant filed his claim for benefits on February 25, 1997. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein.[3] The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge considered the relevant medical opinions of record and reasonably determined that the medical opinion evidence was insufficient to establish total disability based on his conclusion that the opinions of Drs. Baker and Marshall, that claimant was totally disabled, were outweighed by the opinions of Drs. Broudy, Powell and Fino, that claimant did not have a totally disabling respiratory impairment.[4] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 11; Director's Exhibits 12, 13, 30, 32, 36; Employer's Exhibits 1, 4, 7. The administrative law judge acted within his discretion, as factfinder, when he accorded greater weight to the opinions by Drs. Broudy and Powell, that claimant has no respiratory

---

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]Dr. Bushey diagnosed chronic lung disease with pulmonary emphysema and fibrosis, compatible with coal workers' pneumoconiosis but did not offer an opinion with respect to total disability. Director's Exhibit 12. Dr. Anderson diagnosed pneumoconiosis and opined that claimant retains the pulmonary functional capacity to do his usual coal mine employment or comparable and gainful work. Director's Exhibit 11. Dr. Broudy opined that claimant was not suffering from coal workers' pneumoconiosis and that claimant retained the respiratory capacity to perform coal mine employment or similar arduous labor. Director's Exhibit 32; Employer's Exhibit 1. Dr. Baker stated that claimant had no occupational lung disease due to coal mine employment and no respiratory or pulmonary impairment. Director's Exhibit 13. In a subsequent report, Dr. Baker opined that claimant suffered from coal workers' pneumoconiosis and was 100% occupationally disabled and should be removed from further dust exposure. Director's Exhibit 30. Dr. Marshall diagnosed occupational lung disease due to coal mine employment and opined that claimant cannot work due to the loss of normal lung function. Director's Exhibit 30. Dr. Powell diagnosed pneumoconiosis and opined that claimant has no respiratory or pulmonary impairment regardless of cause. Director's Exhibit 36; Employer's Exhibit 7. Dr. Fino concluded that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis or any occupationally acquired pulmonary condition and opined that claimant had no respiratory impairment. Employer's Exhibit 4.

impairment, as they are supported by the objective evidence of record and the consultative opinion of Dr. Fino. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985)*; Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; Decision and Order at 11-12; Director's Exhibits 12, 13, 30, 32, 36; Employer's Exhibits 1, 4, 7. Contrary to claimant's contention, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel, supra*. Moreover, we reject claimant's arguments that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education, since the medical opinion evidence does not establish the existence of a totally disabling respiratory impairment under Section 718.204(c).[5] *See* 20 C.F.R. §718.204(c)*; 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. 1985).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the opinions diagnosing a totally disabling respiratory impairment outweighed by the remaining contrary medical opinions, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need

---

[5]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 only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

not address the administrative law judge's findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[6] *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]Although the administrative law judge failed to consider Dr. Anderson's opinion pursuant to 20 C.F.R. §718.202(a)(4), a remand is not required as the administrative law judge's finding that claimant failed to establish that he was totally disabled, an essential element of entitlement, is supported by substantial evidence as Dr. Anderson opined that claimant retains the pulmonary functional capacity to do his usual coal mine employment or comparable and gainful work. Director's Exhibit 11.