BRB No. 00-0657 BLA

TERRY COUCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
SUN COAL COMPANY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader, Manchester, Kentucky, for employer.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1150) of Administrative Law Judge Joseph E. Kane 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).[1] After accepting the parties' stipulation to at least twenty-one years of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings that the x-ray evidence and medical opinions are insufficient to establish the existence of pneumoconiosis and a total respiratory or pulmonary impairment. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.[2]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect

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[1]This claim was filed on December 1, 1998. Director's Exhibit 1. The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3)(2000), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which only the Director has responded.[3] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant alleges that Dr. Baker's medical opinion is sufficient to establish that he suffers from a totally disabling respiratory impairment. Claimant also asserts that "a single medical opinion may be sufficient for invoking the presumption of total disability," that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine employment as a mine foreman, and that because pneumoconiosis is a progressive and irreversible disease, it can be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 8-11. Additionally, claimant argues that the administrative law judge erred because he did not consider claimant's age, education or work experience in his assessment that claimant was not totally disabled.

Initially, we note that the interim presumption of total disability due to pneumoconiosis arising under 20 C.F.R. Part 727 is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Inasmuch as this claim was filed after March 31, 1980, the

[3]The Director's brief, dated March 7, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case.

administrative law judge correctly applied the permanent criteria under 20 C.F.R. Part 718 (2000). *See* 20 C.F.R. §§718.(1)(b) and 718.2. (2000).

Additionally, the administrative law judge permissibly found Dr. Baker's 1993 and 1998 medical opinions not supportive of a finding of total disability. In his 1993 report, Dr. Baker responded "no" to the question "Is the miner physically able, from a pulmonary standpoint, to do his usual coal mine employment...?" Director's Exhibit 10. Dr. Baker provided the following explanation in support of his opinion:

> Patient should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and bronchitis. He *may have difficulty* doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions.

Id. at 4 (emphasis added). The administrative law judge, within his discretion, gave little probative weight to Dr. Baker's 1993 opinion finding it an "inadvisability of returning to coal mine employment to prevent further dust exposure" and Dr. Baker's opinion that the claimant "may have difficulty" in performing his usual or comparable coal mine work is not equivalent to an opinion finding claimant totally disabled. Decision and Order at 10; Director's Exhibit 10; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). Further, the administrative law judge properly found that while in his 1998 report Dr. Baker diagnosed a minimal impairment, Dr. Baker also concluded, in the same report, that claimant has no pulmonary or respiratory impairment and has the respiratory capacity to perform his previous coal mine or comparable job in a dust-free environment. Decision and Order at 10; Director's Exhibit 12.

Inasmuch as the administrative law judge properly found the opinions by Dr. Baker insufficient to establish the existence of a totally disabling respiratory impairment and that the remaining medical opinions of record, state that claimant retains the respiratory capacity to perform his usual coal mine work doing general labor and as a mine foreman or similar arduous manual labor, the administrative law judge properly considered exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.* 2000 WL 1262464 (6th Cir. 2000). *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon*, 9 BLR 1-104(1986); Decision and Order at 10; Director's Exhibits 11, 25.[4] Finally, 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]Further, contrary to claimant's contention, the existence of pneumoconiosis does not, in and of itself, establish that the condition is totally disabling.

compensable under the Act.[5] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLA 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability under Section 718.204(c)(4).

Inasmuch as claimant has failed to establish total disability under Section 718.204(c)(1)-(4), a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. *Anderson, supra; Trent, supra; Perry, supra.* Therefore, we need not address claimant's arguments under Section 718.202(a). *Endrzzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

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

[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 20 C.F.R. §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).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge