BRB No. 98-0992 BLA

JIMMIE SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 4/28/99
	)	
Employers-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.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer, Whitaker Coal Corporation.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (97-BLA-0610) of Administrative Law Judge Daniel J. Roketenetz, 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] This claim was previously denied by

[1]The administrative law judge properly found that claimant filed for benefits on August 24,1993, Director's Exhibit 1 and again on September 20, 1993. Director's Exhibit 2. An informal conference was held, and on August 1, 1995, the district director issued a Proposed Decision and Order Denying Benefits. Director's Exhibit

the district director because claimant failed to establish total disability. Within a year of the prior denial claimant submitted new evidence and requested a modification of the prior denial. The district director again denied benefits. The administrative law judge determined that claimant established 25.75 years of coal mine employment, and found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). However, the administrative law judge found that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1)-(4).[2] Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings under 20 C.F.R. §718.204(c)(4).[3] In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence.[4] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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57. On July 26, 1996, claimant submitted additional evidence and requested modification of the prior denial. Director's Exhibit 26

[2]The administrative law judge made no findings under 20 C.F.R. §725.310.

[3]Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of 25.75 years of coal mine employment and his findings of no total disability under 20 C.F.R. §718.204(c)(1)-(3), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Because we affirm the denial of benefits on the merits at 20 C.F.R. §718.204(c)(1)-(4), *see supra* at n.3 and *infra* at 4-5, based on all the evidence of record, we need not address employer's challenge to the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

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 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, ant that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant alleges that the medical opinions by Drs. Baker and Clarke are sufficient to establish a totally disabling respiratory or pulmonary impairment. Claimant also argues that a "single medical opinion may be sufficient for invoking the presumption of total disability" and that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine employment as a shuttle driver. We disagree. 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). Because this claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under Part 718. *See* 20 C.F.R. §§718.(1)(b) and 718.2.

Additionally, the administrative law judge properly found that while Dr. Baker diagnosed total disability in one report, Dr. Baker made contrary findings in follow-up reports dated October 20 and 22, 1993 after a second examination, which he conceded was not significantly different from the first. Decision and Order-Denial of Benefits at 8; Director's Exhibit 14, 15, 53. The administrative law judge properly found Dr. Baker's reports not "particularly persuasive given the conflict therein". *Id.* With respect to Dr. Clarke's medical opinion, the administrative law judge permissibly found his opinion that claimant was totally disabled, not well-reasoned or well-documented. The administrative law judge properly found that Dr. Clarke diagnosed total disability despite non-qualifying studies, a discrepancy that Dr. Clarke failed to address or explain. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because the administrative law judge properly found the medical opinions by Drs. Baker and Clarke, the only medical opinions of record that arguably support a finding of total disability, not persuasive and because the remaining medical opinions of record,

namely those submitted by Drs. Burki and Broudy, find that claimant can perform his usual coal mine employment, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment with his condition. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon*, 9 BLR 1-104 (1986). Further, 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. *See Ramey v. Kentland Elkhorn Coal Corp.,* 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence as a whole does not establish total disability at Section 718.204(c)(4).

Inasmuch as claimant has failed to establish total disability at 20 C.F.R. §718.204(c), an essential element of entitlement, a finding of entitlement is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge