BRB No. 99-0389 BLA

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| SHERMAN OSBORNE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WHITAKER COAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| SUN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| 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.

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

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (98-BLA-0026) 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). Claimant filed a claim for benefits in November, 1996. Director's Exhibit 1. The administrative law judge found that claimant established thirty-one and one-half years of coal mine employment. Decision and Order at 3. Further, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-

(4). In addition, the administrative law judge found that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), and in finding the evidence insufficient to establish total disability under Section 718.204(c)(4). Employer has filed a response brief supporting affirmance of the administrative law judge's Decision and Order - Denial of Benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the appeal unless specifically requested to do so by the Board.[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 the Board and may not be disturbed. 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), claimant argues that his age, work experience, and the progressive and irreversible nature of pneumoconiosis support a finding that he is totally disabled. Contrary to claimant's contention, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4), as the regulatory criteria require claimant to provide medical evidence that he suffers from a pulmonary disability. *See* 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

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

In taking exception to the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4), claimant argues that the administrative law judge erred in failing to mention claimant's usual coal mine employment, and in failing to compare the exertional requirements of claimant's usual coal mine employment with the medical reports assessing a disability. In order to establish entitlement to benefits, claimant must demonstrate the presence of a totally disabling respiratory impairment. *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). In the instant case, the administrative law judge properly found that Drs. Myers, Broudy and Wicker opined that claimant retains the respiratory capacity to perform his last coal mine employment. Director's Exhibits 10-12. Further, the administrative law judge properly found that Dr. Joyce did not render an opinion on this issue but found that claimant's pulmonary function was normal.[2] Director's Exhibit 29; Decision and Order at 9. Since the record contains no medical opinion evidence that claimant suffers from any respiratory impairment, it was not necessary for the administrative law judge to make specific findings as to the exertional requirements of claimant's work, which then could be compared to a medical impairment assessment to determine if claimant has established a totally disabling respiratory impairment. *Id.*

Inasmuch as claimant raises no other specific assertions of error on the part of the administrative law judge in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(c)(4), that finding is affirmed. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Since claimant has failed to establish total disability, a necessary element of entitlement under Part 718, an award of benefits is precluded.[3] *See Trent, supra*; *Perry, supra*.

[2] Dr. Joyce found normal spirometry. Director's Exhibit 29.

[3] Since we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(c), we decline to address claimant's arguments pertaining to 20 C.F.R. §718.202(a)(1) and (a)(4). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge