BRB No. 99-1185 BLA

ROBERT L. SMITH, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Jasper, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, 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 (98-BLA-1052) of Administrative Law Judge Gerald M. Tierney 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 credited claimant with twenty-seven years of coal mine employment based on the parties stipulation and determined that employer was the responsible operator. As this claim was filed on June 16, 1997, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203 (b). The administrative law judge, however, found the evidence of record insufficient to demonstrate the presence of a

totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge on the presence of a totally disabling respiratory impairment at Section 718.204(c). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one of these elements precludes entitlement.[2] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is

[1] We affirm the findings of the administrative law judge on the length of coal mine employment based on the parties' agreement, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Since the miner's last coal mine employment took place in Alabama, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

no reversible error contained therein. At Section 718.204(c), claimant must demonstrate the presence of a totally disabling respiratory impairment. *See Trent, supra*; *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-139 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). In the instant case, the administrative law judge properly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment under the regulatory criteria set forth in Section 718.204(c)(1)-(3) as the administrative law judge correctly determined that the results of the pulmonary function study and two blood gas studies of record were nonqualifying under the regulatory disability tables, and that the record did not contain any evidence of cor pulmonale. *Id*.; 20 C.F.R. §718.204(c)(1)-(3), Appendices B and C; Director's Exhibits 10, 15. At Section 718.204(c)(4), the administrative law judge accurately found that the letters and treatment notes of Dr. Powell do not reflect that claimant suffers from a respiratory or pulmonary impairment and that although Dr. Padove notes in his report the diagnosis of a mild restrictive impairment with hypoxemia by Dr. Hasson, Dr. Padove does not provide his own opinion on the issues of disability and impairment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1- 48 (1986) and 13 BLR 1-46 (1985)(*en banc*), *aff'd on recon*. 9 BLR 1-109 (1986)(*en banc*); Decision and Order at 4; Director's Exhibits 12, 13, 22, 29; Claimant's Exhibits 1, 3: Employer's Exhibit 3. Thus, the administrative law judge properly found that these reports were insufficient to meet claimant's burden of proof. *See Beatty, supra*; *Carson, supra*; *Trent, supra*.

Furthermore, the administrative law judge correctly determined that in his medical report, Dr. Hasson opined that claimant suffered from a mild pulmonary impairment arising out of his coal mine employment and asthmatic bronchitis, and that claimant's pulmonary impairment was minimal in terms of any total disability. *See* Decision and Order at 4-5; Director's Exhibits 14, 29; Claimant's Exhibit 2; Employer's Exhibit 3. Reviewing the exertional requirements of claimant's usual coal mine employment to decide if Dr. Hasson's diagnosis of mild pulmonary impairment was sufficient to establish a totally disabling respiratory impairment, the administrative law judge rationally found that claimant failed to carry his burden of establishing total disability. *See Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash, supra*; *Gee, supra*; *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In light of this conclusion, the administrative law judge properly found that the medical opinion evidence of record was insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4). *See Beatty, supra*; *Trent, supra*. Moreover, contrary to claimant's argument, claimant's testimony alone cannot establish total disability in the instant case. *See Matteo v. Director, OWCP*, 8 BLR 1-200 (1985); *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984); nor, contrary to claimant's argument, is the administrative law judge required to consider claimant's ability to perform comparable and gainful work in the instant case. *See Taylor, supra*. Further, the administrative law judge properly found Dr. Hasson's opinion of mild pulmonary impairment insufficient to establish total disability in light of the other

evidence of record. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). We, therefore, affirm the finding of the administrative law judge that claimant failed to meet his burden of proof at 20 C.F.R. 718.204(c) and the denial of benefits as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying 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