BRB No. 99-1187 BLA

KENNETH W. SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ARCH MINERAL CORPORATION	)	
	)	
Employer-Carrier	)	
	)	
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.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0152) 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). Based on the parties stipulation, the administrative law judge credited claimant with twenty-seven years of coal mine employment. The administrative law judge determined that Apogee Coal Company was the responsible operator. As the claim was filed on December 4, 1997, the administrative law judge adjudicated it pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), and thus, claimant was not entitled to the presumption at 20 C.F.R. §718.203(b). The administrative law judge also

found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. Employer has not filed a response brief in this case. 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

At Section 718.204(c)(1), (2) the administrative law judge properly found that the valid pulmonary function studies performed on February 28, 1992 and October 5, 1998 and the blood gas study performed on October 5, 1998 were non-qualifying under the regulatory criteria, and thus, insufficient to demonstrate the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1)-(2), Appendices B and C; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Decision and Order at 11. Likewise, the administrative law judge correctly concluded that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability at Section

[1] We affirm the findings of the administrative law judge regarding the length of coal mine employment, the designation of employer as the responsible operator, 20 C.F.R. §718.202(a)(2)-(3), and his treatment of the medical reports of Drs. Dahhan, Hudson and Cornish (Lexington Clinic) at 20 C.F.R. §718.202(a)(4), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.204(c)(3). 20 C.F.R. §718.204(c)(3).

At Section 718.204(c)(4), the administrative law judge properly found that claimant did not meet his burden of proof as the medical opinion evidence did not establish the presence of a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-139 (3d Cir. 1995), *aff'd* 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 so doing, the administrative law judge properly found that the medical opinions of Drs. Myers, Anderson and Hudson were insufficient to meet claimant's burden of proof because they opined that from a pulmonary standpoint claimant could perform his usual coal mine employment, they had an accurate understanding of the nature of claimant's usual coal mine employment, and their opinions were supported by objective testing.[2] Decision and Order at 12; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Additionally, the administrative law judge correctly concluded that the medical opinions of Drs. Cornish, Dalloul, and Dahhan did not assess claimant's respiratory disability, and were, thus, insufficient to meet claimant's burden of proof. *See Danri*, *supra*; *Carson*, *supra*; *Trent*, *supra*; *Gee*, *supra*. Finally, at Section 718.204(c), the administrative law judge properly weighed all the evidence together and properly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment. *Taylor v. Evans and Gambrel Inc.*, 12 BLR 1-83 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1996), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). We, therefore,

[2] Because these medical opinions did not diagnose the presence of a pulmonary or respiratory disability or otherwise assess the severity of a pulmonary or respiratory impairment, the administrative law judge was not required, as claimant asserts, to consider the exertional requirements of claimant's usual coal mine employment and compare these findings to the physicians' disability diagnoses. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

affirm the findings of the administrative law judge at Section 718.204(c) and the denial of benefits as supported by substantial evidence.[3] As claimant has failed to establish a necessary element of entitlement, we need not address claimant's arguments regarding the existence of pneumoconiosis at Section 718.202(a)(1) and (4). *See Trent*, *supra*; *Gee, supra*.

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

[3] Claimant argues that the administrative law judge should have considered his age, education and work experience when making his disability findings. These factors, however, are relevant in determining whether claimant can perform comparable and gainful employment, not whether he can perform his usual coal mine employment. *See Taylor v. Evans and Gambrel, Inc.*, 12 BLR 1-83 (1988).