BRB No. 04-0229 BLA

RICHARD DEAN MARCUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/20/2004
	)	
LEECO, INCORPORATED	)	
	)	
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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts, (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5131) of Administrative Law Judge Rudolf L. Jansen 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] The administrative

[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

law judge credited claimant with nineteen years of qualifying coal mine employment, based on the evidence of record and a stipulation by the parties, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in 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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant 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).

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 contains no reversible error.

Initially, we affirm the administrative law judge's unchallenged findings that claimant failed to establish total disability pursuant to 20 C.F.R.

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effective on January 19, 2001, and apply to this claim filed on February 17, 2001. *See* 20 C.F.R. Parts 718, 722, 725, and 726.

§§718.204(b)(2)(i) and (iii).[2] *Stark v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 11-12; Director's Exhibits 12-13; Employer's Exhibits 1-2, 5. With respect to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge should not have rejected the opinions of Drs. Baker and Hussain for the reasons he provided. Claimant asserts that the opinions are well reasoned and well documented. Claimant also contends that the administrative law judge must consider the exertional requirements of claimant's usual coal mine employment in considering an opinion on total disability.

The administrative law judge noted that Dr. Baker diagnosed a Class I impairment based on the FEV1 and vital capacity being greater than 80% of predicted as classified in the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Decision and Order at 8; Director's Exhibit 13. The administrative law judge permissibly found that Dr. Baker's rationale for diagnosing a totally disabling impairment was insufficient to support a finding of total disability because Dr. Baker merely opined that claimant should limit his further exposure to coal dust. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 12; Director's Exhibit 13. Thus, we affirm the administrative law judge's determination that Dr. Baker's opinion did not establish total disability.

With respect to the medical opinion of Dr. Hussain, who found a moderate impairment which prevented performance of claimant's previous coal mine employment, the administrative law judge acted within his discretion in according little weight to the physician's opinion since Dr. Hussain's conclusion that claimant was totally disabled was inadequately explained and there was no indication the physician was familiar with claimant's usual coal mine work. Decision and Order at 7-8, 12; Director's Exhibit 12; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-106 (6th Cir. 1983); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm the administrative law judge's determination to accord Dr. Hussain's opinion less weight on the issue of total disability.

In addition, the administrative law judge rationally found that the contrary opinions of Drs. Rosenberg and Vuskovich, stating that claimant was not suffering

[2] The administrative law judge's finding is supported by substantial evidence as there are no qualifying pulmonary function studies or blood gas studies of record and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 12-13; Employer's Exhibits 1-2, 5.

from a disabling respiratory or pulmonary impairment as defined in the Act, were well-reasoned and well documented and entitled to full weight.[3] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields*, 10 BLR 1-19; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, 11 BLR 1-1; Decision and Order at 8-9, 12; Employer's Exhibits 1, 4. Thus, based on the medical opinion evidence of record, the administrative law judge acted within his discretion in crediting the opinions of Drs. Baker, Rosenberg and Vuskovich over Dr. Hussain's opinion in finding that claimant had no disabling pulmonary or respiratory impairment. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 12.

Additionally, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education or work experience in relation to his ability to work outside of the coal mine industry. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). Accordingly, the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(b)(2)(iv) is affirmed.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR 1-26; *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, 12 BLR 1-149; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Claimant's failure to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718, and we need not address claimant's other arguments on

[3] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

appeal regarding the existence of pneumoconiosis at Section 718.202(a)(1), (4). *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge