

BRB No. 04-0957 BLA

CECIL HERALD)
)
 Claimant-Petitioner)
)
 v.)
)
 KENTUCKY PRINCE MINING COMPANY) DATE ISSUED: 08/17/2005
)
 and)
)
 ACORDIA EMPLOYERS SERVICE)
)
 and)
)
 SECURITY INSURANCE COMPANY)
 OF HARTFORD)
)
 Employer/Carrier-)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-5594) of Administrative Law Judge Joseph E. Kane rendered 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 date of filing, February 26, 2001, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and found that claimant established thirty-two years of coal mine employment.¹ The administrative law judge found the evidence of record sufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), but insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established and erred in allowing employer to submit x-ray readings and medical opinions in excess of the evidentiary limitations set forth at Section 725.414. Claimant also contends that the administrative law judge's rejection of Dr. Hussain's opinion means that he was not provided with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required by the Act. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director responds, contending that claimant was provided a complete, credible pulmonary evaluation as required by the Act, pursuant to Section 413(b), 30 U.S.C. §923(b). The Director also contends that there is "some merit" to claimant's argument that the administrative law judge erred by admitting evidence in excess of the evidentiary limitations and contends that should the Board determine that this error was not harmless, the case should be remanded for imposition of the evidentiary limitations.

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).

¹ The record indicates that claimant filed an earlier application for benefits on October 20, 2000, which was withdrawn on February 9, 2001. Director's Exhibit 1. Claimant refiled his claim on February 26, 2001. Director's Exhibit 2.

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*).

Although claimant raises the contentions set forth above, he has not specifically challenged the administrative law judge's finding that the medical opinion evidence fails to establish disability causation at Section 718.204(c), an essential element of entitlement. In finding that the evidence failed to establish that claimant's pulmonary disability was due to coal mine dust exposure, the administrative law judge credited the opinions of Drs. Fino and Broudy, who found that claimant's respiratory disability was solely due to cigarette smoking, over the contrary opinions of Drs. Baker, Hussain, and Simpao. Decision and Order at 17. Although claimant contends, *inter alia*, that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability established, he does not specifically challenge the administrative law judge's finding that disability causation was not established.² The administrative law judge's denial of benefits must, accordingly, be affirmed on that basis, and we need not reach claimant's arguments regarding the existence of pneumoconiosis and disability on appeal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, contrary to claimant's contention, claimant was provided a complete, credible pulmonary evaluation on the issues of entitlement by Dr. Hussain. Director's Exhibit 11. As the Director asserts, claimant is not entitled to a dispositive opinion. *See* 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406;³ *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 ,

² Claimant mistakenly contends that the administrative law judge erred in failing to find total disability established. Review of the administrative law judge's Decision and Order shows that the administrative law judge found total disability established by pulmonary function studies, blood gas studies, and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv). Decision and Order at 15-16.

³ Section 725.406(a) provides:

The Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner. A complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.

2-327 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984). In this case, in finding that disability causation was not established, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino and Broudy which he found to be better reasoned and documented than the opinion of Dr. Hussain. Decision and Order at 17; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985). Likewise, we reject claimant's argument regarding the evidentiary limitations since the administrative law judge considered only two opinions from employer in finding that claimant failed to establish disability causation. See 20 C.F.R. §725.414; see also *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge