

BRB No. 06-0149 BLA

BOBBY SHEPHERD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BOBBY SHEPHERD TRUCKING)	DATE ISSUED: 08/09/2006
COMPANY)	
)	
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 William S. Cowell, Administrative Law Judge, United States Department of Labor.

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

David L. Murphy (Clark & Ward, PLLC), Louisville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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-6621) of Administrative Law Judge William S. Cowell 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 found that claimant

established a coal mine employment history of at least twenty-five years. Decision and Order at 4, 14. In considering entitlement, the administrative law judge found that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence and erred in not finding total respiratory disability established. In addition, claimant contends that because the administrative law judge found that Dr. Baker's opinion was based on an inaccurate smoking history and contained contradictions as to whether claimant had legal pneumoconiosis, the Director, Office of Workers' Compensation Programs, (the Director) failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b), in order to substantiate his claim. Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide claimant with a complete pulmonary evaluation. The Director contends, however, that he is only required to provide claimant with a complete and credible pulmonary examination, not a dispositive one and that since Dr. Baker provided claimant with a complete evaluation, administering the appropriate tests, recording the relevant histories, and addressing each element of entitlement, the Director's statutory obligation was discharged. Furthermore, the Director contends that, in any case, since the administrative law judge relied on Dr. Baker's opinion to find that claimant did not establish total disability, a necessary element of entitlement, error, if any, in the administrative law judge's consideration of Dr. Baker's opinion regarding another element of entitlement, *i.e.*, the existence of pneumoconiosis, would be harmless.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

After considering 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. The administrative law judge properly denied benefits, as the Director contends, based on his finding that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR 1-4.

In addition to finding that the pulmonary function studies and blood gas studies were non-qualifying, the administrative law judge correctly determined that both Dr. Baker and Dr. Broudy opined that claimant retained the pulmonary capacity to perform his usual coal mine employment. Decision and Order at 11, 18; Director's Exhibit 13, Employer's Exhibit 1. The administrative law judge correctly determined that even though Dr. Baker found that claimant had a minimal impairment based upon his objective study results, Dr. Baker nonetheless found that claimant was able to perform his regular coal mine work. Decision and Order 10-11; Director's Exhibit 13. Thus, the administrative law judge accurately characterized the evidence of record in concluding that none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment.¹

Contrary to claimant's assertion, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment when the administrative law judge found that Dr. Baker concluded that claimant's minimal impairment would not prevent claimant from performing his usual coal mine employment. *Id.*; see *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Furthermore, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled as these factors were not relevant to determining whether claimant established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). Lastly, claimant's general assertion that he must be totally disabled because pneumoconiosis is a progressive and irreversible disease is without merit as claimant bears the burden of establishing that he is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). See *White*, 23 BLR at 1-7 n.8; *Gee*, 9 BLR 1-4. Accordingly, we affirm the administrative law judge's finding that claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus,

¹ The administrative law judge found that the exertional requirements of claimant's usual coal mine employment were medium, at most, as he was a truck driver at various coal sites and did not manually load or unload coal. Decision and Order at 18; Hearing Transcript at 15; Director's Exhibit 5 at 5; Director's Exhibit 6 at 7, 8, 30.

since claimant has failed to raise any meritorious allegations of error with respect to the administrative law judge's finding that total respiratory disability was not established, an essential element of entitlement, we affirm the administrative law judge's finding and the denial of benefits.² *Trent*, 11 BLR 1-26, 1-27; *Perry*, 9 BLR 1-1, 1-2; *Gee*, 9 BLR 1-4.

We also reject claimant's assertion that remand of this case is required because he was not provided a complete, credible pulmonary examination on the element of pneumoconiosis. As the Director contends, error, if any, would be harmless since the administrative law judge credited Dr. Baker's opinion that claimant was not totally disabled due to a pulmonary or respiratory impairment. *Gee*, 9 BLR 1-4; *see Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992), *alj decision summarily aff'd*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992)(court retained jurisdiction).

Accordingly, the administrative law judge's Decision and Order 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

² Because we have affirmed the denial of benefits based upon the administrative law judge's finding that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we decline to reach claimant's arguments concerning the existence of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).