BRB No. 98-1331 BLA

CHARLES K. ROBISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 8/31/99
and		
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Gregory S. Feder (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0080) of Administrative Law Judge J. Michael O'Neill 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 at least sixteen years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of claimant's July 1996 filing date. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b). However, the administrative law judge further found that the medical evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(4). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish total respiratory disability. In particular, claimant argues that the opinion of Dr. Baker is sufficient to establish entitlement to benefits. Claimant further argues that his lay testimony also establishes that he is totally disabled. In response, employer urges affirmance of the administrative law judge's denial of benefits. Additionally, employer argues that the administrative law judge erred in finding that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

[1] The parties do not challenge the administrative law judge's decision to credit claimant with sixteen years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c)(1)-(3). We, therefore, affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). In finding that the medical opinion evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment, the administrative law judge found that the physical limitations set forth in the opinions of Drs. Baker and Houser, in comparison with the physical requirements of claimant's usual coal mine employment,[2] do not support a finding of total respiratory disability. Decision and Order at 20; Director's Exhibits 25, 27; Employer's Exhibits 2, 5. The administrative law judge further found that this determination was supported by the opinions of Drs. Gallo and Selby, who opined that claimant was not totally disabled, as well as the objective evidence of record. Decision and Order at 20; Director's Exhibit 25; Employer's Exhibits 4, 10.

[2] The administrative law judge found that claimant's usual coal mine employment was as a welder, which required claimant to repair the mine equipment. Decision and Order at 3; Director's Exhibit 5; Hearing Transcript at 11-13, 20, 24-27. In the regular course of his job, claimant testified that he carried his tools, weighing from fifteen (15) to twenty (20) pounds, and also lifted and carried other machine parts or materials, when necessary, weighing up to one hundred (100) pounds. *Id.* Claimant was also required to push and pull items and was constantly on his feet. *Id.*

Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that the opinion of Dr. Baker,[3] when compared with the physical requirements of claimant's usual coal mine employment, was insufficient to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 3, 20; Director's Exhibits 5, 26; Employer's Exhibit 5; Hearing Transcript at 11-13, 24-27; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see also Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Moreover, the additional recommendation in Dr. Baker's 1997 report and deposition testimony, that claimant should have no further exposure to coal dust or rock dust, is not sufficient to establish that claimant is totally disabled. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *reh'g denied* 877 F.2d 495, 12 BLR 2-303 (6th Cir.); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Inasmuch as claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(c)(4), we affirm his finding that the evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4). Decision and Order at 20; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Lastly, claimant's argument that his lay testimony established that he is

[3] In his medical report dated May 8, 1997, Dr. Baker opined that claimant was able to do his usual coal mine employment, stating that claimant has a non-disabling degree of respiratory insufficiency with mild obstructive airway disease, chronic bronchitis, and an advanced pneumoconiosis. Therefore, Dr. Baker stated that while claimant would be physiologically able to do his usual coal mine employment, the advanced degree of pneumoconiosis would preclude him from further dust exposure. Thus, Dr. Baker stated that claimant could do some type of occupation with a mild degree of exertion in a non-dusty environment. Director's Exhibit 26. Dr. Baker reiterated this opinion in his November 1997 deposition. Employer's Exhibit 5. In addition, Dr. Baker stated that non-disabling meant that there were some things that claimant could do, but that he can't do everything. However, the physician further opined that claimant was not totally disabled. Dr. Baker summarized his opinion by stating that claimant could do a sedentary occupation in a non-dusty environment without other environmental irritants or he could do something of a non-repetitive nature that required a mild degree of exertion if he was in a non-dusty environment. Employer's Exhibit 5 at 11, 12, 19.

totally disabled is without merit. In a living miner's claim adjudicated pursuant to Part 718, lay testimony alone is not sufficient to establish total disability. Rather, it must be supported by a "quantum of medical evidence." 20 C.F.R. §718.204(d)(2); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985).

Since claimant has failed to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement under Part 718, an award of benefits is precluded.[4] *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] In light of our affirmance of the administrative law judge's finding that the medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement, *see* discussion, *supra*, error, if any, in the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge