BRB No. 98-1574 BLA

JAMES FOY, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert D. Whitfield, Chicago, Illinois, for claimant.

Michael E. Turner (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-59) of Administrative Law Judge Gerald M. Tierney 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). The administrative law judge credited claimant with thirty years and four months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant asserts that the evidence establishes a material change in

conditions pursuant to 20 C.F.R. §725.309(d) and generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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 the 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 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*).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as the pulmonary function study and blood gas study evidence of record was non-qualifying, total disability was not established pursuant to Section 718.204(c)(1)-(2).[1] *See* Decision and Order at 5, 8; Director's Exhibits 5, 7-8, 23. In addition, the administrative law judge correctly found that there is no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), and thus establishing total disability by this method is precluded. Decision and Order at 8. In considering whether total disability was established by the medical opinions of record, *see* 20 C.F.R. §718.204(c)(4), the administrative law judge initially considered the medical report submitted with the most recent claim and correctly concluded that Dr. Hasson did not state that claimant had a totally disabling respiratory or pulmonary impairment. Decision and Order at 6, 8; Director's Exhibit 6. Contrary to claimant's assertion, Dr. Hasson did not diagnose a severe respiratory impairment, but instead stated that claimant had a severe impairment due to hypertensive cardiovascular disease, but no impairment due to pneumoconiosis or asthmatic bronchitis. Director's

[1] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Exhibit 6. In addition, the administrative law judge permissibly found that the opinion of Dr. Goodman was unreasoned and failed to establish total disability by a preponderance of the evidence in light of the non-qualifying objective studies and the contrary medical opinions of Dr. Hasson that claimant was not totally disabled from a respiratory standpoint. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 8. 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. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). *Clark, supra*; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, with respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and rationally concluded that the newly submitted evidence as well as the other evidence of record failed to establish total respiratory disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c).[2] Claimant's failure to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson, supra, Trent, supra*. Consequently, we affirm the administrative law judge's denial of

[2] 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(c)(1)-(4), 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).

benefits as it is supported by substantial evidence.[3]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3] As we affirm the administrative law judge's denial of benefits on the basis of the administrative law judge's findings on the merits, we need not address the duplicate claim issue.