BRB No. 99-0109 BLA

DANIEL WILLIAM JAMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 8/19/99
	)	
OSBORNE BROTHERS, INC.	)	
	)	
and	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	
Employers	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Daniel William James, Bluefield, West Virginia, *pro se*.

Barry H. Joyner (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order

(97-BLA-1107) of Administrative Law Judge Richard T. Stansell-Gamm 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 found fourteen years and seven months of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 4. The administrative law judge, after noting that the instant case was a duplicate claim and finding a material change in conditions established, concluded that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C.

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[1]Claimant filed his initial claim for benefits on March 22, 1995, which was finally denied on August 23, 1995. Director's Exhibit 32. Claimant took no further action until he filed the instant claim for benefits on November 15, 1996. Director's Exhibit 1.

[2]As the administrative law judge's findings that the evidence of record was sufficient to establish a material change in conditions and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.§§725.309, 718.202(a) and 718.203, as well as his responsible operator determination, are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

§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 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 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 that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as the preponderance of the pulmonary function studies were non-qualifying and all of the blood gas study evidence was non-qualifying, total disability was not established pursuant to Section 718.204(c)(1)-(2).[3] *See* Decision and Order at 15-16; Director's Exhibits 9, 11, 32; Employer's Exhibit 1; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 14; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Based on the foregoing, we affirm the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1)-(3).

[3]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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge reasonably determined that the preponderance of the medical opinion evidence was insufficient to establish total disability based on his conclusion that the opinion of Dr. Rasmussen, that claimant was totally disabled due to his respiratory problem, was outweighed by the opinions of Drs. Castle and Vasudevan, that claimant did not have a totally disabling respiratory impairment.[4] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 20; Director's Exhibits 9, 10, 11, 32; Claimant's Exhibit 4; Employer's Exhibit 1. The administrative law judge acted within his discretion, as factfinder, when he accorded greater weight to the opinion by Dr. Castle, that claimant has the respiratory capacity to return to his coal mine employment as a roof bolter, in light of his superior qualifications. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985). 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. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion diagnosing a totally disabling respiratory impairment outweighed by the preponderance of the remaining contrary medical opinions, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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 Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.[5]

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[4]The administrative law judge rationally concluded that the finding of the West Virginia Pneumoconiosis Board, that claimant suffered from a 15% pulmonary impairment due to pneumoconiosis, was entitled to little probative value since it was the least documented and reasoned opinion due to the terse nature of the report and as the evaluation was over ten years old. *See* Decision and Order at 20; Director's Exhibit 3; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

[5]Since 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),

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order 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

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lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).