BRB No. 04-0420 BLA

RONALD L. BARGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	DATE ISSUED: 12/20/2004
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5542) of Administrative Law Judge Rudolf L. Jansen 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). Claimant filed the instant claim on May 9, 2001. Director's

Exhibit 2. Following the district director's denial of benefits, claimant requested a hearing before the Office of Administrative Law Judges, which was held on October 1, 2003. Director's Exhibits 32, 34. Based on his review of the record, the administrative law judge accepted the parties' stipulation that claimant worked nineteen years in coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, respectively. The administrative law judge found, however, that the evidence failed to establish that claimant was totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. Claimant appeals, challenging the administrative law judge's finding that claimant failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

After consideration of the administrative law judge's Decision and Order, the issue on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). Specifically, the administrative law judge properly found that none of the pulmonary function study or arterial blood gas study evidence was qualifying for total disability.[1] Director's Exhibits 9, 19; Employer's Exhibits 2, 4; Decision and Order at 12. We therefore affirm the administrative law judge's finding that claimant failed to establish a totally disabling pulmonary or respiratory impairment

[1] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii). A "non-qualifying test" produces results that exceed the table values.

pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii). The administrative law judge also correctly found that there was no medical evidence to establish that claimant suffered from cor pulmonale with right-sided congestive heart failure, and therefore that claimant was unable to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 12.

With respect to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered five medical opinions, from Drs. Brooks, Baker, Simpao, Rosenberg and Broudy.[2] Director's Exhibits 8, 9; Employer's Exhibits 2, 4; Decision and Order at 12-13. The administrative law judge correctly noted that while Dr. Brooks opined that claimant was disabled for work due to a back injury, Dr. Brooks did not address whether claimant had a disabling pulmonary or respiratory impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); Director's Exhibit 8; Decision and Order at 12. Similarly, the administrative law judge properly found that Dr. Baker's report only advised claimant against further dust exposure and did not include an assessment of claimant's pulmonary or respiratory disability for work. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Company, Inc*., 12 BLR 1-83 (1988); Director's Exhibit 9; Decision and Order at 13. Consequently, the administrative law judge properly determined that these opinions were insufficient to carry claimant's burden of proof at 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, contrary to claimant's contention, the administrative law judge permissibly assigned less probative weight to Dr. Simpao's opinion, that claimant was totally disabled by a mild respiratory impairment, since the administrative law judge found that Dr. Simpao's report did not reveal an understanding of the physical or exertional requirements of claimant's last coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Director's Exhibit 10; Decision and Order at 13. In contrast, the administrative law judge permissibly credited the opinions of Drs. Rosenberg and Broudy, that claimant was not totally disabled and could perform his coal mine work, as he found their opinions were better supported by the objective evidence of record, including the non-qualifying pulmonary function and arterial blood gas studies. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc); King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Employer's Exhibits 2, 4; Decision and Order at 13. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[2] Contrary to claimant's contention, the administrative law judge acknowledged the exertional requirements of his last coal mine job. *See* Decision and Order at 4.

Since claimant has the burden of establishing entitlement, he bears the risk of non-persuasion when his evidence is found insufficient for any reason. *See Trent*, 11 BLR at 26; *Perry*, 9 BLR at 1. Because the evidence failed to establish total pulmonary or respiratory disability, a requisite element of entitlement, a finding of entitlement to benefits is precluded. *Id.*

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge