BRB No. 05-0656 BLA

JOSHUA DANIEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINTOP RESTORATION, INCORPORATED	)	DATE ISSUED: 12/16/2005
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joshua Daniel, Pikeville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order – Denial of Benefits (03 BLA-6334) of Administrative Law Judge Thomas F. Phalen, Jr. 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 his claim for benefits on September 27, 2001.[2] Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on March 7, 2003. Director's Exhibit 25. Claimant requested a hearing, which was held on February 17, 2004. In his Decision and Order dated April 25, 2004, the administrative law judge found that the medical evidence was insufficient to establish the existence of pneumoconiosis or that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[3] 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 Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any

[1] Susie Davis, the President of Kentucky Black Lung Coalminers and Widows Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision. Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's first application for benefits was filed on September 15, 1995. Director's Exhibit 1. At claimant's request, the claim was later withdrawn and is now considered never to have been filed. *See* 20 C.F.R. §725.306. *Id*.

[3] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

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 and the issues presented by this appeal, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding that claimant failed to establish his total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2).

The regulations at 20 C.F.R. §718.218.204(b)(2) provide four methods by which claimant may establish total disability. We affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2)(i) because the four pulmonary function studies of record dated October 31, 2001, March 5, 2002, August 20, 2002 and January 10, 2004 are non-qualifying for total disability.[4] Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibits 9, 12; Decision and Order at 11-12. Likewise, because the arterial blood gas studies dated October 31, 2001, March 5, 2002, and January 10, 2004 are non-qualifying, we affirm the administrative law judge's finding that claimant failed to establish his total disability under Section 718.204(b)(2)(ii). Director's Exhibit 13; Employer's Exhibits 9, 12; Decision and Order at 11. Additionally, as the record is devoid of any evidence that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly found that claimant is unable to establish his total disability pursuant to Section 718.204(b)(2)(iii).[5] Decision and Order at 11.

In his consideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2(iv), the administrative law judge also properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment. The administrative

[4] 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.

The administrative law judge resolved the height discrepancy recorded on the pulmonary function tests, finding that claimant's actual height was 69 inches. Decision and Order at 6, n. 6.

[5] The administrative law judge also properly noted that since claimant did not present evidence of complicated pneumoconiosis, he was unable to avail himself of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 11.

law judge correctly noted that Drs. Baker, Rosenberg, and Dahhan opined that claimant had no respiratory impairment, while Dr. Sundaram diagnosed that claimant was totally disabled for his usual coal mine work. Director's Exhibit 12, Claimant's Exhibit 1; Employer's Exhibits 3, 9. The administrative law judge permissibly assigned controlling weight to Drs. Rosenberg and Dahhan based on their superior qualifications, *see Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and because he found their opinions were based on "more comprehensive information." Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Furthermore, the administrative law judge properly relied on Dr. Baker's opinion in finding that claimant was not totally disabled. Although Dr. Baker opined that claimant's objective studies demonstrated a "minimal respiratory impairment," when given a choice of: no impairment, mild impairment, moderate impairment, severe impairment or totally disabled, Dr. Baker specifically stated in his October 31, 2001 report that claimant had no respiratory impairment which would preclude the performance of his usual coal mine employment. *See Cornet v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Director's Exhibit 13. Thus, the administrative law judge properly found the weight of the medical opinion evidence was insufficient to carry claimant's burden of proving that he has a totally disabling respiratory or pulmonary impairment. Consequently, we affirm as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge properly concluded after weighing all of the medical evidence that claimant is not totally disabled. Decision and Order at 12. Because claimant is unable to establish total disability, a requisite element of entitlement, benefits are precluded.[6] *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

[6] Because we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.204(b)(2), we decline to address the administrative law judge's finding with respect to the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

The Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge