BRB No. 04-0454 BLA

TEDDY BROWN	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 02/11/2005
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICES CORPORATION	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5240) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) 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 that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish total disability at Section 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[2]

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 this 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).

Claimant challenges the administrative law judge's finding that the evidence fails to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant relies upon the

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[1] Claimant, Teddy Brown, also alleges that the administrative law judge may have confused his claim with the claim of his brother, Terry Brown, based on the administrative law judge's misstatement regarding the correct date of his birth and marriage. Claimant's Brief at 2-3. Although the administrative law judge may have mistakenly cited claimant's birth date in his Decision and Order, claimant, himself gave the incorrect birth date at the hearing inasmuch as it differs from the birth date he listed on his application for benefits, which the administrative law judge noted. Decision and Order at 3 n. 4; Hearing Transcript at 9; Director's Exhibit 1. In any case, we deem any misstatement by the administrative law judge to be harmless. All of the evidence in the file references the claim of Teddy Brown so the administrative law judge properly considered the claim of Teddy Brown.

[2] Inasmuch as no party challenges the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(2)-(3), and fails to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iii), we affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

opinions of Drs. Baker and Hussain. Claimant initially contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge permissibly found that Dr. Baker's opinion was insufficient to establish total respiratory disability because Dr. Baker merely contraindicated further exposure to coal dust. Decision and Order at 15; Director's Exhibit 10. Dr. Baker opined that claimant has an impairment:

> based upon … the Guidelines to the Evaluation of Permanent Impairment, 5th Ed., which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply that the patient is 100% occupationally disabled in the coal mine industry or similar dusty conditions.

Director's Exhibit 10. A doctor's recommendation that further coal dust exposure is contraindicated is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). We affirm, therefore, the administrative law judge's finding that Dr. Baker's opinion was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Turning to Dr. Hussain's opinion, Dr. Hussain opined that claimant had a mild impairment, but could perform the work of a coal miner from a respiratory standpoint. Claimant's Exhibit 1 Drs. Rosenberg and Dahhan both opined that claimant did not have a totally disabling respiratory impairment. Employer's Exhibits 5, 7, 13, 14. Contrary to claimant's contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). We affirm, therefore, the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). *See White v. New White Coal Co.*, 23 BLR 1-1 (2004). Additionally, the administrative law judge found the pulmonary function study and blood gas study evidence to be non-qualifying, a finding unchallenged by claimant, and noted that he was required to weigh that evidence with the medical opinion evidence in determining whether claimant was totally disabled, which he did. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Because claimant has failed to establish a totally disabling respiratory impairment, a necessary element of entitlement, we affirm the administrative law judge's denial of benefits in the instant claim, 20 C.F.R. §718.204(b)(2); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*) and we need not address claimant's challenge to the administrative law judge's finding that the

evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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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JUDITH S. BOGGS
Administrative Appeals Judge