BRB No. 05-0797 BLA

ROY K. HANSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANYON FUEL COMPANY c/o ARCH COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 02/16/2006
ACE/USA CLAIMS	)	
	)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Matt C. Osborne (Osborne & Barnhill, P.C.), Draper, Utah, for claimant.

Catherine MacPherson (MacPherson, Kelly & Thompson, LLC), Rawlins, Wyoming, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5473) of Administrative Law Judge Richard K. Malamphy 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, and the parties

stipulated to, twenty-one years of coal mine employment. Decision and Order at 3; Hearing Transcript at 7. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 5. After determining 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, the administrative law judge found, however, that the evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 6-8. The administrative law judge further concluded that claimant failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability and disability causation established pursuant to 20 C.F.R. §718.204(b), (c). Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.[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).

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

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[1] Claimant filed his claim for benefits on November 25, 2002, in which benefits were awarded by the district director on September 29, 2003. Director's Exhibits 2, 38. Employer subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 44.

[2] The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.304, 718.202, 718.203 and 718.204(b)(2)(i),(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After considering 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 contains no reversible error. The administrative law judge permissibly found that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant argues that the administrative law judge failed to give adequate consideration to the relevant evidence of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to a qualifying blood gas study, the opinion of Dr. Shockey, and the lay evidence as they are sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204. Claimant's Brief at 8-13. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988).

In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge initially determined that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record contains no evidence of complicated pneumoconiosis, and that total disability can not be established pursuant to Section 718.204(b)(2)(iii), as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(1), (b)(2)(iii); Decision and Order at 7. The administrative law judge further found that all of the pulmonary function studies, the resting blood gas study dated January 29, 2003, and the subsequent blood gas study dated July 22, 2003, were non-qualifying and that only the exercise portion of the January 29, 2003 blood gas study produced qualifying results.[3] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 16, 36; Decision and Order at 8. The administrative law judge additionally noted that the opinions supportive of claimant, the opinions of Drs. Alward and Shockey, did not adequately explain their conclusions and found that the contrary opinion by Dr. Repsher was well explained and supported by the objective medical evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8. The administrative law judge also considered, and gave "some weight" to claimant's testimony that he is unable to perform his previous coal mine employment. Decision and Order at 8. The administrative law judge then weighed this evidence together and concluded that the evidence contrary to a finding of total disability was entitled to at least

[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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

as much weight as the evidence supporting a finding of total disability, and thus claimant failed to establish that he suffers from a totally disabling respiratory impairment by a preponderance of the evidence. Decision and Order at 8.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the evidence failed to carry claimant's burden pursuant to Section 718.204(b)(2). Claimant's Brief at 8-13; Decision and Order at 7-8; Director's Exhibits 16, 18, 20, 36; *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge had to consider all of the contrary probative evidence in the record, and he rationally determined that the evidence overall was insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b), as the conflicting evidence was in equipoise. Decision and Order at 8; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Because the administrative law judge permissibly found that the objective study evidence, the medical opinions, and lay testimony of record did not establish total disability by a preponderance of the evidence, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999); *Shedlock*, 9 BLR 1-195.

Claimant states that his testimony that he is totally disabled was "uncontroverted." Claimant's Brief at 13. Total disability can not be established solely on the lay testimony of record in a living miner's case and therefore, in this case, it could not satisfy claimant's burden of proof on this issue. 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999). Because the administrative law judge's finding that the evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b) is supported by substantial evidence and in accordance with law, we affirm the denial of benefits in this claim and we need not address claimant's remaining contentions on appeal. *See* 20 C.F.R. §718.204(b); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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