BRB No. 97-0916 BLA

WILLIE R. CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits, Administrative Law Judge Robert L. Hillyard, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington, D.C., for employer.

J. Matthew McCracken (Marvin Krislov, Deputy Solicitor for National Operations; 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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (96-BLA-0775) of Administrative Law Judge Robert L. Hillyard 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 credited claimant with twenty-nine years and three months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 inasmuch as claimant filed his application for benefits in September 1994. The administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4). In addition, the administrative law judge found the medical evidence of record insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, asserting that the administrative law judge erred in his weighing of the x-ray evidence and the medical opinions of record at Section 718.202(a)(1) and (a)(4). In addition, claimant challenges the administrative law judge's finding under Section 718.204(c)(4), arguing that the administrative law judge erred in his weighing of the medical opinion evidence. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, argues in a letter to the Board that claimant's contention concerning application of the true doubt rule at Section 718.202(a)(1) is without merit, but, otherwise, states that he will not file a further response in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

[1] We affirm the administrative law judge's decision to credit claimant with twenty-nine years and three months of coal mine employment and his findings at 20 C.F.R. §§718.202(a)(2) and (a)(3) and 718.204(c)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We affirm the administrative law judge's determination that the weight of the medical opinion evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4). The administrative law judge, in weighing the medical opinion evidence, reasonably found that the medical opinions of Drs. Anderson, Myers, Dineen and Broudy, that claimant was capable of performing his usual coal mine employment, were well-documented.[2] Director's Exhibits 13, 14, 36-38; Decision and Order at 11. Moreover, the administrative law judge acted within his discretion as fact-finder in declining to credit Dr. Baker's February 1994 opinion, the sole opinion supportive of claimant's burden of showing that claimant was unable to perform his usual coal mine employment, in light of Dr. Baker's subsequent diagnosis in October 1994 that claimant suffered from only a mild impairment and had the respiratory capacity to perform his usual coal mine employment.[3] Director's Exhibits 12, 15, 16; Decision and Order at 12;

[2] The record contains the medical reports of Drs. Myers and Anderson, both of whom, while diagnosing the existence of pneumoconiosis, nonetheless, opined that claimant was capable, from a pulmonary standpoint, of performing his usual coal mine employment. Director's Exhibits 13, 14, 36. In addition, the record contains the medical opinions of Drs. Broudy and Dineen, who opined that claimant was not suffering from pneumoconiosis and that claimant is physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibits 37, 38.

[3] The record contains two medical reports by Dr. Baker. In his earlier report dated February 23, 1994, Dr. Baker opined that claimant was unable to perform his usual coal mine employment, stating that claimant should have no further exposure to coal dust or rock dust and that claimant may have difficulty doing sustained manual

see Fagg, supra; Hopton v. United States Steel Corp., 7 BLR 1-12 (1984); *see also Puleo v. Florence Mining Co*., 8 BLR 1-198 (1984). Furthermore, contrary to claimant's contention, the additional recommendation in Dr. Baker's February 1994 report that claimant should have no further exposure to coal dust or rock dust is not sufficient to establish that claimant is totally disabled. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *reh'g denied* 877 F.2d 495, 12 BLR 2-303 (6th Cir.); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

In addition, contrary to claimant's contention, the administrative law judge did not err in failing to render specific findings regarding the nature of claimant's usual coal mine employment since the administrative law judge did not credit any medical opinion in which a physician diagnosed total disability or offered findings from which the administrative law judge could infer a finding of a totally disabling respiratory or pulmonary impairment. *See generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Finally, we reject claimant's contention that the administrative law judge erred in failing to consider other factors, such as claimant's age, education, work experience and the progressive nature of pneumoconiosis, in determining claimant's ability to perform his usual coal mine employment inasmuch as these factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

---

labor, on an eight hour basis, even in a dust-free environment. Director's Exhibit 12. However, in a subsequent medical report, dated October 13, 1994, Dr. Baker, under the heading "Impairment," merely stated "mild with decreased FEV1, decreased PO2, bronchitis and CWP, 2/1." Director's Exhibit 15. In addition, Dr. Baker submitted a supplemental letter dated November 28, 1994, wherein he clarified his diagnosis concerning claimant's respiratory condition, stating that claimant's respiratory impairment was mild and that claimant does have the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 16.

Since claimant has not established total disability, a necessary element of entitlement pursuant to Part 718, an award of benefits is precluded.[4] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] In light of our affirmance of the administrative law judge's findings that the medical evidence of record is insufficient to establish total disability pursuant to Section 718.204(c), a requisite element of entitlement, *see* discussion *supra*, we decline to address claimant's argument that the administrative law judge erred in his consideration of the evidence under Section 718.202(a)(1) and (a)(4), as any error in those findings would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge