BRB No. 04-0452 BLA

JOHNNY HACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C. RANDALL CROUCH, INCORPORATED/ EARLINE COUCH, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 01/21/2005
	)	
AMERICAN RESOURCES INS. COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5141) of Administrative Law Judge Daniel J. Roketenetz on a claim[1] 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 initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twelve years. Next, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by admitting x-ray evidence submitted by employer in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i). With respect to the merits, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response letter limited to claimant's allegation regarding employer's compliance with the evidentiary limitations regulation. The Director argues that, if the administrative law judge erred in admitting employer's extra x-ray reading into the evidence of record, such error is harmless because it would not impact the administrative law judge's ultimate weighing of the x-ray evidence.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by rejecting the well reasoned and documented opinion of Dr. Baker and by finding that claimant failed,

[1] Claimant, Johnny Hacker, filed his application for benefits on February 27, 2001. Director's Exhibit 2.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 7, 11.

therefore, to carry his burden of establishing total respiratory disability by a preponderance of the evidence. Citing, *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant argues that a single medical opinion may be sufficient to invoke the presumption of total disability.

Claimant's reliance on *Meadows* is misplaced, however, because that case dealt with the application of the interim presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. Part 727. The instant case arises under 20 C.F.R. Part 718 which requires that claimant affirmatively establish each element of entitlement. 20 C.F.R. §§718.2, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The administrative law judge permissibly found that Dr. Baker's total disability assessment was entitled to little probative weight inasmuch as the rationale underlying his opinion consisted of a recommendation that claimant not return to a dusty environment to preclude further exacerbation of his pneumoconiosis. Decision and Order at 12. Inasmuch as a medical opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is insufficient to demonstrate total respiratory disability, we affirm the administrative law judge's rejection of Dr. Baker's opinion. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Bentley v. Director, OWCP*, 7 BLR 1-612, 614 (1984); *New v. Director, OWCP*, 6 BLR 1-597 (1983); Decision and Order at 12.

Claimant further contends that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work or to consider that claimant's disability, age, and limited education and work experience would preclude claimant from obtaining gainful employment outside of the coal mine industry. Because he assigned little probative weight to Dr. Baker's opinion that claimant was totally disabled and found that the only other physician of record, Dr. Hussain, opined that claimant retained the physiological capacity to continue his previous coal mine employment, the administrative law judge properly concluded that the medical opinion evidence was insufficient to demonstrate that claimant is totally disabled by a respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor*, 12 BLR at 1-87; *Gee*, 9 BLR at 1-4. Furthermore, contrary to claimant's assertion, consideration of the exertional requirements of his usual coal mine work and other factors affecting claimant's ability to obtain gainful employment was "unnecessary" because the administrative law judge found that Dr. Baker's opinion was insufficient to demonstrate total respiratory disability since it contained an inadequate rationale. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading*

Anthracite Co., 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 12. Accordingly, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

Consequently, because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See Fields*, 10 BLR at 1-19; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).[3]

[3] Our affirmance of the administrative law judge's determination that claimant failed to establish total respiratory disability at Section 718.204(b) precludes the need to address the parties' arguments with respect to the administrative law judge's admission of x-ray evidence under Section 725.414(a)(3)(i) or his findings concerning the existence of pneumoconiosis under Section 718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge