BRB No. 04-0453 BLA

ASHER HENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 01/31/2005
	)	
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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts, James M. Kennedy (Baird and 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 – Denying Benefits (03-BLA-5451) of Administrative Law Judge Rudolf L. Jansen (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). 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.[1]

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 newly submitted evidence fails to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant relies upon the opinions of Drs. Baker and Hussian. Claimant 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 found that Dr. Baker's opinion was insufficient to establish total respiratory disability because Dr. Baker merely stated that further exposure to coal dust was contraindicated for claimant, opining "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." Decision and Order at 13; Director's Exhibit 11.

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). Accordingly, we affirm the administrative law judge's

[1] Inasmuch as no party challenges the administrative law judge's findings that the newly submitted 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).

finding that Dr. Baker's opinion is insufficient to establish total respiratory disability.

Turning to Dr. Hussain's opinion, that claimant had a severe impairment and could not perform the work of a coal miner from a respiratory standpoint, Director's Exhibit 12, the administrative law judge gave it less weight because he found that Dr. Hussain did not explain his findings in light of his own pulmonary function study which yielded normal values and his blood gas study showing only a mild hypoxemia. This was proper. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The administrative law judge, therefore, properly found that the opinions of Drs. Baker and Hussain, the only opinions which could support a finding of total respiratory disability, were inadequate to carry claimant's burden. *See Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Cooper*, 11 BLR 1-95; *Fields*, 10 BLR 1-19; *Fuller*, 6 BLR 1-1291.

Furthermore, the administrative law judge found that both Drs. Rosenberg and Vuskovich, who opined that claimant did not have a totally disabling respiratory impairment, Employer's Exhibits 3, 4, 5, 8, explained that the mild hypoxemia observed from the arterial blood gas study results was due to claimant's obesity and not a coal-induced lung disease. Accordingly, the administrative law judge gave greater weight to the opinions of Drs. Rosenburg and Vuskovich on the basis that their opinions were better documented and reasoned than the opinions of Drs. Baker and Hussain. This was proper. *See Trumbo*, 17 BLR at 1-888-89; *Clark*, 12 BLR at 1-155 (1989)(*en banc*); *Cooper*, 11 BLR at 1-98. Moreover, the administrative law judge gave additional weight to the opinion of Dr. Rosenburg on the basis of his superior credentials, as he found that Dr. Rosenburg was a pulmonary expert.[2] This was permissible. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.).[3] We affirm, therefore,

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[2] Dr. Rosenburg is Board-certified in internal medicine, pulmonary medicine, and occupational medicine. Employer's Exhibits 3, 5.

[3] Claimant argues that the administrative law judge erred in failing to identify claimant's usual coal mine work or the physical requirements of that work. The administrative law judge, however, noted that claimant "engaged in heavy manual labor

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). Decision and Order at 14; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1996) *aff'd on recon. en banc* (1997). Accordingly, inasmuch as total respiratory disability is a necessary element of entitlement, we affirm the administrative law judge's denial of benefits in the instant claim. Because we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, we need not address claimant's arguments regarding the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

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during his coal mine employment due to the physical requirements associated with his work as a roof bolter and scoop and shuttle car operator." Decision and Order at 12. Further, contrary to claimant's contention, an administrative law judge is 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. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).