BRB No. 07-0328 BLA

D.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HORIZON NATURAL RESOURCES	)	DATE ISSUED: 01/17/2008
	)	
and	)	
	)	
AMERICAN ZURICH	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

D.N., Hazel Green, Kentucky, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denying Benefits (2004-BLA-06323) of Administrative Law Judge Joseph E. Kane on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

[1] Claimant was represented by counsel before the administrative law judge.

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with nineteen years of qualifying coal mine employment, as stipulated by the parties, and adjudicated this claim, filed on April 30, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding the evidence of record insufficient to establish total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(i)-(iv), the administrative law judge initially determined that the record contained no evidence of complicated pneumoconiosis. Thus, the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. Decision and Order at 8. The administrative law judge accurately

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

determined that the pulmonary function studies of record produced non-qualifying[3] values at Section 718.204(b)(2)(i); the three blood gas studies of record produced non-qualifying values at Section 718.204(b)(2)(ii); and the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Mahan v. Kerr-McGee Coal Corp.*, 7 BLR 1-159, 1-162 (1984); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989). As Dr. Broudy diagnosed a "mild restriction due to myasthenia gravis and obesity," Director's Exhibit 10; Dr. Rosenberg diagnosed "no significant obstruction or restriction," Employer's Exhibits 1, 3; and Dr. Vuskovich opined that claimant did not have a "permanent pulmonary impairment caused by coal dust exposure," Employer's Exhibit 4, the administrative law judge properly found that the medical opinions of record at Section 718.204(b)(2)(iv) were insufficient to establish that claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work pursuant to Section 718.204(b)(1). Decision and Order at 11-12; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). As no physician diagnosed a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding at Section 718.204(b)(2)(iv), as supported by the record.

Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Peabody Coal Co. v. Hill*, 123 F.3d 412,416, 21 BLR 2-192, 197 (6th Cir. 1997); *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR 1-26, 1-27 (1987). Consequently, we affirm the administrative law judge's denial of benefits and conclude that we need not reach the issues of the existence of pneumoconiosis or disability causation.

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i),(ii).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge