BRB No. 03-0128 BLA

BEN C. BUNCH	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 07/28/2003
v.	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Timothy S. Williams (Howard Radzely, Acting 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5012) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] The administrative law judge credited

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

claimant with twenty-six years and nine months of coal mine employment and found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. '718.202(a)(4) and 718.203(b). However, the administrative law judge found that claimant had failed to establish the existence of total disability pursuant to 20 C.F.R. '718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of a total disability pursuant to Section 718.204(b).[2] The Director, Office of Workers= Compensation Programs (the Director), responds urging affirmance of the administrative law judge=s denial of benefits.

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 the 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ''718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*). After consideration of the administrative law judge=s Decision and Order, the issues 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. Claimant contends that Dr. Baker=s opinion is sufficient to establish total disability because it stated claimant must work Ain a dust free environment.@ Claimant=s Brief at 3. Claimant argues that he is therefore Aunable to engage in his usual and customary employment in the coal mines

[2] The administrative law judge=s findings pursuant to 20 C.F.R. '718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iii) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

because his employment was in the most dusty areas.@ *Id.* Citing *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984), claimant suggests that Dr. Baker=s opinion does not have to state Atotal disability@ to establish entitlement.[3] *Id.*.

The administrative law judge recognized that a physician=s opinion need not be phrased in the words of Atotal disability@ provided that the assessment discusses claimant=s impairment sufficiently to allow the inference of total disability. Decision and Order at 10. The administrative law judge further found that in the only medical opinion of record, Dr. Baker reported that claimant had a mild pulmonary impairment, but had the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* Dr. Baker opined that claimant=s impairment was Amild with decreased FEV1, decreased PO2, bronchitis and coal worker=s pneumoconiosis 1/0. Director=s Exhibit 11. He categorized claimant=s impairment as Amild@ and responded Ayes@ to the question A[d]oes the miner have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment?@ *Id.* Because Dr. Baker opined that claimant retains the respiratory capacity to perform his usual coal mine work or comparable work, the administrative law judge rationally found the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 10; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

[3] Claimant also argues that the opinion of Dr. Bushey enclosed with the Petition for Review and Motion to Submit Evidence is a reasoned medical report that demonstrates total disability. Claimant=s Brief at 4. By Order issued on January 17, 2003, the Board returned Dr. Bushey=s medical reports to claimant=s counsel as they constitute new evidence which cannot be considered by the Board pursuant to 20 C.F.R. ' 802.301(b). *Bunch v. Director, OWCP*, BRB No. 03-0128 BLA (Jan. 17, 2003) (unpublished Order).

In addition, because we affirmed as unchallenged the administrative law judge=s finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)- (iii), and his finding under Section 718.204(b)(2) (iv) is supported by substantial evidence, we affirm the administrative law judge=s finding that claimant has failed to establish by a preponderance of the evidence that he is totally disabled pursuant to Section 718.204(b)(2). Decision and Order at 11; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-4 (1986). Because the administrative law judge properly considered all of the evidence of record and rationally determined that it failed to establish the existence of total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge=s denial of benefits.[4] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Accordingly, the administrative law judge=s Decision and Order denying benefits is affirmed.

SO ORDERED.

[4] In light of our holding, we decline to address the Director=s arguments raised in his response letter.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge