BRB No. 04-0771 BLA

PAT WHITAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEM COAL COMPANY	)	
d/b/a PRO LAND, INCORPORATED	)	DATE ISSUED: 07/29/2005
	)	
and	)	
JAMES RIVER COAL 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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

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

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-6000) of Administrative Law Judge Daniel J. Roketenetz 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-one years of coal mine employment, and adjudicated this claim pursuant to the permanent regulations contained in 20 C.F.R. Part 718. The

administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant next asserts that the administrative law judge erred in allowing employer to submit two x-ray rereadings of a single x-ray. 20 C.F.R. §725.414(a)(3)(ii). Claimant also argues that the administrative law judge erred in discrediting the physicians who diagnosed pneumoconiosis, because he found that they relied upon positive x-ray interpretations. 20 C.F.R. §718.202(a)(4). Claimant further challenges the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §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 not filed a brief in this appeal.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, such as the instant claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

In the instant case, the administrative law judge found, *inter alia*, that the evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Claimant contends that the administrative law judge erred in finding the medical opinion evidence to be insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and sets forth the medical opinions of Drs. Baker, Simpao, and James Chaney.[1] Dr. Baker diagnosed coal workers' pneumoconiosis, 1/0; moderate resting

[1] Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

arterial hypoxemia with mild moderate hypercarbia; and chronic bronchitis. Director's Exhibit 16. Dr. Baker indicated that claimant had a Class I impairment "with an FEV1 and vital capacity both being greater than 80%." *Id.* Dr. Baker also found that claimant had a second impairment "based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply that the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.* Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/0 and indicated that claimant's "multiple years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 13. Dr. Simpao opined that claimant had a mild impairment due to pneumoconiosis, and does not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. *Id.* Dr. James Chaney diagnosed coal workers' pneumoconiosis due to coal mine employment, indicated that claimant's impairment is due thereto, and opined that claimant does not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibits 15, 38, 39. Claimant asserts that the reports of Drs. Baker, Simpao, and James Chaney "may be sufficient for invoking the presumption of total disability," and are documented and reasoned and thus should not have been "rejected" by the administrative law judge for the reasons he provided. Claimant's Brief at 8, 9.

Claimant's contentions lack merit. Claimant's argument that the opinions of Drs. Baker, Simpson, and James Chaney are sufficient to invoke "the presumption of total disability" is unavailing. The presumption of total disability due to pneumoconiosis provided in 20 C.F.R. Part 727, is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the instant claim, filed on August 22, 2001. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 2. Further, it is within the discretion of the administrative law judge to determine the weight and credibility of the medical opinion evidence. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). In the instant case, the administrative law judge properly found that Dr. Baker's opinion, advising against further exposure to coal mine dust, does not amount to an opinion that claimant is totally disabled within the meaning of the Act. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge further determined, within his discretion, that the opinions expressed by both Dr. James Chaney and Dr. Simpao, that claimant is totally disabled due to coal workers' pneumoconiosis, are not supported by their respective underlying evidence, including non-qualifying results on pulmonary function studies and arterial blood gas studies. *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also properly found that the opinions of Dr. James Chaney and

Dr. Simpao are contradicted by other, more credible evidence of record, including the medical reports of Drs. Broudy and Rosenberg. *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). Drs. Broudy and Rosenberg opined that claimant retains the respiratory capacity to perform his usual coal mine employment or comparable work, based on their knowledge of claimant's usual coal mine work loading coal as an operator of a front-end loader at a surface coal mine. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Director's Exhibit 10 at 7, 9, 11 (Dr. Broudy); Employer's Exhibits 7, 11 at 26 (Dr. Rosenberg).

Claimant next argues that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Drs. Baker, Chaney and Simpao's opinions of disability" and "made no mention of the claimant's age or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 10. Claimant's contentions lack merit. The record shows that the administrative law judge considered the exertional requirements of claimant's usual coal mine employment, *see* Decision and Order at 3. Because the administrative law judge properly discredited the opinions of Drs. Baker, James Chaney, and Simpao on the issue of total disability, *see* discussion, *supra*, he was not required to compare these opinions to the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986). Further, claimant's age and work experience are factors that have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv) as it is rational, supported by substantial evidence, and in accordance with law. Because claimant fails to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the instant case. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. Given our affirmance of the administrative law judge's denial of benefits based on claimant's failure to establish total disability at 20 C.F.R. §718.204(b)(2), we need not address claimant's arguments regarding the administrative law judge's findings at 20 C.F.R. §718.202(a), as any error therein could not affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge