BRB No. 05-0214 BLA

VERNON FRANCE	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 07/08/2005
	)	
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 Denying Benefits of Jeffrey Tureck, 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/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5306) of Administrative Law Judge Jeffrey Tureck 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). Without rendering findings as to whether the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203, the administrative law judge found that the evidence of record

was insufficient to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement. Accordingly, the administrative law judge denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Claimant also contends that the administrative law judge erred in not making any findings on the issues of pneumoconiosis and causation. Employer responds, contending that the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment and contending that the administrative law judge did not err by failing to address the existence of pneumoconiosis and causation since he had already found that total disability, an essential element of entitlement, was not established. Employer responds, urging affirmance of the administrative law judge's award 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *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*).

Claimant contends that the administrative law judge erred in finding that the well-reasoned and well-documented opinion of Dr. Baker did not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv) since Dr. Baker, claimant's treating physician, opined that claimant had a "Class I breathing impairment" and was "100% occupationally disabled for working in the coal mining industry or similar dusty occupations." Claimant's Brief at 3. Claimant also asserts that Dr. Hussain's finding of a

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[1] As no party challenges the administrative law judge's findings that the evidence fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), those findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

mild pulmonary impairment is sufficient to establish that claimant is totally disabled. Claimant's Brief at 5.

In addressing the issue of total disability, the administrative law judge found that claimant worked twenty years in underground coal mining, primarily as a scoop driver. Decision and Order at 2; Hearing Transcript 15-16. Considering the medical opinions of record, the administrative law judge found that they did not establish a totally disabling respiratory impairment. Specifically, the administrative law judge found that Dr. Rosenberg opined that claimant had no respiratory or pulmonary impairment and was capable of performing his usual coal mine work. Employer's Exhibit 3. Dr. Broudy, although diagnosing a very slight impairment due to cigarette smoking, concluded that claimant had the respiratory capacity to perform his usual coal mine work, Employer's Exhibit 4 at 2-3, and Dr. Hussain found a mild impairment which did not preclude claimant from engaging in his work as a coal miner. Director's Exhibit 7. Turning to Dr. Baker's opinion, the administrative law judge noted that Dr. Baker opined that claimant:

> has a Class I impairment with the FEV_1 and vital capacity being greater than 80% of predicted. This is based upon Table 5-12, Page 107, Chapter Five [American Medical Association's] Guides to the Evaluation of Permanent Impairment, Fifth Edition. Director's Exhibit 9, at 2. But a Class I impairment under the table in the AMA Guides is no impairment at all, and it is significant that Dr. Baker does not state that claimant is physically incapable of performing his usual coal mine work.

Decision and Order at 3; Director's Exhibit 9 at 2.

Noting that a Class I impairment is defined as no impairment at all according to the AMA Guides and noting that Dr. Baker did not state that claimant was physically incapable of performing his usual coal mine employment, Decision and Order at 3, the administrative law judge properly concluded that Dr. Baker's statement, above, failed to establish total disability. Further, the administrative law judge properly found that Dr Baker's statement that "persons who develop pneumoconiosis should limit further exposure to the offending agent," Director's Exhibit 9, was also insufficient to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 3; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 649 (6th Cir. 2003); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *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); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, 9 BLR 1-4. Further, the administrative law judge properly found that Dr. Hussain's opinion that claimant had only a mild

impairment and that he had the respiratory capacity to perform the work of a coal miner was insufficient to establish total disability. *Wright v. Director, OWCP*, 8 BLR 1-245 (1984). Additionally, the administrative law judge found that the pulmonary function and blood gas study evidence was non-qualifying and could not establish total respiratory disability. Having considered all the evidence, therefore, the administrative law judge properly concluded that the evidence in this case did not establish a total respiratory disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

Further, contrary to claimant's argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant to determining the miner's ability to perform comparable and gainful work, not to establishing whether claimant is totally disabled from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(2)(iv); *White v. New White Coal Co.*, 23 BLR 1-1, 1-6-7; *Fields*, 10 BLR 1-19. Nor, contrary to claimant's assertion, can total disability be presumed on the basis of a diagnosis of simple pneumoconiosis. Claimant's Brief at 4-6; *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); *White*, 23 BLR 1-7 n.8; *Gee*, 9 BLR 1-4. Accordingly, we reject claimant's contention pursuant to Section 718.204(b)(2)(iv), and we affirm the administrative law judge's finding that the evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Because claimant failed to establish total respiratory disability, a necessary element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, we must affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-29; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR at 1-2. We decline to address claimant's contention that the administrative law judge erred by not rendering findings as to whether the evidence established the existence of pneumoconiosis or causation, as claimant's failure to establish a totally disabling respiratory impairment, precludes an award of benefits. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the administrative law judge's decision denying benefits. I write separately because I believe that the administrative law judge erred in crediting Dr. Hussain's opinion; the error was, however, harmless.

Dr. Hussain opined that claimant had a "mild impairment which does not preclude [him] from engaging in his work as a coal miner." Decision and Order at 3; Director's Exhibit 7. Because a mild impairment may be totally disabling, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), such an opinion should not be credited unless the physician relates the job's exertional requirements to the miner's impairment, *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1981), or the administrative law judge considers the exertional requirements of the miner's usual job in light of the impairment, *Cornett*. In the case at bar, Dr. Hussain's report reflects no familiarity with claimant's job or its exertional requirements and the administrative law judge did not determine the exertional requirements of claimant's job. Hence, it was error for the administrative law judge to hold that Dr. Hussain's opinion of a mild impairment could not support a finding of total disability, despite his statement that claimant could return to his work as a miner. *Cornett*. The error, however, was harmless, because the weight of the evidence established that claimant was not totally disabled: all of the objective studies were non-qualifying and of the three remaining medical reports, two diagnosed no impairment and the third diagnosed a "very slight impairment…." Employer's Exhibit 4 at 2; Decision and

Order at 3. In light of this evidence, the administrative law judge's failure to recognize that Dr. Hussain's opinion could be supportive of a finding of total disability is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In all other respects, I concur in the majority's opinion.

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REGINA C. McGRANERY
Administrative Appeals Judge