

BRB No. 07-0926 BLA

H.S.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/28/2008
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05207) of Administrative Law Judge Alice M. Craft on a subsequent 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 sixteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Based on the concession of the Director, Office of Workers'

¹ Claimant filed an initial claim for benefits on February 2, 1987, which was finally denied by Administrative Law Judge Gerald M. Tierney on November 13, 1997, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on January 17, 1995, which was denied by Administrative Law Judge Michael O'Neill on March 11, 1998, on

Compensation Programs (the Director), that claimant established the existence of pneumoconiosis, the administrative law judge determined that claimant established a change in an applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that the evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find Dr. Baker's opinion, considered in conjunction with the exertional requirements of his usual coal mine work, to be sufficient to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).² The Director responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 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, 363 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his

the ground that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1997). *Id.* The Board affirmed Judge O'Neill's denial of benefits in *[H.S.] v. Director, OWCP*, BRB No. 98-0866 BLA (March 19, 1999)(unpub.). *Id.* Claimant took no further action until he filed his subsequent claim on January 3, 2002. Director's Exhibit 2.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and her findings that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Decision and Order at 3; Director's Exhibit 3.

pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions submitted with claimant's prior claims and the newly submitted medical opinion of Dr. Baker. The administrative law judge found that this evidence did not support a finding of total disability, as claimant's "current treating physician, Dr. Baker, is of the opinion that [claimant] is not suffering from a pulmonary impairment" and "the weight of the creditable medical opinion evidence from the prior claims is consistent with Dr. Baker's current opinion."⁴ Decision and Order at 11.

Claimant asserts that in addressing the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In support of this contention, claimant states:

The claimant's usual coal mine work included being an equipment operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Craft made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

⁴ Dr. Baker examined claimant at the request of the Department of Labor on February 15, 2002, and recorded the results of his examination on Form CM-988. Director's Exhibit 10. Dr. Baker characterized the degree of severity of claimant's pulmonary impairment as "minimal" and on a separate document appended to Form CM-988, Dr. Baker checked the box next to "No Impairment" when asked to categorize the extent of claimant's pulmonary impairment. *Id.* Dr. Baker subsequently examined claimant periodically and his assessment remained the same. Director's Exhibit 19; Claimant's Exhibit 2.

Claimant's Brief at 3. Claimant's argument is without merit. Because the administrative law judge rationally concluded that Dr. Baker rendered a diagnosis of no respiratory or pulmonary impairment, there was no comparison to be made between a finding of impairment and the exertional requirements of claimant's usual coal mine work.⁵ See *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. In light of claimant's failure to raise a meritorious allegation of error in the administrative law judge's consideration of the medical opinions of record, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

We also reject claimant's assertion that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable gainful work. Claimant's Brief at 3-4. There is no merit to claimant's argument. Claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant has failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

⁵ The administrative law judge properly determined that Dr. Baker's 1991 opinion, that claimant should avoid further coal dust exposure, is not equivalent to a diagnosis of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988); Decision and Order at 10.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge