BRB No. 99-0961 BLA

IRVIN D. YOUNT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
BETHENERGY MINES, INC.	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Irvin D. Yount, Ford City, Pennsylvania, *pro se*.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-924) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found, and the parties stipulated to, twenty-eight and one-half years of coal mine employment and that employer was the responsible operator. Decision and Order at 12; Hearing Transcript at 6-8. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1]

[1]Claimant filed his application for benefits on December 3, 1996. Director's Exhibit 1.

Decision and Order at 12. The administrative law judge determined that the evidence of record was sufficient, in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.[2] Decision and Order at 12-14. The administrative law judge concluded, however, that the evidence of record was insufficient to establish that claimant was totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Decision and Order at 14-16. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 rational,

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]As the administrative law judge's findings 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) and 718.203, as well as his length of coal mine employment and responsible operator determinations, are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

supported by substantial evidence, and are in accordance with law. 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 in a living miner's claim pursuant to 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. *See* 20 C.F.R. §§718.3, 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 arguments raised 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 that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as all of the pulmonary function studies were invalid[4] and all of the blood gas study evidence was non-qualifying,[5] total disability was not established pursuant to Section 718.204(c)(1)-(2). *See* Decision and Order at 14-15; Director's Exhibits 16, 17, 18, 21, 28, 38; Employer's Exhibits G, H, J; *Winchester v. Director,* OWCP, 9 BLR 1-177 (1986); Budash *v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right

[4]The administrative law judge rationally determined that the pulmonary function studies of record were invalid as the administering physicians questioned the reliability of the studies and as Drs. Laman and Altmeyer, who are both board-certified in internal medicine with a subspecialty in pulmonary disease, concluded that all the studies were invalid due to the variability in tracings and inadequate patient effort. See Decision and Order at 14; Director's Exhibits 16, 17, 18, 28, 38; Employer's Exhibits G, H, I, J; *Trent v. Director,* OWCP, 11 BLR 1-26 (1987); Winchester *v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 15; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Based on the foregoing, we affirm the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1)-(3).

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge addressed all of the relevant medical opinion evidence of record and reasonably determined that the preponderance of the evidence was insufficient to establish total disability based on his conclusion that the opinion of Dr. Lebovitz, that claimant was totally disabled due to his respiratory problem, was outweighed by the opinions of Drs. Laman and Altmeyer, that claimant did not have a totally disabling respiratory impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 15-16; Director's Exhibits 28, 38; Claimant's Exhibit 1; Employer's Exhibits G, H, I, J. The administrative law judge acted within his discretion, as factfinder, when he accorded greater weight to the opinions by Drs. Laman and Altmeyer as these physicians possess qualifications superior to those of Dr. Lebovitz and because the administrative law judge found that their opinions were in accordance with the objective evidence of record.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields, supra*; *Budash, supra*; *Gee, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *Fuller, supra*; *Piccin, supra*; Decision and Order at 15-16; Director's Exhibits 28, 38; Claimant's Exhibit 1; Employer's Exhibits G, H, I, J.

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. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion diagnosing a totally disabling respiratory impairment outweighed by the preponderance of the remaining contrary medical opinions, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989);

[6]The record indicates that Dr. Lebovitz is an A-reader and is board-eligible in internal medicine. Director's Exhibit 28. Drs. Laman and Altmeyer are B-readers and are board-certified in internal medicine with a subspeciality in pulmonary disease and critical care medicine. Director's Exhibit 38; Employer's Exhibit G, H, I, J.

Worley v. Blue Diamond Coal Co., 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.[7]

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

[7]Since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge