

BRB No. 03-0782 BLA

DOUGLAS EVERSOLE)
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 Claimant-Petitioner)
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 v.)
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 PERRY COUNTY COAL CORPORATION) DATE ISSUED: 06/04/2004
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 and)
)
 REALM NATIONAL INSURANCE)
 COMPANY)
)
 Employers/Carriers-)
 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 Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Norman E. Harned (Harned, Bachert & Denton, LLP), Bowling Green, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5084) of Administrative Law Judge Ruldolph L. Jansen rendered 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 found, and the parties stipulated to, twenty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the date of filing.² Decision and Order at 3. Finding that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, the administrative law judge nonetheless found it insufficient to establish a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant was not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating 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 rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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. 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*).

Claimant contends that the administrative law judge erred in finding that claimant failed to establish total disability based on the medical opinions pursuant to Section 718.204(b)(2)(iv). Claimant does not challenge the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii) because there were no qualifying pulmonary function or blood gas studies and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii). The administrative law judge's findings that total disability was not established thereunder are, therefore,

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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his claim for benefits on February 1, 2001. Director's Exhibit 1.

affirmed. 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In considering the medical opinions, the administrative law judge accorded little weight to the opinion of Dr. Hussain because, while he stated that claimant had a mild respiratory impairment, he also stated that claimant retained the capacity to perform coal mine employment.³ The administrative law judge further found that Dr. Hussain's opinion contained no information regarding the years of claimant's coal mine employment or the duties he performed. The administrative law judge also found that Dr. Hussain's opinion did not reflect the exertional requirements of claimant's usual coal mine employment. Regarding Dr. Wicker's opinion, that claimant's respiratory capacity was moderately decreased, the administrative law judge found that Dr. Wicker did not address whether claimant was capable of performing his former coal mine employment. Employer's Exhibit 2.⁴ Instead, the administrative law judge gave full weight to the opinion of Dr. Baker, who stated that claimant had either mild or no respiratory impairment, and also stated that claimant retained the capacity to perform his former coal mine employment.⁵ The administrative law judge also found that Dr. Baker's opinion was supported by pulmonary function and blood gas studies that were performed. Employer's Exhibit 1.⁶ Further, the administrative law judge assigned increased weight to the opinion of Dr. Baker because he was a pulmonary specialist, unlike the other physicians. Decision and Order at 8. Accordingly, the administrative law judge found that the medical opinion evidence failed to establish a totally disabling respiratory impairment. This was reasonable. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Fields*

³ The administrative law judge noted that Dr. Hussain's qualifications were not in the record. Decision and Order at 7; Director's Exhibit 8.

⁴ The administrative law judge noted that Dr. Wicker was board-certified in Internal Medicine. Decision and Order at 6; Employer's Exhibit 2.

⁵ Dr. Baker is identified as board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 1.

⁶ Both Drs. Wicker and Baker stated that claimant's last coal mine employment was as a mine manager. Employer's Exhibits 1, 2. The administrative law judge found that claimant worked as a general mine manager, but stated that this was strenuous because in addition to supervising employees, monitoring equipment, and checking safety measures, it also involved lifting sixty pounds per day repeatedly and crawling two to three miles per day. Decision and Order at 3; Hearing Transcript at 21; Employer's Exhibit 3.

v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. See *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Nor, contrary to claimant's argument, was claimant entitled to a presumption of total disability because he showed the existence of simple pneumoconiosis. See 20 C.F.R. §718.204(b); *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. We, therefore, affirm the administrative law judge's finding that the evidence in the record was insufficient to establish total disability pursuant to Section 718.204(b), an essential element of entitlement. See *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Because we affirm the administrative law judge's finding that total disability was not established, claimant is not entitled to benefits. *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge