BRB No. 03-0811 BLA

LIGE SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 06/28/2004
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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2002-BLA-5135) of Administrative Law Judge Rudolf L. Jansen 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, accepting the parties' stipulation, credited claimant with twenty-four years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's February 6, 2001 filing date. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, he found the medical evidence insufficient to

establish 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 in denying benefits, arguing that the administrative law judge erred in weighing the x-ray evidence and medical opinion evidence of record. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of this appeal.[1]

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. 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total respiratory disability. In particular, claimant asserts that the administrative law judge erred by not comparing the exertional requirements of claimant's usual coal mine employment with the medical opinions assessing disability, specifically Dr. Baker's opinion of a minimal pulmonary impairment. Claimant further contends that the administrative law judge should have considered claimant's age, education and work experience in determining claimant's ability to perform comparable and gainful employment. Finally, claimant contends that since pneumoconiosis is a progressive and irreversible disease, claimant's pneumoconiosis has worsened, and that such worsening would adversely affect his ability to perform his usual coal mine employment.

[1] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-four years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. This analysis is required in situations where a physician details a claimant's physical limitations but does not provide an opinion regarding the extent of any disability from which the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co*., 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Herein, the administrative law judge rationally found that the medical opinions of record addressed the issue of disability and none concluded that claimant was totally disabled, or stated that claimant was unable to return to his usual coal mine employment. Decision and Order at 10; Director's Exhibit 9; Employer's Exhibits 1-5.

In particular, Dr. Baker, under the heading "Impairment" on his examination form stated "minimal with only chronic bronchitis." Director's Exhibit 9. However, on an additional medical form accompanying his report, he concluded that there was no occupational lung disease caused by claimant's coal mine employment and that there was no respiratory impairment and that claimant had the respiratory capacity to perform his usual coal mine employment. *Id*. Likewise, Drs. Broudy and Vuskovich opined that claimant was not suffering from a respiratory impairment and that he was not totally disabled from returning to his usual coal mine employment. Employer's Exhibits 1-5. Inasmuch as each of the physicians rendered an opinion that claimant was capable, from a respiratory standpoint, of performing his usual coal mine employment, based upon information that claimant's last coal mine employment was as a foreman and that his previous jobs included running a roof bolter, miner and scoop operator, we affirm the administrative law judge's weighing of these opinions. Decision and Order at 4, 6-7, 10; Director's Exhibit 9; Employer's Exhibits 1-5; 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Budash*, 9 BLR 1-48.

Furthermore, claimant's assertion of vocational disability based on his age and limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act.[2] 20 C.F.R. §718.204(b)(2)(iv); *Carson*

[2] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1)(i), (ii).

v. Westmoreland Coal Co., 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence.[3] Decision and Order at 9-10; *see Fields*, 10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

Since claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 20 C.F.R. §718.204(b)(2),[4] a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits in this miner's claim is precluded. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[3] We reject claimant's argument that "because pneumoconiosis is proven to be a progressive and irreversible disease" it can be concluded that his condition has worsened and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

[4] In light of our affirmance of the administrative law judge's finding that the medical evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement, we decline to address claimant's contentions regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §718.202(a). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

REGINA C. McGRANERY
Administrative Appeals Judge