

BRB No. 04-0958 BLA

DEE ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 06/16/2005
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (01-BLA-1018) of Administrative Law Judge Joseph E. Kane (the administrative law judge) on a duplicate claim for benefits 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). In considering this duplicate claim for benefits, the administrative law judge found that the newly submitted evidence failed to establish the elements of entitlement previously adjudicated against claimant, and therefore, found that a material change in a conditions was not established. Assuming that a material change in conditions was established, the administrative law judge went on to find that the evidence of record, both old and new, failed to establish a total respiratory disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the x-ray evidence and medical opinion evidence and erred in failing to find that the evidence established a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs, (the Director) responds, asserting that the administrative law judge's Decision and Order on Remand Denying Benefits should be affirmed.

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).

Claimant argues that, taking into consideration that his usual coal mine employment required exposure to heavy concentrations of dust on a daily basis and that his respiratory condition would preclude the performance of his working in such an atmosphere, as well as Dr. Baker's opinion that claimant had a mild pulmonary impairment, the administrative law judge should have concluded that claimant's respiratory condition prevented him from engaging in employment that occurred in a dusty environment and involved exposure to dust on a daily basis. Further, claimant argues that the administrative law judge did not discuss claimant's usual coal mine employment in conjunction with Dr. Baker's opinion. Additionally, claimant argues that the administrative law judge failed to consider claimant's advanced age, limited education or limited work experience in determining whether he was totally disabled. Likewise, claimant contends that, given the fact that pneumoconiosis is a progressive and irreversible disease, and a considerable amount of time has passed since claimant was first diagnosed with pneumoconiosis, it can be concluded that claimant is totally disabled.

In finding that claimant failed to establish total respiratory disability, the administrative law judge noted that even though Dr. Baker had found that claimant suffered from a mild impairment, the doctor went on to state that claimant's impairment would not prevent him from working as a coal miner in a dust-free environment. The administrative law judge further noted that claimant's usual coal mine employment involved arduous manual labor and noted that Dr. Baker was apparently familiar with the exertional requirements of claimant's usual coal mine employment. Dr. Baker reported that claimant had thirty-five years of underground coal mine employment and that his last coal mine employment was as a shuttle car operator. Director's Exhibit 8. When weighing Dr. Baker's opinion with the other newly submitted pulmonary function studies and medical opinions, however, the administrative law judge concluded that claimant's pulmonary impairment was not significant enough to prevent him from performing his usual coal mine employment.

Decision and Order at 8. Likewise, on reviewing the evidence as a whole, the administrative law judge concluded that the earlier evidence was insufficient to establish total disability as the opinion of Dr. Clark, the only physician to find claimant totally disabled, was not sufficiently reasoned; the other opinions found either no respiratory impairment, mild respiratory impairment, or failed to address claimant's respiratory capacity; and the pulmonary function and blood gas studies were non-qualifying. Thus, on weighing the evidence as a whole, both old and new, the administrative law judge reasonably concluded that claimant failed to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Shedlock v. Bethlehem Mines*, 9 BLR 1-195 (1986) *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 47 (1985). Additionally, contrary to claimant's argument, the fact that claimant should not work in a dusty environment does not establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor*, 12 BLR at 1-88. Moreover, contrary to claimant's contention, an administrative law judge is 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 White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor*, 12 BLR at 1-87. Nor does a diagnosis of pneumoconiosis automatically lead to a finding of total disability. *White*, 23 BLR at 1-7 n.8. The administrative law judge, therefore, properly found that claimant failed to establish a totally disabling respiratory impairment, an essential element of entitlement. Because claimant failed to establish an essential element of entitlement, we need not consider his other assertions on appeal. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge