BRB No. 05-0226 BLA

MELVIN P. MAYNOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDERSON & ANDERSON CONSTRUCTION, INCORPORATED	)	DATE ISSUED: 06/29/2005
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Melvin P. Maynor, Mount Hope, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2003-BLA-5641) of Administrative Law Judge Daniel L. Leland 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 employer stipulated to, eighteen years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3-5; Hearing Transcript at 6. After determining that the instant claim was a subsequent claim,[1] the administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and thus established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Decision and Order at 2, 4-6. Considering the record *de novo*, the administrative law judge concluded that the evidence established the existence of pneumoconiosis arising out of coal mine employment, but did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 7-8. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by

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[1] Claimant filed his initial claim for benefits on July 10, 1973, which was finally denied by the Department of Labor on October 7, 1980. Director's Exhibit 1. Claimant filed a second claim on June 13, 1986, which was denied by Administrative Law Judge George P. Morin on June 14, 1991 and the denial was affirmed by the Benefits Review Board on November 11, 1992. Director's Exhibit 1. Claimant filed his third claim on February 18, 1997, which was finally denied by Administrative Law Judge John Holmes on August 17, 1998, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the instant claim on July 18, 2001, which was denied by the district director on December 10, 2002. Director's Exhibits 3, 18. Claimant subsequently requested a hearing before the Office of Administrative Law Judges on December 17, 2002. Director's Exhibit 19.

[2] Because the administrative law judge's length of coal mine employment determination, as well as his findings pursuant to 20 C.F.R. §§725.309, 718.202 and 718.203, are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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 and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence and contains no reversible error.[3] In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge accurately determined that all of the pulmonary function studies and blood gas studies of record are non-qualifying.[4] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 1, 9-12, 26; Employer's Exhibit 1; Decision and Order at 8. The administrative law judge further found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37, 1-39 (1989).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinion evidence of record and rationally concluded that the medical opinions did

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. Director's Exhibits 1, 4; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] 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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

not support a finding of total disability because no physician opined that claimant is totally disabled.[5] Decision and Order at 8; Director's Exhibits 1, 8, 26; Employer's Exhibit 1; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *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 on recon. en banc*, 9 BLR 1-104 (1986).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR at 1-27. The administrative law judge is empowered to weigh the medical evidence and to draw his or her 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge's finding that the evidence of record does not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2) is supported by substantial evidence and in accordance with law, we affirm the denial of benefits. *See* 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27. *Perry*, 9 BLR at 1-2.

[5] Dr. Mullens opined that claimant suffers from a mild impairment which would not prevent him from performing his last coal mine employment. Director's Exhibit 8. Dr. Zaldivar concluded that claimant has no pulmonary impairment and is capable of performing his last coal mine employment or arduous manual labor if so required. Director's Exhibit 26; Employer's Exhibit 1. Dr. Santos found that the miner did not suffer from a significant pulmonary dysfunction. Director's Exhibit 1. Dr. Daniel found no evidence of a significant pulmonary impairment and stated that claimant should be able to perform his last coal mine employment. Director's Exhibit 1. Dr. Rasmussen opined that claimant has minimal impairment and retains the capacity to perform his last coal mine employment. Director's Exhibit 1. Dr. Renn opined that claimant does not suffer from any ventilatory impairment and is able to perform his last coal mine employment. Director's Exhibit 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