BRB No. 06-0681 BLA

THOMAS V. JACOBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 03/15/2007
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Thomas V. Jacobs, Centerville, Iowa, *pro se*.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, without the assistance of counsel, appeals the Decision and Order Denying Living Miner's Benefits (04-BLA-5183) of Administrative Law Judge Thomas M. Burke 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). Claimant filed this subsequent claim on August 19, 2002.[1] Director's Exhibit 4. On May

[1] Claimant first filed a claim for benefits on August 13, 1979, which was denied by the district director on November 8, 1979. Director's Exhibit 1. Claimant filed a duplicate claim on June 11, 1984. Director's Exhibit 2. In a Decision and Order dated October 4, 1988, Administrative Law Judge V. M. McElroy denied benefits because he found the evidence insufficient to establish the existence of pneumoconiosis pursuant to

2, 2003, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 26. Claimant filed a request for reconsideration on May 14, 2003, which was denied by the district director on June 9, 2003. Director's Exhibits 27, 28. On August 7, 2003, claimant requested modification and submitted additional evidence. Director's Exhibit 31. The district director subsequently issued a Proposed Decision and Order Denying Request for Modification on September 18, 2003. Director's Exhibit 35. The district director determined that while claimant established the existence of clinical pneumoconiosis, the medical evidence was insufficient to establish a causal relationship between his pneumoconiosis and coal mine employment, or that he was totally disabled due to his disease. *Id*. Claimant requested a hearing, which was held on August 25, 2005. Based on the district director's finding that claimant suffered from pneumoconiosis, the administrative law judge determined that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge determined that claimant worked seven years and one month in coal mine employment. He found that while claimant established the existence of clinical pneumoconiosis based on the positive x-ray evidence, the medical evidence was insufficient to establish, under 20 C.F.R. §718.203, that claimant's clinical pneumoconiosis arose out of his coal dust exposure. The administrative law judge further determined that claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment due, at least in part, to coal dust exposure. Accordingly, the administrative law judge denied benefits.

Claimant has filed a *pro se* appeal, challenging that administrative law judge's finding as to the length of his coal mine employment. Claimant asserts that he has proved at least ten years of qualifying coal mine employment, and that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, urging the Board to affirm the denial of benefits. The Director contends that substantial evidence supports the administrative law judge's calculation of seven years and one month of coal mine employment. The Director, however, asserts that the Board need not address claimant's work history because the administrative law judge properly found that claimant was not totally disabled as a result of his coal dust exposure in coal mine employment.

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. *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

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20 C.F.R. §718.202(a). *Id*. The denial of benefits was affirmed by the Board. *See Jacobs v. Director, OWCP*, BRB No. 88-3701 BLA (Dec. 14, 1990) (unpub.); Director's Exhibit 2. Claimant took no further action on this claim.

law are rational, supported by substantial evidence, and 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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

In the instant case, the administrative law judge assumed *arguendo* that claimant suffered from coal workers' pneumoconiosis, *see* Decision and Order at 14. He further found, however, that claimant failed to carry his burden of proof to establish his entitlement to benefits because "no physician of record concludes that claimant suffers from a totally disabling respiratory or pulmonary impairment due, even in part, to coal dust exposure." Decision and Order at 15.

We affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis, as that finding is supported by substantial evidence. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In evaluating the evidence relevant to total disability, the administrative law judge properly determined that there was no qualifying pulmonary function or arterial blood gas study evidence to establish that claimant has a totally disabling respiratory or pulmonary impairment.[2] *See* 20 C.F.R. §718.204(b)(2)(i) and (ii); Decision and Order at 13-14; Director's Exhibits 1, 2, 18, 19, 31; Claimant's Exhibits B1, B2, B3. The administrative law judge also properly found that claimant failed to establish his total respiratory or pulmonary disability based on a review of the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(4).

As noted by the administrative law judge, Dr. Jewett examined claimant on December 13, 2002 and diagnosed that he suffered from moderate respiratory impairment, but the doctor did not state that claimant was totally disabled from performing his usual coal mine work. Decision and Order at 10; Director's Exhibit 17. Dr. Zorn examined claimant on October 15, 1979 and opined that claimant suffered from

[2] Because there was no evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was ineligible to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 13 n.4.

chronic bronchitis with no limitation in exercise tolerance from either a respiratory or cardiac standpoint. Decision and Order at 9, 15; Director's Exhibit 2. Dr. Knight examined claimant on September 6, 1984 and opined that claimant had no evidence of pulmonary disease. Decision and Order at 9-10; Director's Exhibit 2. Finally, the administrative law judge properly found that Dr. Cohen examined claimant on May 20, 2003, and opined that claimant showed no evidence of a significant pulmonary limitation during cardiopulmonary exercise testing. Decision and Order at 11; 15; Director's Exhibit 31. Dr. Cohen also specifically opined that claimant suffered only minimal respiratory impairment, which was "not nearly enough to make [claimant] disabled for coal mining work." Director's Exhibit 31. Thus, because the majority of physicians' opinions of record did not specifically opine that claimant is totally disabled by a respiratory or pulmonary impairment, we affirm the administrative law judge's determination that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Moreover, we affirm the administrative law judge's denial of benefits based on claimant's failure to establish that his pneumoconiosis was a substantially contributing factor to his respiratory condition, even if that condition were totally disabling. *See* 20 C.F.R. §718.204(c). As noted by the administrative law judge, Dr. Jewett's opinion does not aid claimant in satisfying his burden of proof relevant to disability causation. Dr. Jewett stated only that claimant suffered from chronic bronchitis, which was "probably" the result of an infectious process. Decision and Order at 15; Director's Exhibit 2, 17; *see generally Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Dr. Jewett did not attribute any of claimant's moderate respiratory impairment to coal dust exposure. Director's Exhibit 17. Similarly, when Dr. Cohen was asked by claimant to clarify his opinion as to whether claimant was totally disabled due to pneumoconiosis, Dr. Cohen stated that he was unable to explain claimant's symptoms of shortness of breath based on a lung disease. Decision and Order at 11; 15; Claimant's Exhibit A.

Insofar as the administrative law judge correctly found that the objective test results and medical opinion evidence fail to support a finding of respiratory or pulmonary impairment due, at least in part, to coal dust exposure, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.204(b)(2) and (c). *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *see generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because we affirm the administrative law judge's findings under Section 718.204(b)(2) and (c), we decline to address the propriety of the administrative law judge's determination regarding the length of the

miner's coal mine employment.[3] We note, however, that even if claimant were able to establish at least ten years of coal mine employment, as alleged, benefits would still be precluded based on his failure to establish all of the requisite elements of entitlement, *see Trent*, 11 BLR at 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). We therefore affirm, as supported by substantial evidence, the administrative law judge's decision to deny benefits.

Accordingly, the Decision and Order Denying Living Miner's Benefits of the administrative law judge 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

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3] We also decline to address the administrative law judge's findings under 20 C.F.R. §§718.203, 718.202(a)(4) relevant to the issues of disease causation and legal pneumoconiosis.