

BRB No. 07-0602 BLA

D.B.)
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 Claimant-Petitioner)
)
 v.)
)
 GREAT WESTERN COAL (KY),) DATE ISSUED: 03/25/2008
 INCORPORATED)
)
 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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Gregory F. Jacob, 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 appeals the Decision and Order Denying Benefits (06-BLA-5206) of
Administrative Law Judge Robert D. Kaplan on a claim¹ 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 credited claimant with

¹ Claimant filed a claim for benefits on February 14, 2005. Director's Exhibit 2.

seventeen years of qualifying coal mine employment and found that claimant established the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b); Hearing Transcript at 6. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find total respiratory disability established under Section 718.204(b)(2)(iv). Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, urges affirmance of the denial of benefits.²

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 the 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'Keefe v. Smith, Hinchman and 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.³ 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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant argues that in finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work as a shuttle car operator and

² We affirm the administrative law judge's determinations regarding length of coal mine employment, that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), as these determinations are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 5; Hearing Transcript at 6.

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

bridge operator in conjunction with Dr. Baker's disability assessment. Claimant further contends that in light of the heavy concentrations of dust exposure to which he was exposed on a daily basis, his condition would preclude him from engaging in his usual coal mine employment.

In finding that Dr. Baker's opinion did not establish total disability, the administrative law judge noted that Dr. Baker concluded that claimant had a mild respiratory impairment based on his pulmonary function study and arterial blood gas study values.⁴ The administrative law judge further noted that Dr. Baker opined that claimant had "a class 2 impairment" and that this was "a 10 to 25% impairment of the whole person."⁵ Decision and Order at 6. Nonetheless, the administrative law judge noted that Dr. Baker opined that "claimant retain[ed] the respiratory capacity to perform his previous coal mine employment or comparable work in a dust-free environment." Director's Exhibit 12. The administrative law judge found, therefore, that because "Dr. Baker concluded that [c]laimant was capable of performing his previous coal mine employment, his conclusion constitutes the finding that [c]laimant is not totally disabled under the Act." Decision and Order at 6; Director's Exhibit 12.

The administrative law judge correctly found that Dr. Baker, who rendered the sole medical report of record, opined that claimant retained the physiological capacity to continue his previous coal mine employment. Hence, the administrative law judge properly concluded that the medical opinion evidence was insufficient to demonstrate that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); Decision and Order at 6. Accordingly, we reject claimant's argument and affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Because claimant has not otherwise challenged the administrative law judge's credibility determinations pursuant to Section 718.204(b)(2)(i)-(iv),⁶ we affirm

⁴ The administrative law judge found that Dr. Baker's opinion was well documented and reasoned, noting that it was based on a physical examination, symptoms, and objective testing. Decision and Order at 6.

⁵ *See Guides to the Evaluation of Permanent Impairment*, 5th Edition (2001).

⁶ In addition, the administrative law judge found that the one pulmonary function study of record was non-qualifying, the one arterial blood gas study of record was,

the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2). *See Fields*, 10 BLR at 1-21; *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *see also White*, 23 BLR at 1-7.

Because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See* 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

likewise, non-qualifying, and that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(i)-(iii) respectively. Decision and Order at 5.