BRB No. 98-0802 BLA

WOODROW WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1331) of Administrative Law Judge Thomas F. Phalen, Jr. 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 credited claimant with twenty-four years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of

claimant's December 1995 filing date. In weighing the evidence of record, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, asserting that the administrative law judge erred in his weighing of the x-ray evidence and medical opinions of record at Section 718.202(a)(1) and (a)(4). In addition, claimant challenges the administrative law judge's finding under Section 718.204(c)(4), arguing that the administrative law judge erred in his weighing of the medical opinion evidence. 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, filed a letter stating that he will not file a response brief in 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).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the medical evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). Initially, contrary to claimant's contention, since the medical opinions credited by the administrative law judge did not merely phrase claimant's disability in terms of exertional or physical limitations, but explicitly provided findings regarding the presence or absence of a

[1] We affirm the administrative law judge's decision to credit claimant with twenty-four years of coal mine employment and his findings at 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(c)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling respiratory impairment, the administrative law judge was not required to render a specific finding regarding claimant's usual coal mine employment. *See generally 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*); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

In weighing the medical evidence of record, the administrative law judge correctly found that, of the five medical opinions of record, the only opinion supportive of a finding that claimant is totally disabled pursuant to Section 718.204(c)(4) was the opinion of Dr. Varghese, who noted that claimant's FEV_1 was 45 percent of normal and stated that claimant "is unable to work with much chronic obstructive pulmonary disease."[2] Decision and Order at 4-5, 8; Director's Exhibit 29. The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that this opinion was entitled to little weight, however, inasmuch as it was based on a pulmonary function study which was invalidated on review by Dr. Burki.[3] Decision and Order at 8; Director's Exhibits 29, 32; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *see Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). Moreover, contrary to claimant's contention, Dr. Myers's statement that claimant has a pulmonary impairment due to coal workers' pneumoconiosis is insufficient to establish total disability inasmuch as Dr. Myers further stated that claimant was able, from a pulmonary standpoint, to perform his usual coal mine employment. Director's Exhibit 26; *see Mazgaj, supra; Budash, supra*.

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[2] In addition, the record contains the medical reports of Drs. Jarboe, Myers, Powell and Wicker, each of whom opined that claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine employment. Director's Exhibits 12, 26, 28.

[3] Dr. Burki stated that this pulmonary function study was invalid because the equipment does not meet specifications, *i.e.*, the paper speed was too low, and that the curve shape indicates sub-optimal effort. Director's Exhibit 32.

Lastly, we reject claimant's argument that his age, education, work history and the progressive nature of pneumoconiosis support a finding that he is totally disabled inasmuch as these factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since claimant has failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c), a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded.[4] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief

[4] In light of our affirmance of the administrative law judge's findings that the medical evidence of record is insufficient to establish total disability pursuant to Section 718.204(c), a requisite element of entitlement, *see* discussion *supra*, we decline to address claimant's argument that the administrative law judge erred in his consideration of the evidence under Section 718.202(a)(1) and (a)(4) as any error in those findings would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge