BRB No. 05-0137 BLA

EVERETT WAYNE NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRO-LAND, INCORPORATED, d/b/a/ KEM COAL COMPANY	)	DATE ISSUED: 05/26/2005
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5593) of Administrative Law Judge Joseph E. Kane 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 thirteen years of coal mine employment, in accordance with the parties' stipulation. Decision and Order at 2; Hearing Transcript at 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20

C.F.R. Part 718 and found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[1] Decision and Order at 3-7. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.[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 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).

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*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the opinions of Drs. Baker and Hussain are sufficient to establish total disability. Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the

---

[1] Claimant filed his claim for benefits with the Department of Labor on February 21, 2001, which was denied by the district director on November 13, 2002. Director's Exhibits 2, 35. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 36.

[2] The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). *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); Decision and Order at 7; Director's Exhibits 10, 27; Employer's Exhibits 1, 3, 8.

With respect to the report by Dr. Baker, the administrative law judge rationally found that it was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as Dr. Baker "did not assess whether claimant would be prevented from engaging in his usual coal mine employment or comparable and gainful employment."[3] Director's Exhibit 27; Decision and Order at 7; *Fagg*, 12 BLR 1-77; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In addition, the administrative law judge did not err in declining to treat Dr. Baker's statement that claimant should limit further exposure to coal dust as equivalent to a finding of total disability. Director's Exhibit 27; Decision and Order at 7; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Lafferty*, 12 BLR 1-190; *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

The administrative law judge also permissibly gave little weight to Dr. Baker's opinion because the physician did not explain his diagnosis of impairment in light of the non-qualifying pulmonary function study results. *See Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 7; Director's Exhibit 27. Finally, we find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment to Dr. Baker's assessment of claimant's physical limitations. In this case, a comparison was not required, as the

---

[3] Dr. Baker diagnosed coal workers' pneumoconiosis based on an abnormal x-ray and a significant history of dust exposure. Dr. Baker further found that claimant has a Class I impairment based upon the "*Guides to the Evaluation of Permanent Impairment*," which corresponds to a 0% impairment of the whole person. *Guides to the Evaluation of Permanent Impairment* 107, Table 5-12 (5th ed. 2001). Dr. Baker found a "second impairment based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*," which provides that persons who develop pneumoconiosis should limit further exposure to the offending agent. Decision and Order 27. Dr. Baker observed that "this would imply that claimant is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." *Id.*

administrative law judge rationally determined that Dr. Baker's opinion did not contain a diagnosis of a respiratory or pulmonary impairment which the administrative law judge could compare to the exertional requirements of claimant's coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *see also Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

Regarding Dr. Hussain's opinion, the administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion was insufficient to meet claimant's burden of proof as Dr. Hussain did not opine that claimant was totally disabled.[4] *See Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, 9 BLR 1-4; Decision and Order at 7; Director's Exhibit 10. In addition, contrary to claimant's assertion, the administrative law judge did not err in not comparing Dr. Hussain's finding of a moderate impairment to the exertional requirements of claimant's usual coal mine work as a truck driver and dozer operator, as claimant failed to submit evidence of the exertional requirements of these jobs.[5] *Cornett*, 227 F.3d 569, 577, 22 BLR 2-107, 2-124; *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988).

Claimant's assertion that he is entitled to a presumption of total disability also lacks merit. Claimant's Brief at 6. Claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 2; Decision and Order at 4-6; *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *See Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed all of the medical opinion evidence and rationally found that this evidence could not carry claimant's burden of proof. Decision and Order at 7; Director's Exhibits 10, 27; Employer's Exhibits 1, 3; *Zimmerman*, 871 F.2d 564,

---

[4] Dr. Hussain diagnosed pneumoconiosis and a moderate impairment but opined that claimant retained the respiratory capacity to perform the work of a coal miner or perform comparable work in a dust free environment, based upon non-qualifying blood gas and pulmonary function studies. Director's Exhibit 10.

[5] On Form CM-913, claimant indicated that he was last employed as an equipment operator. He did not describe the nature of his duties. Director's Exhibit 4. Claimant testified at the hearing that he drove trucks and operated a dozer. He did not discuss the degree of physical exertion either job required. Hearing Transcript at 13.

12 BLR 2-254; *Taylor*, 12 BLR 1-83; *Trent*, 11 BLR 1-*26; Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Finally, citing the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), claimant argues that he is totally disabled for comparable and gainful work because of his age, work experience and education. Claimant's argument lacks merit. Initially, the Board's decision in *Bentley* is inapposite.[6] Moreover, under Section 718.204(b), the test for total disability is medical, not vocational. *See* 20 C.F.R. §718.204(b)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Thus, claimant's arguments are rejected. Consequently, as claimant makes no other specific challenge to the administrative law judge's credibility determinations with respect to the medical opinion evidence, we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67*; Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his 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. *See Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b), a crucial element of entitlement, we decline to reach claimant's arguments concerning Section 718.202. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is

---

[6] In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at 20 C.F.R. §410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(a), (b)(1).

affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge