BRB No. 07-0768 BLA

A.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION	)	
	)	
and	)	
	)	
MAPCO, INCORPORATED	)	DATE ISSUED: 05/28/2008
	)	
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

A.B., Louisa, Kentucky, *pro se*.

Paul E. Jones (Jones, Walters, Turner & Shelton P.L.L.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-5245) of Administrative Law Judge Jeffrey Tureck 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, 33 U.S.C. §901 *et seq.* (the Act). Director's

Exhibit 2. The administrative law judge credited claimant with twenty-four to twenty-five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish that claimant has pneumoconiosis or is totally disabled pursuant to 20 C.F.R. §§718.202, 718.204(b). Accordingly, as the administrative law judge found that claimant did not satisfy his burden of proof in establishing the elements of his claim, he denied benefits. Claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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, the claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 1-88 (6th Cir. 1997);[1] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

We first address the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b), 20 C.F.R. §718.204(b). Pursuant to that section, a miner is totally disabled if he has a pulmonary or respiratory impairment which prevents him from performing his usual coal mine work or engaging in comparable and gainful work. 20 C.F.R. §718.204(b)(1); *see generally Kolesar v. Y & O Coal Co.*, 760 F.2d 728, 7 BLR 2-211 (6th Cir. 1985); *Farmer v. Weinberger*, 519 F.2d 627 (6th Cir. 1975). Total disability can be demonstrated by

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

pulmonary function tests, arterial blood gas studies, a diagnosis of cor pulmonale with right-sided congestive heart failure, or a physician's opinion. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); 20 C.F.R. §718.204(b)(2). In this case, claimant's pulmonary function and blood gas study results exceed the levels set forth as disabling in the tables at Appendices B, C, 20 C.F.R. Part 718 App. B-C, and, therefore, are non-qualifying.[2] Director's Exhibits 10, 14; Employer's Exhibit 2. Accordingly, claimant has not shown total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Further, there is no diagnosis of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). Finally, the administrative law judge accurately stated that Drs. Broudy, Dahhan and Baker concluded that claimant has no respiratory or pulmonary impairment. Decision and Order at 5; Director's Exhibits 10, 14, 25; Employer's Exhibits 2-3. All three doctors also stated that claimant can return to coal mine employment or to a job with comparable physical demands. Director's Exhibits 10, 14; Employer's Exhibit 3. Thus, claimant cannot establish total disability in accordance with 20 C.F.R. §718.204(b)(2)(iv). Because claimant has not established that he is totally disabled, a necessary element of entitlement, we affirm the administrative law judge's denial of benefits as it is rational, supported by substantial evidence, and in accordance with law.[3] *Trent*, 11 BLR at 1-27; *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986); *Tischler v. Director, OWCP*, 6 BLR 1-1086 (1984).

[2]A "qualifying" study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

[3]As a result, we need not address the administrative law judge's findings regarding the existence of pneumoconiosis at Section 718.202, 20 C.F.R. §718.202, as any error therein would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge