BRB No. 08-0610 BLA

J.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWTON ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/20/2009
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-6027) of Administrative Law Judge Daniel L. Leland, rendered on a claim filed on September 22, 2005, 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). Director's Exhibit 2. The administrative law judge accepted employer's concession to twenty-seven years of coal mine employment and that claimant has coal workers' pneumoconiosis arising out of coal mine employment. The administrative law judge however found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response 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.[2] 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 20 C.F.R. Part 718 in a living miner's claim, 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. 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*).

Claimant generally contends that the administrative law judge erred in finding that he does not have a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in finding that Dr. Graeber's opinion, that continued exposure to coal dust would cause claimant's pulmonary condition to deteriorate, is not equivalent to a finding of total disability. Claimant contends that Dr. Graeber's opinion is in more definite terms than an opinion of "inadvisability of returning to coal mine employment" because the

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination of twenty-seven years of coal mine employment and his finding that claimant has coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

physician clearly indicated that claimant "must not return to such work." Claimant's Brief at 6, *citing* Claimant's Exhibit 1. We disagree.

> In a letter dated January 11, 2008, Dr. Graeber stated:
>
> > Working in a dusty environment has caused [the miner's] lungs to deteriorate and has caused lymph nodes to become enlarged. As a result, he must not work in any environment where there is any significant amount of dust. Working in such an environment would cause further deterioration of his lungs and cause further respiratory embarrassment and restriction for [the miner].

Claimant's Exhibit 1. Contrary to claimant's contention, the administrative law judge reasonably found that Dr. Graeber's statement that continued exposure to coal dust would cause further deterioration of claimant's pulmonary condition, is an opinion of the inadvisability of returning to coal mine employment and, therefore, is not equivalent to a finding of total disability. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order at 4; Claimant's Exhibit 1.

Moreover, the administrative law judge properly found that the remaining medical opinions of record do not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge correctly determined that Dr. Rasmussen's opinion, that claimant has no significant loss of lung function and that he retains the pulmonary capacity to do his usual coal mine job as a continuous miner operator, is insufficient to satisfy claimant's burden of proof under Section 718.204(b)(2)(iv). *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*); Decision and Order at 4; Director's Exhibit 11. Further, the administrative law judge rationally found Dr. Poling's conclusion, that claimant "is totally disabled as a result of his Black Lung Pulmonary status," neither well reasoned nor well documented. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 11; Director's Exhibit 12. We affirm, therefore, the administrative law judge's determination that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence.

Because claimant has not challenged on appeal the administrative law judge's finding that the evidence is insufficient to establish total disability at Section 718.204(b)(2)(i)-(iii), we affirm the administrative law judge's determination that claimant did not prove that he is totally disabled by any of the methods set forth in Section 718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, because claimant has failed to establish that he is totally disabled, an

essential element of entitlement, we must affirm the denial of benefits under Part 718. *See Perry*, 9 BLR at 1-2.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge