BRB No. 04-0264 BLA

DEVANCIL MOSES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRUSHY MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/23/2004
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Office), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (03-BLA-5092) of Administrative Law Judge Rudolf L. Jansen in a miner's 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 the miner with twenty years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 7-8. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 6-9. 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 Section 718.202(a)(4). Claimant's Brief at 2-3. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability pursuant to Section 718.204(b). *Id.* at 3. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To establish entitlement to benefits under Part 718 in a living miner's claim, a 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1]Claimant is Devancil Moses, the miner, who filed his claim for benefits on February 12, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of twenty years of coal mine employment and his findings that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's report, which is the only opinion contained in the record. Decision and Order at 8-9. In his June 16, 2001 opinion, Dr. Baker indicated that claimant has a "mild [impairment] with bronchitis and decreased PO2." Director's Exhibit 11. Later in this same report, Dr. Baker checked a box indicating that claimant has no pulmonary impairment and that claimant "has the respiratory capacity to perform the work of a coal miner or perform comparable work in a dust-free environment."[3] *Id.* The administrative law judge noted Dr. Baker's findings and stated that it is claimant's burden to demonstrate total respiratory disability. Decision and Order at 8. The administrative law judge concluded that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv) because the "record contains no physician[s'] opinions opining that Claimant is totally disabled." *Id.* at 8-9. We hold that the administrative law judge reasonably found that Dr. Baker's opinion is insufficient to establish total disability under Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Gee*, 9 BLR at 1-6. Accordingly, we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

Considering all of the relevant evidence pursuant to Section 718.204(b), the administrative law judge noted that the record contains no qualifying[4] pulmonary function studies or blood gas studies and no physician's opinion establishing total disability due to pneumoconiosis.[5] Thus, we hold that the administrative law judge properly concluded that claimant failed to establish total disability under Section 718.204 based on the medical evidence of record. Decision and Order at 9; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom.*

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[3]Because Dr. Baker found that claimant has no pulmonary impairment, Director's Exhibit 11, it was unnecessary for him to demonstrate knowledge of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *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 on recon.*, 9 BLR 1-104 (1986).

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[5]In addition, the record contains no evidence of cor pulmonale with right-sided congestive heart failure.

Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to Section 718.204(b), claimant contends that his hearing testimony provides evidence that "his impairment and conditions . . . rationally would preclude him from engaging in the work of a coal miner or similar work outside the coal industry" and that there is no evidence to refute claimant's allegation that he is totally disabled. Claimant's Brief at 3. Regarding claimant's hearing testimony, the Board has held that in a living miner's case, lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence.[6] *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1987); *Trent*, 11 BLR at 1-28. Because we affirm the administrative law judge's finding that the record does not contain medical evidence sufficient to establish total respiratory disability, we hold that any testimony provided by claimant regarding his physical limitations is insufficient to carry claimant's burden of proof at Section 718.204(b).

Claimant additionally contends that because he was receiving Social Security benefits at the time of the hearing, he is entitled to federal black lung benefits. Claimant's Brief at 3. Claimant asserts that "[w]hile these two entitlement programs do not have the same requirement to benefits," one who is determined to be totally disabled by the Social Security Administration's guidelines would be totally disabled under the black lung regulations. *Id.* Contrary to claimant's assertion, the Board has held that while determinations made by other agencies serve as relevant evidence to a Department of Labor adjudication, such determinations are generally not binding.[7] 20 C.F.R. §718.206; *Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994).

Based on the foregoing, we reject claimant's assertions and affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*). Because we affirm the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), a

[6]20 C.F.R. §718.204(d)(5) provides, "In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony."

[7]The record does not contain any evidence of a Social Security Administration award.

requisite element of entitlement under Part 718, we also affirm the administrative law judge's denial of benefits.[8] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[8]Because we affirm the administrative law judge's denial of benefits based on claimant's failure to establish total respiratory disability, we need not address claimant's assertions regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).