

BRB No. 05-0340 BLA

EDWARD FRAYNERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DELAWARE & HUDSON RAILROAD)	DATE ISSUED: 11/22/2005
)	
Employer-Respondent)	
)	
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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Harry T. Coleman, Carbondale, Pennsylvania, for claimant.

Anthony J. Piazza, III (Murphy, Piazza & Genello, P.C.), Scranton, Pennsylvania,
for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5150) of Administrative Law Judge Robert D. Kaplan, 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 reviewed claimant’s employment history and found that claimant had not established that he was a “miner” as defined in the Act. Nonetheless, the administrative law judge also considered the record to determine whether claimant would otherwise have been able to establish entitlement to benefits. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, because claimant had not established that he was a miner, the administrative law judge determined that

claimant could not establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge also found the evidence insufficient to establish that claimant is totally disabled due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore found that claimant has not established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On appeal, claimant asserts that he was a “miner” as defined in the Act. Claimant further asserts that the evidence establishes the existence of pneumoconiosis, and that his pneumoconiosis is due to his coal mine employment. Claimant also addresses the issue of total disability due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has indicated that he will not file a brief in this appeal.

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).

As an initial matter, we consider the administrative law judge’s findings regarding total disability pursuant to Section 718.204(b).¹ In his brief, claimant addresses the administrative law judge’s finding that total disability is not demonstrated by the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant describes the opinions of Drs. Levinson and Weiss.² Claimant then notes that Dr. Weiss based his

¹ We affirm the administrative law judge’s finding that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), or (iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The record contains three medical opinions addressing total disability. Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant in 2003. Dr. Levinson diagnosed pneumoconiosis and opined that claimant is unable to perform work activities comparable to his previous work for the railroad. Claimant’s Exhibit 1. Dr. Talati, who is Board-certified in Internal Medicine and Pulmonary Disease examined claimant in 2003 and performed a blood gas study and pulmonary function study; he diagnosed simple coal workers’ pneumoconiosis and opined that claimant has no pulmonary impairment. Director’s Exhibit 10. Dr. Weiss, who is Board certified in Internal Medicine and Pulmonary Disease, examined claimant in 2004 and reviewed Dr. Talati’s report. Dr. Weiss opined that claimant has no radiographic evidence of coal workers’ pneumoconiosis and that there is no evidence of a pulmonary impairment. Claimant’s Exhibit 1.

opinion on a “purported chest x-ray on July 16, 2004 interpreted by Dr. Robert Lutin,” Claimant’s Brief at 10, and claimant asserts that he did not “submit to [a] chest x-ray in July 2004” and that this error “should cast a tremendous pall upon the credibility of Dr. Weiss.” Claimant’s Brief at 9. Claimant also states that he:

presented for an examination on May 17, 2004. The record clearly reveals [claimant’s] date of birth as October 18, 1941 and therefore his age from purely mathematical calculations was age sixty-two (62). Despite this truth, Dr. Weiss in his report lists the Claimant’s age at age sixty (60).

Further confusion is created by the defense in this matter when one views page three of Dr. Weiss’ report under the title of “Physical Examination”. At the time of the Claimant’s visit, Dr. Weiss repeatedly informed the Claimant that “no technicians are available today to conduct pulmonary tests.” [A]nd therefore [claimant] was to be contacted the following day so that another appointment could be set up in order to conduct a pulmonary examination. No such contact was ever initiated by Dr. Weiss or the defense and as this Honorable Board can see from a review of Dr. Weiss’ report, no pulmonary test was ever conducted.

Claimant’s Brief at 10-11.

In considering these medical opinions, the administrative law judge noted that the pulmonary function study and the blood gas study relied upon by Dr. Levinson were non-qualifying “with regard to determining total disability under the Act, and Dr. Levinson failed to explain why he still found Claimant totally disabled in light of those non-qualifying test results.” Decision and Order at 11. The administrative law judge therefore accorded little weight to Dr. Levinson’s opinion regarding disability. Decision and Order at 11. The administrative law judge found that the opinions of no pulmonary impairment authored by Drs. Weiss and Talati, which are based on medical and occupational histories, as well as objective tests, are “reasoned and well-documented.” Decision and Order at 11. The administrative law judge concluded “The medical opinion evidence also fails to establish total disability.” Decision and Order at 12.

While claimant’s brief identifies piecemeal irregularities in the evidence and its development, it does not take issue with the administrative law judge’s treatment of Dr. Levinson’s opinion, the only medical opinion of record that could carry claimant’s burden. Because claimant has not challenged the administrative law judge’s determination that Dr. Levinson’s opinion is entitled to little weight, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we

affirm the administrative law judge's finding that total disability is not established pursuant to Section 718.204(b)(2)(iv).

Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b), one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), and we, therefore, affirm the administrative law judge's denial of benefits.

In light of the foregoing, we need not address claimant's other assertions regarding the administrative law judge's finding that claimant was not a miner, and his findings at Section 718.203.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge