

BRB No. 05-0400 BLA

REASON R. JOSEPH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 11/22/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6173) of Administrative Law Judge Joseph E. Kane 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).¹ The administrative law judge credited claimant with twenty years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found the record evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or

¹The administrative law judge noted that the district director had granted, on October 5, 2001, claimant's request that a prior claim, filed on May 6, 1992, be withdrawn. Decision and Order at 2 n.1; *see* Director's Exhibit 1. Claimant subsequently filed the instant claim on December 12, 2001. Director's Exhibit 3.

pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), respectively, and in finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) in this case. The Director, Office of Workers' Compensation Programs (the Director), responds, and urges the Board to affirm the administrative law judge's denial of benefits.

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'Keefe 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 that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv).² Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant argues that a finding of total disability is a determination to be made by an administrative law judge through consideration of the exertional requirements of claimant's usual coal mine employment in conjunction with a medical opinion assessing claimant's level of impairment. Claimant's Brief at 6-7. Claimant does not, however, identify any medical opinion upon which he relies to meet his burden at 20 C.F.R. §718.204(b)(2)(iv). Rather, claimant argues that, taking into consideration his condition and the exertional requirements of his usual coal mine employment as a belt man and car driver, "it is rational to conclude that the claimant's condition prevents him from engaging in his usual coal mine employment." Claimant's Brief at 7. The administrative law judge addressed the medical opinions of record, specifically those of Drs. Hussain and Baker. The administrative law judge properly found that neither Dr. Hussain nor Dr. Baker, claimant's treating physician, opined that claimant is totally disabled due to a

²We affirm the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

respiratory or pulmonary impairment or lacks the respiratory capacity to return to his former coal mine employment.³ Decision and Order at 7; *see* Director’s Exhibits 12, 13. The administrative law judge thus rationally found that claimant cannot establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge was therefore not obligated to consider these medical opinions in conjunction with the exertional requirements of claimant’s usual coal mine employment under *Cornett*. Substantial evidence in the record supports the administrative law judge’s finding that the medical opinions of record do not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant also contends that the administrative law judge “made no mention of the claimant’s age, education or work experience in conjunction with his assessment that the claimant was not totally disabled.” Claimant’s Brief at 7. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant next asserts that “pneumoconiosis is proven to be a progressive and irreversible disease,” and because a considerable amount of time has passed since he was first diagnosed with pneumoconiosis, it can be concluded that claimant’s condition has worsened, adversely affecting his ability to perform his usual coal mine employment or comparable and gainful work. Claimant’s Brief at 7. Claimant’s assertion lacks merit. An administrative law judge’s findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant asserts no further error in the administrative law judge’s finding that the evidence is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). We, therefore, affirm the administrative law judge’s finding. Because claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge’s denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. We, therefore, need not address claimant’s arguments regarding the administrative law judge’s finding that the evidence

³By report and questionnaire dated January 30, 2002, Dr. Hussain diagnosed no condition and indicated that claimant does not have an occupational lung disease related to his coal mine employment. Director’s Exhibit 13. Dr. Hussain also indicated that claimant has no pulmonary impairment. *Id.* Dr. Baker’s treatment records include diagnoses of coal workers’ pneumoconiosis and chronic bronchitis but do not include any diagnosis of impairment or disability. Director’s Exhibit 12. The administrative law judge correctly stated that neither Dr. Hussain nor Dr. Baker “opined that Claimant is totally disabled or lacks the respiratory capacity to return to his former coal mine employment.” Decision and Order at 7.

of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as any error therein could not change the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

BETTY JEAN HALL
Administrative Appeals Judge