

BRB No. 05-0555 BLA

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| THADDEUS CALDWELL |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| UNICORN MINING, INCORPORATED |) | DATE ISSUED: 11/30/2005 |
| |) | |
| and |) | |
| |) | |
| AMERICAN INTERNATIONAL SOUTH |) | |
| INSURANCE COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2003-BLA-5528) of Administrative Law Judge Joseph E. Kane 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, 30 U.S.C. §901 *et seq.* (the Act). Based on the date of filing, February 27, 2001, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Director's

Exhibit 2. The administrative law judge found that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), but insufficient to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find total disability established. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

Pursuant to Section 718.204(b), claimant contends that the opinion of Dr. Baker establishes total disability. We find no merit in claimant's contention. The record indicates that Drs. Burki and Hussain diagnosed the presence of coal workers' pneumoconiosis, but found that claimant was able to perform his former coal mine work, and that although Dr. Baker, who also diagnosed the existence of pneumoconiosis, indicated that claimant should avoid further coal dust exposure, he agreed that claimant could perform his previous coal mine work. Employer's Exhibits 3-5; Director's Exhibits 11, 12A, 26. Considering the opinions of Drs. Baker, Burki, and Hussain, along with the non-qualifying pulmonary function and the blood gas studies of record, the administrative law judge properly found that the evidence failed to establish total respiratory disability. Decision and Order – Denying Benefits at 6-11; Employer's Exhibits 3-5; Director's Exhibits 11, 12A, 26; *see White v. New White Coal Co.*, 23 BLR 1-1, 1-6 (2004); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). Contrary to claimant's argument, the administrative law judge properly found that Dr. Baker's opinion contraindicating further coal dust exposure was insufficient to establish a total respiratory

disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).¹ Likewise, contrary to claimant's argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant to determining the miner's ability to perform comparable and gainful work, not to establishing whether claimant is totally disabled from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(2)(iv); *White*, 23 BLR at 1-6-7; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Nor, contrary to claimant's assertion, can total disability be presumed on the basis of a diagnosis of simple pneumoconiosis. *See* Claimant's Brief at 5, 6; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *White*, 23 BLR 1-7 n.8. Accordingly substantial evidence supports the administrative law judge's finding that the medical evidence failed to establish total respiratory disability. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish the presence of a totally disabling respiratory impairment.²

¹ Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² The administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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