BRB No. 99-0333 BLA

VIRGIL L. KELLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Virgil L. Kelley, New Point, Indiana, *pro se*.

Cathryn Celeste Helm (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-350) of Administrative Law Judge Rudolf L. Jansen denying benefits 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 determined that claimant established six years and one month of qualifying coal mine employment. Decision and Order at 3-4. Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found, and the Director, Office of Workers' Compensation Programs (the Director) conceded, that the evidence of record was sufficient to establish the existence of

pneumoconiosis pursuant to 20 C.F.R.§718.202(a). Decision and Order at 6; Director's Exhibit 13; Hearing Transcript at 11, 62. The administrative law judge found, however, that the evidence of record was insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment or that he suffers from a totally disabling respiratory impairment due to coal mine employment pursuant to 20 C.F.R. §§718.203 and 718.204. Decision and Order at 6-8. Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits. The Director responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any 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*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director,*

[1] As the administrative law judge's finding that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is favorable to claimant and unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

OWCP, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, *supra*; *Miller*, *supra*; *Maggard*, *supra*. The administrative law judge, in the instant case, relied upon the Social Security Administration and employment records as well as claimant's testimony in determining the length of qualifying coal mine employment. Decision and Order at 3-4. We, therefore, affirm the administrative law judge's finding of six years and one month of coal mine employment as it is reasonable and supported by substantial evidence. *Vickery*, *supra*; *Hutnick v. Director, OWCP*, 7 BLR 1-326 (1984); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984).

With respect to 20 C.F.R. §718.203(c), the administrative law judge rationally determined that the evidence of record was insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found that the only physician of record, Dr. Farber, opined that claimant suffered from coronary artery disease caused by his cigar smoking and indicated that claimant had no respiratory problems associated with coal dust inhalation. Decision and Order at 6-7; Director's Exhibit 7. The administrative law judge further noted that the miner worked in limestone dust for approximately twenty-four years and was still working in that occupation at the time of the hearing. Decision and Order at 6; Hearing Transcript at 43, 57-59. The administrative law judge properly considered this evidence and acted within his discretion as fact finder in concluding that it was insufficient to establish claimant's burden of proof pursuant to Section 718.203(c) as none of the medical evidence of record indicated that the miner's pneumoconiosis was due to coal mine employment and there is evidence of other industrial irritants. *Smith v. Director, OWCP*, 12 BLR 1-156 (1989); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Perry*, *supra*. We therefore affirm the administrative law judge's evaluation of the evidence pursuant to Section 718.203(c) as it is supported by substantial evidence.

Furthermore, the administrative law judge in the instant case rationally found the evidence of record insufficient to establish that the miner was totally disabled due to pneumoconiosis. *Piccin*, *supra*. In considering whether total disability was established pursuant to Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as all of the pulmonary function and blood gas study

evidence of record produced non-qualifying values, total disability was not established pursuant to Section 718.204(c)(1)-(2).[2] Decision and Order at 7; Director's Exhibits 6, 8; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.* 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry*, *supra*. Additionally, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right sided congestive heart failure, which is necessary to establish total disability pursuant to Section 718.204(c)(3). Decision and Order at 7; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Based on the foregoing, we affirm the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1)-(3).

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

In considering whether total disability due to pneumoconiosis was established pursuant to Section 718.204(c)(4) and (b), the administrative law judge properly concluded that the only medical report of record did not indicate that claimant was suffering from a totally disabling respiratory or pulmonary impairment and that Dr. Farber opined that the only diagnosed condition that claimant was suffering from was due to cigar smoking. Decision and Order at 7-8; Director's Exhibit 7.[3] Thus, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to total disability and disability causation and permissibly concluded that the evidence fails to carry claimant's burden pursuant to Section 718.204(c)(4) and (b). Decision and Order at 7-8; Director's Exhibit 7; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash*, *supra*; *Gee*, *supra*; *Perry*, *supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law.[4]

Inasmuch as claimant has failed to establish that his pneumoconiosis arose out of coal mine employment and that he was totally disabled due to pneumoconiosis, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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[3] Dr. Farber concluded that claimant suffered from "coronary artery disease by history." However, the administrative law judge noted that no disability was associated with this malady. Decision and Order - Rejection of Benefits at 7.

[4] Since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge