BRB No. 04-0241 BLA

JOSEPH P. WARNETSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN SILT PROCESSING COMPANY	)	DATE ISSUED: 10/29/2004
	)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Rocco V. Valvano, Jr. (Mazzoni & Karam), Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5574) of Administrative Law Judge Robert D. Kaplan 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). After crediting the claimant with thirty years of coal mine

employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the existence of pneumoconiosis was not a contested issue in this case. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, concurring in claimant's contention that the administrative law judge erred in considering the issue of pneumoconiosis. The Director, however, responds in support of the administrative law judge's denial of benefits, contending that the administrative law judge properly found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. The record contains two pulmonary function studies conducted on November 1, 2001 and April 19, 2002. Director's Exhibit 15; Employer's Exhibit 1. Because both of these studies produced non-qualifying results both before and after the administration of a bronchodilator, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

In his consideration of the medical opinion evidence, the administrative law judge permissibly found that Dr. Levinson's diagnosis of a mild pulmonary impairment was insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983); Decision and Order at 10; Director's Exhibit 12. Dr. Dittman, the only other physician to address the extent of claimant's pulmonary impairment, opined that claimant was not totally disabled from a respiratory standpoint. Employer's Exhibit 1. Inasmuch as it is

[1] Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (b)(2)(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also note that the Director, Office of Workers' Compensation Programs, has stipulated to the existence of pneumoconiosis. Director's Brief at 3 n.3.

supported by substantial evidence,[2] we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*).

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

[2] We reject claimant's contention that the administrative law judge erred in not considering his testimony. Where there is medical evidence supportive of a finding of total disability, claimant's testimony is relevant and must be considered by the administrative law judge. *See* 20 C.F.R. §718.204(d)(5); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Because the administrative law judge found no credible medical evidence supportive of a finding of total disability, he was not required to consider claimant's lay testimony. We also note that the administrative law judge summarized claimant's testimony in his Decision and Order. *See* Decision and Order at 3.