BRB No. 04-0275 BLA

DILL E. ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BENHAM COAL 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 – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

H. Kent Hendrickson (Rice, Hendrickson & Williams), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-5432) of Administrative Law Judge Joseph E. Kane issued 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). This case involves a subsequent claim filed May 4, 2001. *See* 20 C.F.R. §725.309. The administrative law judge found that claimant's prior claim was finally denied on August 22, 1990. *See* Director's Exhibit 1. The administrative law judge then considered whether the new evidence submitted since the prior denial was sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge found the new medical evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203. The administrative law judge thus determined that claimant established a change in

an applicable condition of entitlement at 20 C.F.R. §725.309. Examining the evidence in its entirety, however, the administrative law judge found that it failed to establish total pulmonary or respiratory disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant relies on the opinion of Dr. Baker in arguing that the administrative law judge erred in finding the record evidence insufficient to establish total disability at 20 C.F.R. §718.204(b). 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 not filed a brief 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 (2000). 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*).

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Contrary to claimant's arguments, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total respiratory or pulmonary disability. Specifically, the administrative law judge found that Dr. Baker's opinion was neither reasoned nor documented, as the underlying objective evidence, as well as the physical findings listed, did not support Dr. Baker's conclusion. Director's Exhibit 12; Decision and Order at 11.

Because claimant had worked in a dusty environment, he asserts that Dr. Baker's opinion establishes total disability where the doctor stated that claimant's impairment "would imply [that claimant] is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 12; Brief for Claimant at 6. The law is clear, however, that this opinion by Dr. Baker amounts to no more than a recommendation against further exposure to coal mine dust and is inadequate to establish total pulmonary or respiratory disability under the Act. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12

BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Claimant relies upon *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984) to argue that the administrative law judge should have considered claimant's age, education, and work experience. 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, 488-90 (6th Cir. 1995).

Claimant next asserts that the administrative law judge should have compared the Class I impairment rating contained in Dr. Baker's report to the exertional requirements of claimant's usual coal mine employment. The administrative law judge rationally found, however, that Dr. Baker failed to explain how a Class I impairment rendered claimant totally disabled since a Class I impairment does not indicate respiratory or pulmonary disability and none of the credible pulmonary function studies or blood gas studies of record was qualifying. *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983); Decision and Order at 9, 11, 12.

Claimant next argues that Dr. Alexander's opinion may be sufficient to invoke the interim presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §727.203(a), citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984). Claimant is mistaken in two respects. First, Dr. Alexander did not diagnose any impairment, rather, he interpreted an x-ray as positive for pneumoconiosis 2/1 pp. *See* Claimant's Exhibit 1. Second, the *Meadows* case, upon which claimant relies, involved the regulations at 20 C.F.R. Part 727, which are not applicable to this case.

Based on the foregoing, we hold that the administrative law judge's finding, that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on the evidence of record, is supported by substantial evidence and we affirm it. Because claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we further affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge