

BRB No. 04-0499 BLA

JESSE E. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 10/21/2004
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jesse E. Johnson, Myra, Kentucky, *pro se*.

Sarah M. Hurley (Howard M. 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order (2003-BLA-5760) of Administrative Law Judge Daniel J. Roketenetz 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 found

---

<sup>1</sup>Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged this appeal on March 12, 2004, stating that the case would be reviewed under the general standard of review.

seven and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4-8. After determining that the claim was a request for modification of a denied subsequent claim,<sup>2</sup> the administrative law judge considered the record *de novo* and found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Decision and Order at 3-4, 8-15. The administrative law judge further found, however, that the evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) or disability causation pursuant to 20 C.F.R. §718.204(c). Decision and Order at 15-19. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly weighed the evidence of record but asserts that the case must be remanded so claimant can be provided with a complete pulmonary examination as required by the statute and regulations.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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

---

<sup>2</sup>Claimant filed his initial claim for benefits on April 21, 1972, which was finally denied by the district director on September 4, 1980, as claimant failed to establish the existence of totally disabling pneumoconiosis. Director's Exhibit 1. Claimant filed another claim on February 17, 1998, which was denied by the district director on June 17, 1998. Director's Exhibits 2, 14. Claimant requested modification on March 9, 1999, which was denied by the district director on September 8, 2000. Director's Exhibits 15, 27. Claimant filed a second modification request on September 5, 2001, which was denied on November 26, 2001. Director's Exhibits 26, 28. Claimant filed a third request for modification on October 28, 2002, which was denied by the district director on December 24, 2002. Director's Exhibits 35, 41. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 42.

<sup>3</sup>As the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4) are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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 Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge denying benefits must be vacated and the case remanded to the administrative law judge for further consideration.<sup>4</sup>

In addressing the length of coal mine employment, the administrative law judge rationally concluded that claimant established seven and one-half years of qualifying coal mine employment. Decision and Order at 4-8. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, 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*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. The administrative law judge, in the instant case, relied upon the affidavits of co-workers, 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 4-8. We, therefore, affirm the administrative law judge’s finding of seven and one-half years of coal mine employment as it is reasonable and supported by substantial evidence. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Vickery*, 8 BLR 1-430; *Hutnick v. Director, OWCP*, 7 BLR 1-326 (1984); *Niccoli v. Director, OWCP*, 6

---

<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. See Director’s Exhibits 1, 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

BLR 1-910 (1984).

With respect to the merits, the administrative law judge rationally found that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment.<sup>5</sup> See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). He permissibly found that the evidence of record was insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii) as the qualifying pulmonary function studies were unreliable and the remaining pulmonary function study and blood gas study evidence was non-qualifying.<sup>6</sup> *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Kuchwara*, 7 BLR 1-167; Decision and Order at 16-17; Director's Exhibits 1, 9, 18, 19, 36, 37. The administrative law judge rationally determined that the November 1, 2001 and March 6, 1999 pulmonary function studies were entitled to little probative value as they were invalidated by Dr. Burki because the flow volume loops indicated less than optimal effort, cooperation and comprehension. Decision and Order at 16; Director's Exhibits 18, 19, 36, 37; *Winchester*, 9 BLR 1-177; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara*, 7 BLR 1-167. He further properly found that there is no evidence of cor pulmonale with right sided congestive heart failure in the record pursuant to Section 718.204(b)(2)(iii). See 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 17; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Moreover, the administrative law judge considered the medical opinion evidence of record and rationally concluded that the opinions were insufficient to satisfy claimant's burden of proof pursuant to Section 718.204(b)(2)(iv). Decision and Order at 17-18; Director's Exhibits 1, 7, 26, 34; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge acted within his discretion in according the opinions of Drs. Kumar and Johnson little weight as they were not probative of claimant's current condition. Decision and Order at 17-18; Director's Exhibit 1; *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-209 (6th Cir. 1989); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge further properly considered the quality of the evidence in determining whether the opinions are supported by the underlying documentation and

---

<sup>5</sup>The administrative law judge correctly concluded that the record did not contain any evidence of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 12.

<sup>6</sup>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 and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2) (i), (ii).

adequately explained and thus permissibly found that it was insufficient to satisfy claimant's burden of proof as the credibility of the opinion supportive of claimant's burden, *i.e.*, the opinion of Dr. Sundaram, was entitled to little probative value since his opinion was based on claimant's subjective complaints with no clinical or laboratory basis. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic*, 8 BLR 1-46; Decision and Order at 18; Director's Exhibits 7, 26, 34. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Additionally, the lay testimony of record, without credible, corroborating medical evidence, is insufficient to establish a totally disabling respiratory or pulmonary impairment in a living miner's case and therefore could not satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Trent*, 11 BLR 1-26; *Fields*, 10 BLR 1-19; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985); *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984). Consequently, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence and is in accordance with law.

Since the administrative law judge properly found Dr. Sundaram's report undocumented and unreasoned, the Director urges that a remand is required in this case so that the Department of Labor can fulfill its statutory duty to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.406; *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). The administrative law judge discredited the only medical evidence of record which addresses the issue of total disability. Since the record contains no credible evidence sufficient to allow claimant an opportunity to prove his claim, we vacate the administrative law judge's denial of benefits and grant Director's motion to remand this case to the district director to furnish claimant with a complete, credible pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101,

725.401, 725.406; *Hodges*, 18 BLR 1-84; *Petry*, 14 BLR 1-98; *Hall*, 14 BLR 1-51; *see also Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide claimant with a complete pulmonary examination and for further consideration of the merits of this claim in light of the new evidence.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge