BRB No. 12-0137 BLA

MALCOLM ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 10/12/2012
	)	
Employer/Carrier-Respondents	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-5644) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on July 30, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge accepted employer's stipulation to thirty-three years of coal mine employment, but found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that, because claimant failed to establish a total respiratory disability, he was not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), even though he established at least fifteen years of qualifying coal mine employment.[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that "Dr. Baker's diagnosis of pneumoconiosis and bronchial asthma provides the necessary burden of proof for this claim." Claimant's Brief at 2. Claimant also contends that claimant "is a career coal miner with 33 years in the coal mine industry and has sufficient time to cause the lung disease and has the medical evidence supporting his claim for coal workers [sic] pneumoconiosis total disability [sic] and should therefore be awarded benefits." *Id.* Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not responded to 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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee*

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[1] Qualifying coal mine employment consists of employment in underground coal mining or in coal mining that occurs in conditions substantially similar to those in underground coal mining. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

v. W.G. Moore and Sons, 9 BLR 1-4 (1986)(en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. In order to rebut the Section 411(c)(4) presumption, it must be shown that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See* 30 U.S.C. §921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556(a)(2010).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed. Contrary to claimant's argument, the administrative law judge properly found that total respiratory disability was not established pursuant to Section 718.204(b) and that claimant was not, therefore, entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). Specifically, the administrative law judge properly found that the evidence relevant to the issue of total respiratory disability included a non-qualifying pulmonary function study and a non-qualifying blood gas study, which were insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i), (ii). The administrative law judge also properly found that there was no evidence of cor pulmonale with right-sided congestive heart failure relevant to Section 718.204(b)(2)(iii). Finally, the administrative law judge properly found that the medical opinion evidence did not establish total respiratory disability, as the only physician of record, Dr. Baker, opined that claimant was not disabled from a respiratory standpoint. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14; Director's Exhibit 9. As there was no evidence of record in this case sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that claimant was not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), and could not establish entitlement under 20 C.F.R. Part 718.[3] *Trent*, 11 BLR at 1-27. Consequently, these findings are affirmed.

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[3] The administrative law judge also properly found that pneumoconiosis, an essential element of entitlement pursuant to Part 718, was not established. In so finding, the administrative law judge properly found that the x-ray evidence did not establish pneumoconiosis because the October 14, 2008 x-ray read as positive by Dr. Baker was

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

BETTY JEAN HALL
Administrative Appeals Judge

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reread as negative by three better qualified readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); Decision and Order at 11. The administrative law judge further properly found that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), as there was no biopsy evidence in this living miner's claim. The administrative law judge properly found that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(3), as the presumptions contained therein were not applicable. Further, the administrative law judge properly found that clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), as Dr. Baker relied on his positive reading of an x-ray that was subsequently reread negative by better qualified readers. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge also found that Dr. Baker did not attribute claimant's "bronchial asthma" to coal mine employment, noting that the doctor opined that there was "no definite legal pneumoconiosis present." 20 C.F.R. §718.201(a)(2); Decision and Order at 12; Director's Exhibit 9 at 2.