BRB No. 99-1298 BLA

LARRY W. ELLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Larry W. Ellis, Madisonville, Kentucky, *pro se*.

Amy E. Wilmot (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-106) of Administrative Law Judge Donald W. Mosser 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, and the parties stipulated to, twenty-one years of coal mine employment and, based on the

date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3, 9; Hearing Transcript at 8. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Decision and Order at 9-14. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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 are 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 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*).

[1]Claimant filed his claim for benefits on September 9, 1997. Director's Exhibit 1.

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 is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c).[2] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as all of the valid pulmonary function studies[3] and all of the blood gas study evidence was non-qualifying,[4] total disability was not established pursuant to Section 718.204(c)(1)-(2). *See* Decision and Order at 5, 13;

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

[3]The administrative law judge rationally determined that the pulmonary function studies dated September 3, 1992 and November 17, 1997 were invalid as Drs. Younes and Burki concluded that these studies were unacceptable due to inadequate patient effort. See Decision and Order at 5, 13; Director's Exhibits 13, 24, 26; *Trent v. Director*, OWCP, 11 BLR 1-26 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

[4]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), (2).

Director's Exhibits 13, 24-26, 29; Employer's Exhibits 1, 2; *Winchester v. Director,* OWCP, 9 BLR 1-177 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 13; *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).

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge addressed all of the relevant medical opinion evidence of record and reasonably determined that the evidence was insufficient to establish total disability based on his conclusion that the opinion of Dr. Selby, that claimant is not totally disabled, outweighed the contrary opinions of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 13-14; Director's Exhibits 13, 24, 25, 30; Employer's Exhibits 1, 3, 5-8. The administrative law judge acted within his discretion, as factfinder, when he accorded greater weight to the opinion by Dr. Selby as it was considerably more recent then the other opinions, the physician was highly qualified, his opinion was in accordance with the objective evidence of record and the opinion was supported by the opinions of Dr. Powell, an examining physician, and Drs. Fino and Branscomb, reviewing physicians, who are also highly qualified.[5] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal* Co., 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields, supra*; *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller, supra*; *Piccin, supra*; Decision and Order at 13-14; Director's Exhibits 13, 24, 25, 30; Employer's Exhibits 1, 3, 5-8.

Claimant has the general burden of establishing entitlement and bears the risk of non-

[5]The record does not indicate that Drs. Joyce, Powell, Traughber and Younes have any special qualifications. Director's Exhibits 13, 24, 25, 30. Dr. Houser is Board-certified in internal medicine and pulmonary diseases. Director's Exhibit 24. Dr. Selby is a B-reader and is Board-certified in internal medicine and pulmonary diseases. Employer's Exhibit 1. Dr. Branscomb is a B-reader and is Board-certified in internal medicine. Employer's Exhibit 7. Dr. Fino is a B-reader and is Board-certified in internal medicine and pulmonary diseases. Employer's Exhibit 6.

persuasion if his evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally relied on the medical opinion of Dr. Selby, that claimant has no respiratory or pulmonary disability due to his coal mine employment, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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. *See Clark, supra*; *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 finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.[6]

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Anderson, supra*; *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]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

JAMES F. BROWN
Administrative Appeals Judge