

BRB No. 06-0377 BLA

COY G. FREEMAN)
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 Claimant-Petitioner)
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 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/22/2006
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Coy G. Freeman, Williamsburg, Kentucky, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2005-BLA-5035) 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.A.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with fifteen years of qualifying coal mine employment, and adjudicated the claim, filed on October 25, 2002, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that this case involved a request for modification of the district director's prior denial of benefits,¹ and found that the weight

¹ On June 27, 2003, the district director denied benefits, finding that claimant established two years of qualifying coal mine employment and the existence of pneumoconiosis, but failed to establish that his pneumoconiosis arose out of coal mine employment or was totally disabling. Decision and Order at 3; Director's Exhibit 17.

of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits, despite finding that claimant had established both a mistake in a determination of fact and a change in conditions pursuant to 20 C.F.R. §725.310.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 in accordance with 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).

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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding the evidence of record insufficient to establish total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(i)-(iv), the administrative law judge initially determined that the record contained no evidence of complicated pneumoconiosis, thus the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. Decision and Order at 7. The administrative law judge accurately determined that the two pulmonary function studies of record were either non-

Claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310 on March 31, 2004. Decision and Order at 3; Director's Exhibits 18-19.

conforming and thus unreliable² or produced non-qualifying³ values at Section 718.204(b)(2)(i), Decision and Order at 8, Director's Exhibits 10, 12; the single blood gas study of record produced non-qualifying values at Section 718.204(b)(2)(ii), Decision and Order at 8, Director's Exhibit 10; the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), Decision and Order at 8; and the sole medical report of record considered at Section 718.204(b)(2)(iv) was insufficient to establish that claimant's respiratory or pulmonary condition prevented him from engaging in his usual coal mine employment or comparable and gainful work pursuant to Section 718.204(b)(1), as Dr. Baker indicated that the results of claimant's objective tests were within normal limits, and that the degree of severity of claimant's impairment was "minimal or none with Coal Workers' Pneumoconiosis 1/0." Decision and Order at 9; Director's Exhibit 10; *see Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26. Consequently, we affirm the

² The administrative law judge determined that the pulmonary function study obtained on February 10, 2003 was unreliable because it was not accompanied by three tracings. Decision and Order at 8; Director's Exhibit 12; *see* 20 C.F.R. §718.103; 20 C.F.R. Part 718, Appendix B; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Estes v. Director, OWCP*, 7 BLR 1-414 (1986).

³ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii). Because the regulations do not specify qualifying pulmonary function study values for a miner over the age of 71, and claimant's two tests were administered when he was age 84, the administrative law judge reasonably extrapolated the appropriate table values pursuant to *Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1996)(unpub.) and *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (Nov. 24, 2000)(unpub.). Decision and Order at 8 n. 5. Additionally, the record reflects that both of claimant's pulmonary function studies yielded non-qualifying values for a miner of claimant's height at age 71. Director's Exhibits 10, 12.

administrative law judge's denial of benefits and need not reach the issue of disability causation.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge