BRB Nos. 08-0141 BLA
and 08-0141 BLA-A

J. H. Claimant-Petitioner Cross-Respondent v. PANTHER MINING, LLC and ANERICAN INTERNATIONAL SOUTH INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/18/2008 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, 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 and employer cross-appeals the Decision and Order – Denial of Benefits (06-BLA-5755) of Administrative Law Judge Larry S. Merck on a claim[1] 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 initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-eight years. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4)[2] but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that the medical opinion evidence established total respiratory disability under Section 718.204(b)(2)(iv). In response, employer/carrier (employer) urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in claimant's appeal.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and in according less weight to the medical opinion of Dr. Dahhan. Claimant has not filed a response brief to employer's cross-appeal. The Director has filed a letter indicating his intention not to participate in the cross-appeal.[3]

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

---

[1] Claimant filed an application for benefits on August 8, 2005. Director's Exhibit 2.

[2] The administrative law judge noted that he need not separately determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) because his finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) subsumed that inquiry. *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[3] We affirm the administrative law judge's finding that the miner worked in qualifying coal mine employment for twenty-eight years because this finding is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

In order to establish entitlement to benefits in a living miner's claim 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; *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). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant argues that, in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work as a roof bolter, miner operator, and a scoop operator in conjunction with the medical reports[5] assessing a disability. Claimant also contends that, considering the heavy concentrations of dust exposure he received on a daily basis, his condition precludes him from engaging in his usual employment in such a dusty environment. The administrative law judge correctly found that the two physicians of record, Drs. Baker and Dahhan, opined that claimant retained the physiological capacity to continue his previous coal mine employment and did not suffer from any respiratory or pulmonary impairment. The administrative law judge, therefore, properly concluded that the medical opinion evidence was insufficient to demonstrate that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997) (consideration of miner's exertional requirements not necessary where physician's opinion finding no impairment is credited); Decision and Order at 11-12. Accordingly, we reject claimant's argument and affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability

[4] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[5] Claimant also contends that the administrative law judge failed to compare the medical opinion of Dr. Hussain, who diagnosed a mild impairment, to the exertional requirements of claimant's usual coal mine work. A review of the record, however, does not reveal a report from Dr. Hussain.

pursuant to Section 718.204(b)(2)(iv).[6] *See White*, 23 BLR at 1-6-7; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*).

In addition, we note that the administrative law judge properly considered the opinions from Drs. Baker and Dahhan along with the one pulmonary function study of record and the one arterial blood gas study of record, both of which yielded non-qualifying values. Decision and Order at 15. After weighing this evidence together, the administrative law judge rationally found that the evidence of record failed to affirmatively establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because claimant has not otherwise challenged the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2). *See Fields*, 10 BLR at 1-19; *Gee*, 9 BLR at 1-4; *see also White*, 23 BLR at 1-7.

We affirm, therefore, the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv) as this determination is rational, contains no reversible error, and is supported by substantial evidence. Because claimant has failed to satisfy his burden of establishing total respiratory disability, a requisite element of entitlement under Part 718, an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of the foregoing, we need not address the merits of employer's cross-appeal challenging the administrative law judge's determination under Section 718.202(a)(4).

[6] We also reject claimant's argument that total disability can be established under 20 C.F.R. §718.204(b)(2)(iv) because his condition precludes further exposure to heavy dust. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge