BRB No. 10-0128 BLA

BILLY D. HAMMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/30/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Billy D. Hammond, Benton, Illinois, *pro se*.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-BLA-06015) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim filed on December 2, 2005, 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). Based on a concession by the Director, Office of Workers' Compensation Programs (the Director), that claimant suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant had established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Adjudicating the claim on the merits at 20 C.F.R. Part 718, the administrative law judge determined that the former administrative law judge's finding of four and one-half years of coal mine employment was reasonable and supported by the

record. However, the administrative law judge determined that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.[1]

On appeal, claimant generally contends that he is entitled to benefits. The Director has filed a response, asserting that the administrative law judge's denial of benefits was properly based on his finding that claimant does not have a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The Director thus urges affirmance of the administrative law judge's Decision and Order Denying Benefits.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of totally disabling pneumoconiosis in cases where the miner has established fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). By Order issued on April 26, 2010, the Board permitted supplemental briefing by the parties in this case to address the impact, if any, of the 2010 amendments on this claim. *Hammond v. Director, OWCP*, BRB No. 10-0128 BLA (Apr. 26, 2010) (unpub. Order). Claimant did not file a response to the Board's Order. The Director responded, maintaining that the amendments to the Act do not affect the outcome of this case because claimant was previously credited with "slightly over four years of coal mine employment" and "[c]laimant has consistently alleged fewer that [ten] years of coal mine employment." Director's Supplemental Brief at 1. In addition, the Director notes that claimant has not established total disability, pursuant to 20 C.F.R. §718.204(b)(2), as required to invoke the Section 411(c)(4) presumption. *Id*.

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 and is in accordance with law.[2] *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 supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated

[1] This administrative law judge decided this case on the record pursuant to claimant's request and the agreement of the Director, Office of Workers' Compensation Programs. Decision and Order at 2.

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

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 under 20 C.F.R. Part 718, claimant is required to establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 Denying Benefits 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. Considering all of the evidence of record on total disability, the administrative law judge rationally determined that there was "no apparent medical basis" for Dr. Kumar's notation of "[c]oal workers' pneumoconiosis (complicated)" in his March 21, 2006 preoperative examination. *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Trent*, 11 BLR 1-26; Decision and Order at 3; Claimant's Exhibit 2. Consequently, as the record contains no credible evidence of complicated pneumoconiosis, claimant cannot establish total disability by means of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1). Furthermore, the administrative law judge correctly found that none of the valid pulmonary function studies was qualifying and that none of the blood gas studies was qualifying. Decision and Order at 3. The administrative law judge also correctly found that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. *Id*. Thus, the administrative law judge properly found that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii) and these findings are affirmed as supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

In considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that none of physicians of record opined that claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 4-5. In a 1980 report, Dr. Chiou did not indicate whether claimant had a respiratory disability and did not state whether claimant could do his coal mine employment. Director's Exhibit 1. In a 1987 report, Dr. Levinson opined that claimant did not have a respiratory disability that would keep him from performing coal mine employment. *Id*. In his 1998 report, Dr. Sanjabi did not assess claimant's pulmonary limitations and subsequently, in 2002, Dr. Sanjabi opined that claimant's pulmonary function study indicated a limitation, but the doctor did not address whether claimant had

a pulmonary impairment that would preclude him from performing his last coal mine employment. Director's Exhibits 2, 3.

Dr. Cohen examined claimant on October 31, 2006 and opined that, while claimant had an obstructive defect, claimant retained the pulmonary capacity to perform his last job in the coal mines. Director's Exhibits 5, 30. Dr. Bittle examined claimant on April 16, 2008 and opined that claimant had dyspnea, but the doctor did not address whether claimant would be precluded from performing his last coal mine employment. Claimant's Exhibit 1. In addition, the record contains reports from Drs. Kumar and Hammond, both of whom evaluated claimant for approval for surgery, but neither doctor addressed whether claimant would be precluded from performing his last coal mine employment. Claimant's Exhibits 2-5, 9.

Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because none of the medical opinions indicates that claimant has a totally disabling respiratory impairment, the administrative law judge reasonably found that claimant failed to establish total disability by medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Perry*, 9 BLR at 1-2; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 5. Inasmuch as the administrative law judge's analysis of the evidence is rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not establish total disability, based upon the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 2-116, 2-120 (7th Cir. 1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Because we have affirmed the administrative law judge's findings that the medical evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement under 20 C.F.R. Part 718, we must also affirm the denial of benefits, as supported by substantial evidence. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Further, in light of our affirmance of the administrative law judge's finding that total disability was not established, we hold that invocation of the Section 411(c)(4) presumption is unavailable.[3] 30 U.S.C. §921(c)(4).

[3] Moreover, the recent amendments to the Black Lung Benefits Act do not apply to the instant case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge