

BRB No. 97-0549 BLA

RONALD MELTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNICORN MINING, INCORPORATED)	DATE ISSUED: _____
)	
Employer-Respondent)	
)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Deron L. Johnson (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-BLA-2360) of Administrative Law Judge Gerald M. Tierney 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).¹ The administrative law judge credited claimant with twenty-two years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total pulmonary disability under 20

¹Claimant's appeal in BRB No. 96-1569 BLA, filed before any decision had been issued by the Office of Administrative Law Judges in connection with the instant claim, was dismissed by the Board by Order dated September 23, 1996.

C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the x-ray and medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4), and that the disease arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b). Claimant further relies on Dr. Baker's medical opinion, asserting that it is credible and that it establishes that claimant is totally disabled. Claimant also asserts his entitlement to benefits pursuant to the interim presumption provided at 20 C.F.R. §727.203. Employer responds, and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement.

Claimant relies on Dr. Baker's medical opinion to meet his burden to establish that he is totally disabled pursuant to Section 718.204(c). Claimant argues that Dr. Baker's opinion is credible and that the report, by itself, is "sufficient for invoking the presumption of total disability." Claimant's Brief at 6.

Claimant's contention lacks merit. Of the five physicians of record, Drs. Anderson, Wright and Broudy opined that claimant retains the pulmonary or respiratory capacity to perform the work of a coal miner or comparable and gainful work, Director's Exhibits 13, 14, Employer's Exhibit 1, while Dr. Wicker indicated that he was unable to assess claimant's respiratory capacity, Director's Exhibit 15. This evidence does not support claimant's burden at Section 718.204(c)(4). Further, Dr. Baker, upon whose opinion claimant relies, explained that claimant should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and chronic bronchitis and that claimant may have difficulty doing sustained manual labor on an eight-hour basis even in a dust-free environment. Director's Exhibit 12. Considering this evidence, the administrative law judge found, "On the disability question, only Dr. Baker said that the Claimant is disabled. His opinion cannot be credited over that of the four other physicians who found no pulmonary impairment for two reasons. Among the physicians who found no impairment was Dr. Anderson, a Board-certified pulmonary expert. The test scores relied on by Dr. Baker were bettered in later tests." Decision and Order Denying Benefits at 5. Notwithstanding the administrative law judge's characterization of Dr. Baker's opinion as

finding that claimant is totally disabled, Dr. Baker's opinion cannot carry claimant's burden at Section 718.204(c)(4). Specifically, the Board has held that a physician's opinion that a claimant should not return to work in a dusty environment is not adequate to establish his total disability under the Act. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, Dr. Baker's opinion that claimant may have difficulty performing sustained manual labor on an eight-hour basis is not equivalent to a finding that the miner is totally disabled from performing his usual coal mine employment or comparable and gainful work, inasmuch as Dr. Baker's statement is equivocal. Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence is insufficient to establish claimant's total disability, 20 C.F.R. §718.204(c)(4). Further, inasmuch as the pulmonary function study and blood gas study evidence is entirely non-qualifying, and there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure, claimant cannot meet his burden of proof under 20 C.F.R. §718.204(c)(1)-(3). We thus further affirm the administrative law judge's finding that claimant has failed to establish total disability under Section 718.204(c) in the instant case.²

In light of our affirmance of the administrative law judge's finding that claimant has failed to establish total disability under Part 718, an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the instant case, as a finding of entitlement is precluded. *Trent, supra; Perry, supra*. We thus decline to address claimant's contention that he has established the existence of pneumoconiosis.

²Contrary to claimant's contention, the instant claim, filed after March 31, 1980, is properly considered under 20 C.F.R. Part 718, 20 C.F.R. §718.2, and not pursuant to 20 C.F.R. §727.203. Further, claimant is not entitled to the benefit of any presumption in meeting his burden at 20 C.F.R. §718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge