BRB No. 05-0218 BLA

DAVID D. HERGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SOUTHERN CORPORATION	)	DATE ISSUED: 06/24/2005
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David D. Hergan, Pittston, Pennsylvania, pro se.

J. Lawson Johnston (Dickie, McCaney & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2004-BLA-5398) of Administrative Law Judge Robert D. Kaplan 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 credited claimant with three and one-half years of qualifying coal mine employment, and adjudicated this claim, filed on March 12, 2003, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response 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. *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 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 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 8. The administrative law judge accurately determined that the two pulmonary function studies of record produced non-qualifying[1] values at Section 718.204(b)(2)(i); the two blood gas studies of record produced non-qualifying values at Section 718.204(b)(2)(ii); the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii); and the two medical opinions of record considered at Section 718.204(b)(2)(iv) were insufficient to establish that claimant's respiratory or pulmonary condition prevents him from

[1] 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).

engaging in his usual coal mine work or comparable and gainful work pursuant to Section 718.204(b)(1), as Dr. Talati opined that claimant has "no significant pulmonary impairment that precludes performing [his] last coal mine job," Director's Exhibit 15, and Dr. Levinson testified that claimant did not have "any pulmonary impairment from any cause," Employer's Exhibit 1 at 20. Decision and Order at 11-12; *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.*, 20 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 administrative law judge's denial of benefits and need not reach the issues of the length of claimant's qualifying coal mine employment and the existence of pneumoconiosis.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge