

BRB No. 03-0405 BLA

DEWAYNE ROBERTS)
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 Claimant-Petitioner)
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 v.)
)
 ANDALEX RESOURCES,) DATE ISSUED: 09/30/2003
) INCORPORATED
))
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 and)
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 ANDALEX RESOURCES,)
 INCORPORATED)
 c/o AIG RESOURCES)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) Decision and Order

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

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5360) 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.C. §901 *et seq.* (the Act).¹ The administrative law judge credited claimant with sixteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c). Although the administrative law judge noted that the amendments to the regulations are applicable to the instant case, he referred to the prior regulation citations in considering the issues of total disability and total disability due to pneumoconiosis.

³Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that Dr. Baker's opinion, considered in conjunction with the exertional requirements of his usual coal mine employment, is sufficient to establish total disability. Dr. Baker's November 8, 2001 report is the only relevant evidence of record. In his report, Dr. Baker opined that claimant suffers from minimal impairment. Director's Exhibit 10. In a form attached to his report, Dr. Baker opined that claimant does not suffer from an impairment and has the respiratory capacity to perform the work of a coal miner. *Id.* The administrative law judge noted that "[w]hen discussing the [c]laimant's impairment, Dr. Baker stated that any impairment was minimal and that the miner would have the respiratory capacity to perform his prior coal mining employment." Decision and Order at 6-7. The administrative law judge therefore concluded that "Dr. Baker, the only evaluating physician of record, found that the [c]laimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work." *Id.* at 8-9; *Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983)(administrative law judge properly found that doctor's opinion of a "mild" respiratory impairment establishes that respiratory problem is not totally disabling).

Since Dr. Baker opined that claimant has the respiratory capacity to perform the work of a coal miner, the administrative law judge was not required to make a comparison of Dr. Baker's opinions with the exertional requirements of claimant's usual coal mine employment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the disability assessment in Dr. Baker's report. In addition, we reject claimant's assertion that the administrative law judge erred by failing to consider claimant's age, education and work experience in his total disability analysis because these factors affect claimant's ability to obtain gainful employment. See 20 C.F.R. §718.204(b)(2)(iv). The fact that a miner would not be hired does not support a finding of total disability.⁴ *Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Therefore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR

⁴We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

1-1 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge