

BRB No. 00-0496 BLA

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| RANDY E. BELCHER |) | | |
| |) | | |
| Claimant-Petitioner |) | | |
| |) | | |
| v. |) | DATE | ISSUED: |
| |) | | |
| R & B COAL COMPANY, INCORPORATED) |) | | |
| |) | | |
| and |) | | |
| |) | | |
| MANALAPAN MINING COMPANY, |) | | |
| INCORPORATED |) | | |
| |) | | |
| 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

W. Stacy Huff (Huff Law Offices), Harlan, Kentucky, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (1998-BLA-1004) of Administrative Law Judge Robert L. Hillyard 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-three years of qualifying coal mine employment based on a stipulation by the parties and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the evidence was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) (2000) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.²

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).

In order to establish entitlement to benefits in a living miner's claim pursuant

¹ The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) (2000) and 718.204(c)(1)-(3) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 (2000). Failure of claimant 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. In considering the issue of total disability, the administrative law judge properly concluded that the evidence was insufficient to establish total disability as no physician of record offered an opinion sufficient to establish a totally disabling respiratory or pulmonary impairment.³ *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988), *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*; Decision and Order at 6, 9-10, 36. The administrative law judge fully discussed the opinion of Dr. Baker, who diagnosed a mild impairment, and properly determined that this opinion was insufficient to establish total disability as the physician concluded that the impairment would not prevent claimant from performing his usual coal mine employment. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); Decision and Order at 6, 9-10; Director's Exhibit 9-10. In addition, contrary to claimant's contention, opinions stating that claimant can perform his usual coal mine employment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, we reject claimant's argument that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education since the medical opinions do not establish the existence of a totally disabling respiratory impairment.⁴ See 20 C.F.R. §718.204 (2000); *Carson v.*

³ As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. See 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

⁴ Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are

Westmoreland Coal Co., 19 BLR 1-18 (1994); see also *Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner is totally disabled by a respiratory or pulmonary condition as it is supported by substantial evidence.⁵ Claimant's failure to establish total respiratory disability pursuant to Section 718.204(c) (2000) or 65 Fed. Reg. 80,049, to be codified at 20 C.F.R. §718.204(b), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718 and we need not address claimant's other arguments on appeal regarding the existence of pneumoconiosis at Section 718.202(a). *Anderson, supra*; *Trent, supra*. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) (2000) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. See also 20 C.F.R. §718.204(b)(1), (b)(2) (2000).

⁵ We reject claimant's general contention that the inadvisability of claimant's return to work in dusty conditions is sufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge