

BRB No. 06-0114 BLA

THOMAS L. STRUNK)
)
 Claimant-Petitioner)
)
 v.)
)
 A & S COAL COMPANY,) DATE ISSUED: 02/28/2006
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-Respondent)
)
 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 (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2004-BLA-5804) 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). The administrative law judge found that the record established a coal mine employment history of ten years. Decision and Order at 3. Considering the evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was unable to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of clinical pneumoconiosis established based on x-ray. Claimant also contends that inasmuch as the administrative law judge rejected Dr. Baker's diagnosis of clinical and legal pneumoconiosis as unreasoned, the Director, Office of Workers' Compensation Programs, (the Director) has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). 20 C.F.R. §725.405. Additionally, claimant contends that the administrative law judge erred in not finding total respiratory disability established. Employer responds and urges that the denial of benefits be affirmed. The Director responds, asserting that the administrative law judge erred in finding Dr. Baker's opinion unreasoned; however, even if the administrative law judge did not err in finding Dr. Baker's opinion on clinical and legal pneumoconiosis to be unreasoned, the Board should reject claimant's argument that the Director failed to provide claimant with a complete, credible pulmonary evaluation because Dr. Baker's opinion supports the administrative law judge's finding that claimant failed to establish total respiratory disability.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b) (3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any elements of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues that inasmuch as claimant's usual coal mine employment is as a foreman and repairman, "[i]t can be reasonably concluded that such duties involved the

claimant being exposed to heavy concentrations of dust on a daily basis[,]” and that “[t]aking into consideration the claimant’s condition against such duties, it is rational to conclude that the claimant’s condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.” Claimant’s Brief at 5. Contrary to claimant’s argument, the inadvisability of further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In this case, the administrative law judge, after finding that the pulmonary function studies and blood gas studies were non-qualifying, found that the opinions of Drs. Dahhan and Rosenberg, that claimant did not have a totally disabling respiratory impairment, which he found to be reasoned and documented, established that claimant did not have a totally disabling respiratory impairment. This was permissible. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

Further, other than contending generally that his condition prevents him from employment in a dusty environment, that the administrative law judge must identify the exertional requirements of his usual coal mine employment, and that, because pneumoconiosis is a progressive and irreversible disease, it is reasonable to infer that his condition worsened and that his ability to perform his usual coal mine employment or comparable and gainful work was adversely affected, claimant points to no errors in the administrative law judge’s evaluation of the medical evidence relevant to disability. The administrative law judge’s finding that claimant failed to establish total respiratory disability must therefore be affirmed. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Because claimant has failed to establish the existence of a totally disabling respiratory impairment, a requisite element of entitlement, entitlement is precluded and we need not address claimant’s arguments as to the existence of pneumoconiosis or whether claimant was provided a complete, credible pulmonary evaluation on the issue of clinical and legal pneumoconiosis. See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; see also *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge