BRB No. 01-0590 BLA

TRENTON BURKHART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREG & OSCAR TRUCKING COMPANY INCORPORATED	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Benefits (00-BLA-638) of Administrative Law Judge Donald W. Mosser with respect to 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 claimant failed to

establish two necessary elements of his case: the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a totally disabling respiratory or pulmonary impairment within the meaning of 20 C.F.R. §718.204(b).[1] Accordingly, benefits were denied. On appeal, claimant challenges both findings. The Director, Office of Workers' Compensation Programs (the Director), argues in response that the administrative law judge's decision be affirmed on the ground that claimant did not prove that he is totally disabled.[2] Employer has not responded to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[1] The Department of Labor has amended the regulations implementing the Act. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Alternatively, the Director argues that if the issue of the existence of pneumoconiosis is reached, the administrative law judge erred in his treatment of the only physician's report in the record.

With regard to the issue of total disability, the administrative law judge found that neither the pulmonary function test nor the arterial blood gas study yielded qualifying results, and there was no evidence that claimant was suffering from cor pulmonale with right-sided congestive heart failure. Therefore the administrative law judge properly found that claimant failed to establish total disability based on the first three measures contained in Section 718.204(b)(2).[3] 20 C.F.R. §718.204(b)(2)(i), (ii), (iii); Decision and Order at 9. Turning to Section 718.204(b)(2)(iv), the administrative law judge found that the only medical opinion in the record concluded that claimant had a mild impairment and was able to perform his last coal mine employment from a respiratory standpoint. Decision and Order at 9. Therefore, the administrative law judge found that claimant failed to prove that he was totally disabled.

Claimant raises several arguments in challenging the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge did not properly identify the exertional requirements of claimant's employment as a coal truck driver and determine whether claimant was disabled in light of those requirements. However, the one medical report in the record is that of Dr. Baker, who noted claimant's years of work as a coal truck driver. Based on claimant's non-qualifying pulmonary function study, Dr. Baker found that claimant suffered from a mild respiratory impairment.[4] The physician also concluded that claimant was able to perform his last coal mine work from a respiratory standpoint. Director's Exhibits 13, 14.

Claimant failed to introduce any significant evidence regarding the exertional requirements of his work as a coal truck driver. Other than Dr. Baker's report, the only evidence in the record with regard to that issue is claimant's testimony that when he was hauling coal he was required to get out of the truck and "tarp" the load. Transcript at 12. That single statement clearly is not sufficient to establish that the exertional requirements of his coal mine employment precluded performance of that work from a respiratory standpoint. *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*).

Claimant further argues that he is totally disabled because his impairment prevents him from working in a dusty environment, and driving a coal truck is a very dusty job. This argument runs counter to case law holding that the fact that a claimant is advised not to work in a dusty environment is not sufficient to establish total disability. *Taylor v. Evans and*

[3] No party challenges these findings; therefore they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Dr. Baker indicated that claimant's impairment was "mild with decreased FEV^1 and chronic bronchitis." Director's Exhibit 14 at 4.

Gambrel Co., Inc., 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Additionally, claimant asserts that the Board, in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), held that the administrative law judge was required to take into consideration claimant's age, education, and work experience in determining whether he was totally disabled. However, *Bentley* stands for a different proposition: that age, education, and work experience may be relevant to the question whether a miner is capable of performing employment *comparable to* that which he held as a miner. Because the administrative law judge found that claimant was capable of performing his last coal mine employment from a respiratory standpoint, he correctly did not reach the issue whether claimant was capable of performing comparable work. *See generally Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

Finally, claimant argues that because pneumoconiosis is a progressive disease, it can be concluded that claimant's pneumoconiosis has worsened over time, adversely affecting his ability to perform his usual or comparable work. Claimant's Brief at 6-7. Speculation of this sort does not meet the regulatory requirement that claimant *prove* that he is totally disabled. *See* 20 C.F.R. §725.103 (2001). *Gee*, *supra*.

Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204 (b)(i)-(iv), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *See* 20 C.F.R. §718.204(b); *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. In view of our disposition of the case on the issue of total disability, we decline to address claimant's and the Director's arguments regarding the administrative law judge's finding that claimant had not established the existence of pneumoconiosis. *See* 20 C.F.R. §718.202; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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

REGINA C. McGRANERY
Administrative Appeals Judge