

BRB No. 03-0775 BLA

PHILLIP CURTIS SMITH )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ISLAND FORK CONSTRUCTION ) DATE ISSUED: 04/27/2004  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 PNEUMOCONIOSIS FUND )  
 )  
 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 – Denying Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Susie Davis (Kentucky Black Lung Association), Pikeville, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund, Employment Programs Litigation Unit), Charleston, West Virginia.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order – Denying Benefits (2002-BLA-5306) of Administrative Law Judge Daniel J. Roketenetz rendered 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).<sup>2</sup> Claimant filed his application for benefits on March 29, 2001. Director’s Exhibit 3. In his Decision and Order - Denying Benefits, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b).<sup>3</sup>

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge’s denial. The Director, Office of Workers’ Compensation Programs, has declined to participate 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. *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).

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<sup>1</sup> Susie Davis, President of the Kentucky Black Lung Association and a benefits counselor, by letter dated August 12, 2003, requested an appeal, on behalf of claimant, of the administrative law judge’s decision. By Order dated August 22, 2003, the Board stated that it would review the appeal pursuant to 20 C.F.R. §§802.211(e), 802.220, since claimant was not represented by an attorney.

<sup>2</sup> 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The administrative law judge determined that the employer is the responsible operator and that claimant established at least 25 years of coal mine employment. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-11.

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence or record, we affirm as supported by substantial evidence the administrative law judge's finding that claimant is not totally disabled. Under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge properly found that the one pulmonary function study of record dated September 18, 2001, is non-qualifying for total disability. Decision and Order at 9; Director's Exhibit 8. Similarly, claimant is unable to establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(ii) since the September 18, 2001 blood gas study also yielded non-qualifying values. *Id.* The administrative law judge likewise properly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure to permit claimant to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

With respect to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly relied on the one medical opinion of record from Dr. Baker, who opined that claimant has minimal or no respiratory impairment and that claimant is capable of performing his usual coal mine employment or comparable work, to find that claimant is not totally disabled. This was rational. Decision and Order at 9-10; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34, 2-45 (4th Cir. 1997).

Inasmuch as the administrative law judge properly found that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we decline to address the administrative law judge's findings relevant to the existence of pneumoconiosis and causation. Decision and Order at 5-8, 10. *Trent*, 11 BLR 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*); *Perry*, 9 BLR 1-1. Because claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(b), a requisite element of entitlement, *see Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Gee*, 9 BLR 1-4, claimant is precluded from benefits. *Id.*

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge 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