BRB No. 00-1186 BLA

ROY W. BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COPPERAS COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0137) of Administrative Law Judge Robert J. Lesnick on a claim[1] 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).[2] The administrative law judge adjudicated this claim pursuant to 20

[1] Claimant is Roy W. Bailey, the miner, who filed his application for benefits on November 2, 1988. Director's Exhibit 1.

[2] 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

C.F.R. Part 718 (2000) and credited claimant with sixteen years of qualifying coal mine employment. The administrative law judge further found that claimant established that he suffers from coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b)(2000), but failed to establish that he is totally disabled from a respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erroneously failed to find total disability due to pneumoconiosis. Employer has not filed a response to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not 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 the 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'Keeffe v. Smith, Hinchman and 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, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] We affirm the administrative law judge's findings pursuant to Sections 718.202(a), 718.203(b), and 718.204(c)(1)-(3) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7-8.

Claimant argues that the administrative law judge erroneously failed to address whether he was able to perform his usual coal mine employment and therefore, improperly credited the opinion of Dr. Zaldivar. Similarly, claimant asserts that the administrative law judge erred by finding that he is able to perform the duties of his current employment as a concrete finisher and complete household chores. Contrary to claimant's arguments, however, it is well established that "consideration of the exertional requirements of a miner's work is 'unnecessary' in a case where the [administrative law judge] credited the reports of physicians who found that the miner 'had no respiratory or pulmonary impairment at all, and therefore, from a respiratory standpoint, could perform any kind of manual labor'." *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *see Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989) (administrative law judge may infer total disability when comparing exertional requirements of miner's coal mine job with physician's assessment of his working capability). Hence, in the instant case, the administrative law judge rationally found that the medical opinion of Dr. Zaldivar, that claimant "is not disabled from any condition," outweighed that of Dr. Rasmussen because Dr. Zaldivar's opinion was consistent with the non-qualifying pulmonary function studies and resting arterial blood gas studies of record, claimant's continued coal mine employment on the date of Dr. Rasmussen's examination, and claimant's testimony concerning his ability to perform household chores which require substantial exertion.[4] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 9; Director's Exhibit 21; Hearing Transcript at 14-15. The administrative law judge, within a proper exercise of his discretion, accorded less weight to Dr. Rasmussen's opinion that claimant suffered from a disabling respiratory insufficiency because Dr. Rasmussen failed to specify whether the respiratory insufficiency that he diagnosed precluded claimant from performing his last usual coal mine employment. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994); *Gee v. W. G. Moore & Son*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order at 8-9; Director's Exhibit 7. In addition, the administrative law judge properly questioned the credibility of Dr. Rasmussen's opinion because claimant was "gainfully employed in his usual coal mine job as a roof bolter," Decision and Order at 9, on the date that Dr. Rasmussen examined claimant, which was January 8, 1999.[5] *See Roberts v.*

[4] Crediting claimant's formal hearing testimony that he continues to perform household chores, albeit at a slower pace, the administrative law judge found that these chores, "such as putting a roof on the garage," required substantial exertion. Decision and Order at 9; *see* Hearing Transcript at 13-14.

[5] In response to a letter dated May 5, 1999 from Donna Adkins, claims examiner, claimant completed an employment form indicating that he last worked at Copperas Coal Corporation as a roof bolter from December 1998 to March 1999. Director's Exhibit 18.

West Virginia C.W.P. Fund, 74 F.3d 1233 (table), 20 BLR 2-67, 2-72 (4th Cir. 1996) (claimant's entitlement to benefits is measured by his physical condition at time of hearing); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); Decision and Order at 9; Director's Exhibit 7. Therefore, as the administrative law judge's determination that claimant failed to demonstrate a totally disabling respiratory or pulmonary impairment is rational and supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence failed to demonstrate total respiratory disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Street*, *supra* (to establish eligibility for benefits, miner must prove that he has totally disabling respiratory condition); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Because claimant has failed to satisfy his burden of affirmatively establishing total respiratory disability, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits.[6] *See Trent*, *supra*; *Perry*, *supra*.

[6] Claimant's failure to affirmatively establish total respiratory disability, a requisite element of entitlement, obviates the need to address claimant's argument regarding the administrative law judge's disability causation determination. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge