BRB No. 98-1521 BLA

ROY HARVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZIEGLER COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	Date Issued:
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0004) of Administrative Law Judge J. Michael O'Neill 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 administrative law judge credited claimant with ten years of coal mine employment, and based on the filing date, applied the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge did not properly weigh the evidence at Sections 718.202(a) and 718.204(c), and applied the incorrect legal standard in determining that claimant did not prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Employer responds, urging

affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge's finding that he did not establish the existence of a totally disabling respiratory or pulmonary impairment at Section 718.204(c)(1)-(4) cannot be affirmed, as the administrative law judge did not fully discuss the relevant evidence of record. Although the administrative law judge's discussion of this issue was brief, his finding is rational and supported by substantial evidence. The record contains the results of three pulmonary function studies. The tests administered on November 27, 1996 and June 7, 1994 yielded nonqualifying results, which the administrative law judge properly determined did not support a finding of total disability at Section 718.204(c)(1). Decision and Order at 7; Director's Exhibit 9; Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(1), Appendix B to 20 C.F.R. Part 718. While the June 30, 1997 study produced qualifying values, the administering physician, Dr. O'Bryan, did not validate the results due to claimant's variable effort. Director's Exhibit 33. The administrative law judge correctly considered this study insufficient to establish total disability. Decision and Order at 7; *see Prater v. Clinchfield Coal Co.*, 12 BLR 1-121 (1989). Accordingly, the administrative law judge rationally concluded that claimant did not demonstrate total disability under Section 718.204(c)(1). *Id.*

As the blood gas studies of record did not produce qualifying results, the administrative law judge properly found that claimant did not prove that he is totally disabled under Section 718.204(c)(2). Decision and Order at 7; Director's Exhibit 10; 20 C.F.R. §718.204(c)(2), Appendix C to 20 C.F.R. Part 718. In addition, the record is devoid of evidence of cor pulmonale with right sided congestive heart failure. Thus, claimant could not establish total disability under Section 718.204(c)(3).

With respect to Section 718.204(c)(4), the administrative law judge determined that none of the physicians of record stated that claimant had a totally disabling respiratory or pulmonary impairment. Decision and Order at 7. This finding is supported by substantial evidence. Drs. Fino and Branscomb opined that claimant does not have a totally disabling respiratory impairment. Employer's Exhibits 2, 3. Dr. Traughber did not offer an opinion as to the existence of a respiratory or pulmonary impairment. Director's Exhibit 9. Dr. O'Bryan initially concluded in a medical report that claimant has a mild restrictive impairment and a moderate obstructive impairment. Director's Exhibit 10. He later stated in his deposition and in subsequent correspondence, however, that he does not have an opinion as to whether claimant is totally disabled because he did not obtain a pulmonary function study that reflects claimant's true pulmonary capacity. *See* Director's Exhibit 33, Deposition Transcript at 14. Thus, the administrative law judge did not err in declining to treat Dr. O'Bryan's opinion as supportive of

a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986). Since none of the physicians termed claimant totally disabled, we affirm the administrative law judge's determination that their opinions are insufficient to establish total disability under Section 718.204(c)(4). *Id*.; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). We therefore affirm the administrative law judge's finding that claimant did not prove that he is totally disabled pursuant to Section 718.204(c)(1)-(4).[1] *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

[1]The administrative law judge was not required to weigh all of the relevant evidence together at 20 C.F.R. §718.204(c), pursuant to *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-1-11 (1991) and *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), as none of the probative evidence of record supported a finding of total disability.

Because claimant has failed to establish total disability under Section 718.204(c)(1)-(4), an essential element of entitlement, we must affirm the denial of benefits.[2] *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987). As we affirm the denial on this ground, we need not address claimant's allegations concerning the administrative law judge's findings under Sections 718.202(a) and 718.204(b), as error, if any, therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[2]Dr. Bassali, a Board-certified radiologist and B reader, interpreted an x-ray dated March 2, 1996 as positive for complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Trover, a Board-certified radiologist, and Dr. Wiot, a Board-certified radiologist and a B reader, read the same film as negative for pneumoconiosis. Employer's Exhibits 4, 5. Inasmuch as the administrative law judge acted within his discretion in finding that Dr. Bassali's x-ray interpretation was outweighed by the preponderance of negative readings of the same film and the other films of record by Board-certified radiologists and B readers, the irrebuttable presumption of total disability due to pneumoconiosis set forth 20 C.F.R. §718.304 does not apply in this case. Decision and Order at 6; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).