

BRB No. 91-1959 BLA

ELBURN KEITH )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ) DATE ISSUED:  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Thomas E. Carroll (Carroll, Germain, Tobbe & Miniard), Monticello, Kentucky, for claimant.

Helen H. Cox (Marshall J. Breger, 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: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and BONFANTI, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order (90-BLA-0092) of Administrative Law Judge Richard E. Huddleston denying benefits 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). Based on the date of filing, January 13, 1989,

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

the claim was adjudicated pursuant to the permanent regulations at 20 C.F.R. Part 718. After crediting claimant with seven years of coal mine employment, the administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge then determined that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's conclusion that he has not established total disability is contrary to the weight of the evidence. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

In order to establish entitlement, a claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205; Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989).

On appeal, claimant challenges the finding of the administrative law judge that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).<sup>1</sup>

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<sup>1</sup>The administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203 is unchallenged on appeal and is therefore affirmed. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983). Moreover, as the administrative law judge's finding that claimant failed to establish total disability under Sections 718.204(c)(1)-(c)(3) is also unchallenged on appeal, it is affirmed. See Skrack, supra.

Upon addressing 20 C.F.R. §718.204(c)(4), the administrative law judge considered the medical opinion evidence of record, which consists of only the report of Dr. Baker. See Director's Exhibit 11. In his report, Dr. Baker states that the degree of severity of claimant's impairment is "mild or minimal". Id. The administrative law judge permissibly found that this opinion is not sufficient to establish a total pulmonary or respiratory disability. See Decision and Order at 6; Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corporation, 9 BLR 1-195 (1986). Claimant asserts that Dr. Baker's finding that claimant was unable to perform an exercise test is indicative of total disability, and therefore, Dr. Baker's conclusion of mild respiratory impairment is not consistent with the accompanying blood gas study. See Claimant's Brief at 2. However, the report of the arterial blood gas study states that the exercise test was not performed due to "possible IHD" (Ischemic Heart Disease). See Director's Exhibit 12. Thus, the decision not to conduct an exercise test was not related to claimant's respiratory condition. As a result, the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(c) is supported by substantial evidence, and is affirmed.

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

ROY P. SMITH,  
Administrative Appeals Judge

RENO E. BONFANTI  
Administrative Law Judge