

BRB No. 03-0717 BLA

JERRY W. TOWERY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 07/19/2004
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Timothy S. Williams (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.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (2002-BLA-5050) of Administrative Law Judge Robert L. Hillyard rendered on claimant's request for modification of the denial of 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 adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the filing date of the claim, credited claimant with twenty years of qualifying coal mine employment as the parties had stipulated, and found that the evidence of record was insufficient to establish either the existence of pneumoconiosis or total respiratory disability. Accordingly, benefits were denied.

On appeal, claimant first contends that he was not provided a complete, credible, pulmonary evaluation as required by the statute inasmuch as the administrative law judge found Dr. Baker's opinion to be confusing and contradictory. Claimant also contends that the administrative law judge erred in not finding that the opinions of Drs. Baker and O'Bryan establish the existence of legal pneumoconiosis as defined at Section 718.201. Further claimant contends that the administrative law judge erred: in finding that total disability was not established inasmuch as the pre-bronchodilator results of claimant's September 30, 2002 pulmonary function study were sufficient to establish total disability and; in crediting Dr. O'Bryan's opinion that claimant retained the respiratory capacity to perform his last usual coal mine employment, when the doctor admitted that he did not know the exertional requirements of claimant's usual coal mine employment. In response, employer contends that the burden of providing evidence sufficient to establish entitlement rests upon claimant and that the Department of Labor had no duty to provide claimant with a "credible" pulmonary evaluation, only a complete one, which it did inasmuch as Dr. Baker rendered an opinion addressing all elements of entitlement. Additionally, employer contends that the administrative law judge correctly found that the evidence failed to establish the existence of legal pneumoconiosis or total disability. The Director, Office of Workers' Compensation Programs, (the Director) concedes that Dr. Baker's opinion, on the issue of pneumoconiosis, is problematic but does not agree that its deficiencies require remand of the case for a complete, credible, pulmonary examination inasmuch as the administrative law judge correctly found the evidence failed to establish total respiratory disability, another essential element of entitlement.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 prove 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*).

We first address claimant's argument that the administrative law judge did not properly weigh the evidence relevant to total disability. Specifically, claimant contends that the administrative law judge should have found the more recent September 30, 2002 pulmonary function study which resulted in qualifying pre-bronchodilator results to be more indicative of claimant's condition than a non-qualifying test conducted fourteen months earlier. Claimant also contends that the administrative law judge erred in crediting Dr. O'Bryan's opinion that claimant retained the respiratory capacity to perform his last usual coal mine employment since Dr. O'Bryan conceded that he did not know the specific exertional requirements of claimant's last coal mine employment.

In finding that claimant failed to establish total disability, the administrative law judge noted that the prebronchodilator portion of claimant's September 30, 2002 resulted in qualifying values, while the post-bronchodilator portion resulted in non-qualifying values. The administrative law judge also noted that a July 21, 2001 pulmonary function study resulted in non-qualifying values and that the two blood gas studies of record resulted in non-qualifying values. Regarding the doctors' opinions of record, the administrative law judge noted that both Drs. Baker and O'Bryan found that claimant had the pulmonary capacity to perform his usual coal mine employment. Considering all this evidence together, the administrative law judge concluded that claimant failed to establish total disability.

Claimant's argument regarding total disability is no more than a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In this case, the administrative law judge properly weighed together all the evidence on total disability, *i.e.*, pulmonary function and blood gas studies as well as doctors' opinions, and found that it failed, as a whole, to establish total disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*). Further, a review of Dr. O'Bryan's deposition testimony supports the administrative law judge's finding that it does not establish total disability as Dr. O'Bryan stated that he did not believe the objective testing supported a finding of total disability. Employer's Exhibit 1 at 20-22 (O'Bryan Deposition). Additionally, claimant has not challenged the administrative law judge's finding that Dr. Baker's opinion does not establish total disability. Inasmuch as claimant has failed to establish total disability, an essential element of entitlement, we need not address his arguments concerning the existence of legal pneumoconiosis. *See Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Moreover, we do not remand a case for a complete, pulmonary examination where the Director has not requested that the case be remanded because he has failed to fulfill his statutory obligation of providing one. *See Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-91 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER, Chief
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant failed to establish total disability and to, therefore, affirm the denial of benefits. As claimant contends, the administrative law judge did not properly evaluate the evidence. Dr. O'Bryan conceded that he was not aware of the specific exertional requirements of claimant's last usual coal mine employment. The administrative law judge erred, therefore, in crediting his opinion that claimant could perform that work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). The administrative law judge's finding that claimant failed to establish total disability cannot, therefore, be affirmed and the case must be remanded for reconsideration on this issue.

In addition, this case must be remanded to the district director for a complete, credible pulmonary examination as required by the Act. 30 U.S.C. §923(b). Contrary to employer's argument, case law has consistently interpreted the statute as requiring not only a "complete" pulmonary examination, but a "credible" one. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). The only reason the Director, Office of Workers' Compensation Programs, (the Director) has not requested that the case be remanded for a complete pulmonary evaluation is because he believes that the administrative law judge properly found that claimant failed to establish total disability, an essential element of entitlement. For the reason discussed, however, the administrative law judge's finding that claimant failed to establish total disability cannot be affirmed. *Cornett*, 227 F.3d

569, 578, 22 BLR 2-107, 2-124. The opinion of Dr. Baker, who states both that claimant has an occupational lung disease and that he does not, and states both that claimant is a nonsmoker and that his lung disease is due in part to smoking, without any explanation, is clearly incredible. The Director acknowledges that Dr. Baker's opinion is problematic. Accordingly, I would vacate the administrative law judge's denial of benefits and remand the case to the district director to provide claimant a complete, credible pulmonary evaluation at no cost to claimant.

BETTY JEAN HALL
Administrative Appeals Judge