

BRB Nos. 05-0120 BLA
and 05-0120 BLA-A

LARRY W. COLLETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 07/08/2005
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
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 Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for
employer.

Jeffrey S. Goldberg (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
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2003-
BLA-5607) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge credited claimant with nineteen years of qualifying coal mine employment, as stipulated by the parties and substantiated by the record, and adjudicated this claim, filed on February 5, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

Claimant appeals, contending that the administrative law judge erred in finding the weight of the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4), or total disability at Section 718.204(b)(2)(iv).¹ Claimant alternatively asserts that because the administrative law judge accorded little weight to the opinion of Dr. Hussain on the issue of the existence of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required pursuant to 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits, and cross-appeals, contending that the evidentiary limitations at 20 C.F.R. §725.414 are invalid and/or were improperly applied in this case to exclude Dr. Repsher's opinion from the record. The Director has filed a limited response, asserting that claimant was provided with a complete and credible pulmonary evaluation and that the evidentiary limitations at Section 725.414 are valid and were properly applied herein.²

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 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).

¹ Claimant's reference to "Section 718.204(c)(4)" is misplaced. *See* Claimant's Brief at 6. The regulation regarding establishing total disability by a reasoned medical opinion is now contained in 20 C.F.R. §718.204(b)(2)(iv).

² We affirm, as unchallenged, the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

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.³ See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, we reject claimant's argument that the Director violated his statutory duty to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. The record reflects that Dr. Hussain's pulmonary evaluation of claimant addressed all elements of entitlement and was based upon a physical examination, x-ray, pulmonary function study, arterial blood gas study, EKG, claimant's symptoms, and employment, medical and smoking histories. Director's Exhibit 11; Decision and Order at 7. While the administrative law judge determined that Dr. Hussain's diagnosis of pneumoconiosis was outweighed by the contrary x-ray and medical opinion evidence of record, the administrative law judge accorded Dr. Hussain's opinion full weight on the issue of total respiratory disability, finding that it was well-reasoned and documented. Decision and Order at 14. As discussed *infra*, substantial evidence supports the administrative law judge's finding that the weight of the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In these circumstances, we agree with the Director's assertion that his statutory obligation to provide claimant with a complete and credible pulmonary evaluation has been satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b).

Turning to the issue of total disability at Section 718.204(b)(2)(iv), claimant maintains that the opinion of Dr. Baker is reasoned, documented and sufficient to establish total respiratory disability, and that the administrative law judge should not have rejected the opinion for the reasons provided but instead should have compared the exertional requirements of claimant's usual coal mine employment with Dr. Baker's assessment of disability. Claimant's Brief at 6-8. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. See *Anderson*, 12 BLR 1-111.

The administrative law judge acknowledged that claimant's usual coal mine employment as a maintenance worker and head drive operator involved heavy manual labor. Decision and Order at 3. The administrative law judge accurately reviewed the

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

conflicting medical opinions of record, and determined that Dr. Baker was the only physician who opined that claimant was “100% occupationally disabled,” Director’s Exhibit 10, based on his diagnosis of a Class I impairment and a second impairment pursuant to the *Guides to the Evaluation of Permanent Impairment*, which states that persons who develop pneumoconiosis should limit further exposure to dust.⁴ Decision and Order at 7. The administrative law judge properly found that Dr. Baker’s opinion was not the equivalent of a finding of total respiratory disability, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988), and permissibly accorded greater weight to the contrary opinions of Drs. Hussain, Dahhan and Rosenberg, that claimant had the respiratory capacity to perform his usual coal mine employment or comparable work, as he found that these opinions were well-reasoned, documented, and consistent with the objective evidence of record. Decision and Order at 14; Director’s Exhibits 11, 15; Employer’s Exhibits 1, 6, 8; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to claimant’s assertion, the administrative law judge was not required to consider claimant’s age, education and work experience. These issues are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁵ *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). The administrative law judge’s findings pursuant to Section 718.204(b)(2)(iv) are supported by substantial evidence and thus are affirmed.

Claimant’s failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26. Consequently, we affirm the administrative law judge’s denial of benefits and need not reach claimant’s arguments on the issue of the existence of pneumoconiosis at Section 718.202(a)(1), (4), or employer’s arguments on cross-appeal regarding the validity of Section 725.414 and the administrative law judge’s exclusion of evidence thereunder.

⁴ Dr. Hussain diagnosed a Class I impairment based on FEV₁ and vital capacity values that were greater than 80% of the predicted value, which is equivalent to a 0% impairment as listed in Table 5-12 of the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Director’s Exhibit 10.

⁵ Claimant further asserts that because “pneumoconiosis is proven to be a progressive and irreversible disease,” it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant’s Brief at 8-9. We reject claimant’s argument, as an administrative law judge’s findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge