

BRB No. 02-0782 BLA

MARION RUSSELL)
)
 Claimant-Petitioner)
)
 v.)
)
 GLENN’S TRUCKING COMPANY,) DATE ISSUED:
)
 INCORPORATED; B & B TRUCKING)
)
 and)
)
 INSURANCE COMPANY OF NORTH)
 AMERICA; LIBERTY MUTUAL)
 INSURANCE COMPANY)
)
 Employers/Carriers-)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Philip J. Reverman, Jr. (Boehl, Stopher & Graves LLP), Louisville, Kentucky, for employer, Glenn’s Trucking Company, Incorporated.

J. Jansen Eige (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer, B & B Trucking.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-943) of Administrative Law Judge Joseph E. Kane rendered 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 found thirty-one years and six months of coal mine employment established and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge also found that Glenn's Trucking Company was the properly designated responsible operator. The administrative law judge further found that the evidence was insufficient to establish the existence of pneumoconiosis and a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was not sufficient to establish the existence of pneumoconiosis and total disability. See 20 C.F.R. §718.202(a)(1), (4), 718.204(b). Employers respond, urging affirmance of the denial of benefits. Employer, B & B Trucking, also contends that the administrative law judge's Decision and Order effectively dismisses it as a responsible operator in this claim. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes

¹ 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability in light of: Dr. Pellegrini's opinion which advised against further coal dust exposure; the fact that it would be highly improbable that claimant would be able to work outside of coal mine employment given his age, education, and work experience; and the fact that because pneumoconiosis is a progressive disease it would be safe to assume that claimant is totally disabled. Claimant's argument is rejected. Contrary to claimant's argument, a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Further, contrary to claimant's argument, the administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment, see *Taylor* at 12 BLR 1-87. Finally, contrary to claimant's argument, claimant must establish that he has a totally disabling respiratory impairment, see *Trent, supra*; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*, and the fact that he has been diagnosed with pneumoconiosis, does not give rise to a presumption that he is totally disabled.

As claimant raises no other arguments regarding the administrative law judge's finding that claimant failed to establish total disability, we affirm that finding. Moreover, inasmuch as claimant has failed to establish total disability, a requisite element of entitlement, *Trent, supra*; *Gee, supra*; *Perry, supra*, we decline to consider claimant's argument concerning the existence of pneumoconiosis.

³ The administrative law judge, considering the pulmonary function study and blood gas study evidence, which was non-qualifying, along with the medical opinion evidence of record, found that claimant failed to establish total disability. See *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc* 9 BLR 1-236 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge