

BRB Nos. 04-0767 BLA
and 04-0767 BLA-A

BRADLEY SMALLWOOD)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 UNICORN MINING)
)
 and) DATE ISSUED: 06/10/2005
)
 BIRMINGHAM FIRE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 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 Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

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

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals from the Decision and Order –
Denying Benefits (03-BLA-5865) of Administrative Law Judge Rudolf L. Jansen 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).¹ The administrative law judge credited claimant with twenty-one years of coal mine employment. On the merits of the claim, the administrative law judge found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) but was insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, and seeks affirmance of the decision below. In its cross-appeal, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis in the instant case. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in either 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).² By report dated October 30, 2001, Dr. Baker diagnosed coal workers' pneumoconiosis 1/1 based on an abnormal chest x-ray and claimant's exposure to coal dust. Director's Exhibit 9. Assessing the severity of claimant's respiratory or pulmonary impairment, Dr. Baker noted, "*minimal or none* with Coal Workers' Pneumoconiosis 1/1." (emphasis added). *Id.* In a separate report, also dated October 30, 2001, Dr. Baker indicated that

¹ Claimant filed the instant claim on February 21, 2001. Director's Exhibit 1.

² No party challenges the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). We thus affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant had *no* impairment and had the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In weighing Dr. Baker's opinion at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated:

Dr. Baker reported that Mr. Smallwood had minimal or no pulmonary impairment and that he retained the respiratory capacity to perform his former coal mine work. There are no other medical opinions of record related to Mr. Smallwood's potential pulmonary impairment. Therefore, the medical opinion evidence also weighs against a finding of total disability.

Decision and Order at 9. Claimant argues that the administrative law judge failed to mention claimant's "usual coal mine work in conjunction with Dr. Baker's opinion of disability." Claimant's Brief at 3.

Claimant's contention lacks merit. The administrative law judge rationally determined that Dr. Baker's opinion, the only medical opinion of record, did not establish that a respiratory or pulmonary impairment prevented claimant from performing his usual coal mine work or comparable and gainful work and thus, the medical opinion evidence weighed against a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). In so doing, the administrative law judge noted Dr. Baker's consideration of claimant's "former coal mine work" as a continuous miner operator in an underground coal mine, Decision and Order at 9; *see Director's Exhibit 9* at 1, which the administrative law judge determined to be claimant's usual coal mine work, Decision and Order at 4. Based on the foregoing, we reject claimant's assertion of error in the administrative law judge's weighing of Dr. Baker's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Claimant next contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 4. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Lastly, claimant summarily asserts that pneumoconiosis "is proven to be a progressive and irreversible disease," and "[i]t can therefore be concluded" that his pneumoconiosis has worsened since it was initially diagnosed, adversely affecting his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 4. There is no merit to claimant's assertion. Claimant bears the burden of establishing, by competent evidence, a totally disabling respiratory or pulmonary

impairment at 20 C.F.R. §718.204(b)(2) based on the record made before the administrative law judge. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Based on the foregoing, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). Because the evidence of record fails to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits as a finding of entitlement is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. Given our affirmance of the administrative law judge's denial of benefits based on claimant's failure to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2), we need not address employer's arguments raised on cross-appeal, which challenge the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge