BRB No. 02-0496 BLA

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

Appeal of the Decision and Order Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Mary Forrest-Doyle (Howard Radzely, Acting 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (01-BLA-0739) of Administrative Law Judge Rudolf L. Jansen on the denial of a duplicate claim [1] filed

[1] Claimant originally filed claims with the Social Security Administration on December 20, 1972 and with the Department of Labor (DOL) on August 30, 1977. Director's Exhibit 25. DOL denied both claims on November 19, 1980. *Id*. Following a formal hearing, Administrative Law Judge Arthur C. White denied benefits in a decision issued on December 5, 1983. *Id*. Claimant did not appeal Judge White's decision, but he filed a duplicate claim on May 30, 1991. *Id*. Administrative Law Judge Bernard J. Gilday denied benefits in a Decision and Order issued on July 18, 1994. *Id*. On appeal, the Board affirmed the denial of benefits. *McDaniels v. Perry County Coal Co.*, BRB No. 94-3688 BLA (May 26, 1995) (unpublished). Claimant filed the current duplicate claim on April 29,

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).[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-six years, but found that because claimant failed to establish the existence of pneumoconiosis and total respiratory disability,

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1997. In a decision issued on March 19, 1999, Administrative Law Judge Thomas F. Phalen, Jr., denied benefits finding that the evidence submitted since the denial of claimant's prior claim was insufficient to establish either the existence of pneumoconiosis or total disability, and thus a material change in conditions. Claimant appealed to the Board. The Board affirmed Judge Phalen's denial of benefits on March 28, 2000. *McDaniel v. Director OWCP*, BRB No. 99-0665 BLA (Mar. 28, 2000) (unpublished). On October 20, 2000, claimant requested modification of the denial of benefits. Director's Exhibit 50. After the district director denied claimant's request, the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 57, 60. The administrative law judge held a hearing on October 10, 2001.

[2] 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

he failed to establish a basis for modification of the denial of his duplicate claim. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds urging affirmance.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 to benefits under Part 718 in this living miner's claim, it must be established that claimant suffers from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

In considering the evidence pursuant to Section 718.204(b), the administrative law judge determined that the objective evidence and medical reports do not support a finding that claimant suffers from a totally disabling respiratory impairment. Claimant alleges that Dr. Baker's opinion is sufficient to establish total disability. Claimant specifically argues that the administrative law judge failed to identify the exertional requirements of claimant's usual coal mine employment and to compare those requirements with Dr. Baker's opinion. Claimant's Brief at 7. In addressing claimant's impairment, Dr. Baker stated:

> Patient's impairment is based on Table 10, Page 164, Chapter Five, Guides to the Evaluation of Permanent Impairment, which states that although a pneumoconiosis may cause no physiological impairment, its presence usually requires the patient's removal from exposure to the dust causing the condition. This would imply that the patient is 100% occupationally disabled for working in any type coal mine employment or similar dusty environment.

[3] We affirm as unchallenged the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis and total disability under 20 C.F.R. §§718.202(a)(2) and (a)(3), 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director's Exhibit 50. The administrative law judge correctly determined that Dr. Baker's opinion provides no assessment of claimant's physical capabilities to perform his previous coal mine employment. Decision and Order Denying Modification at 10. The administrative law judge also reasonably found that Dr. Baker merely concluded that claimant should not be exposed to coal dust, which is not equivalent to a finding of total disability.[4] *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); Decision and Order Denying Modification at 10.

[4] Additionally, we reject claimant argument that because pneumoconiosis is a progressive and irreversible disease, it can be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis "claimant's condition has worsened, thus affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 8. Contrary to claimant's contention, there is no evidence in the record to support this allegation.

Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act.[5] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Consequently, as claimant makes no other specific challenge to the administrative law judge's finding that the weight of the medical opinion evidence of record as well as the non-qualifying pulmonary function studies and blood gas studies fails to support a finding of total disability, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish total disability under Section 718.204(b)(2) as it is supported by substantial evidence and is in accordance with law. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because the administrative law judge reasonably found the evidence of record insufficient to establish total disability at Section 718.204(b)(2), an essential element of entitlement under Part 718, we must also affirm the denial of benefits.[6] *See Trent, supra*; *Perry, supra*. Therefore, we need not address claimant's arguments under Section 718.202(a).

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[5] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426 (a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

[6] In light of our affirmance of the administrative law judge's findings under Section 718.204(b), we decline to consider whether the administrative law judge's modification analysis comports with 20 C.F.R. §725.310 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge