

BRB No. 04-0799 BLA

DARRELL KEITH SAVAGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RMI CONTRACTING CORPORATION	)	DATE ISSUED: 03/17/2005
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-05871) of Administrative Law Judge Stephen L. Purcell 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 found fourteen and one-quarter years of coal

mine employment and, based on the date of filing, adjudicated this claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 3. The administrative law judge concluded, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2)(i)-(iv). Decision and Order at 4-8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond in the instant 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 into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.<sup>2</sup>

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<sup>1</sup> Claimant filed his claim for benefits with the Department of Labor on June 22, 2001, which was denied by the district director on January 24, 2003. Director's Exhibits 2, 25. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges on January 28, 2003. Director's Exhibit 26.

<sup>2</sup> 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*); Director's Exhibits 3, 4.

On appeal, claimant does not challenge the findings of the administrative law judge on claimant's failure to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).<sup>3</sup> We therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As claimant has failed to establish the existence of total disability, an essential element of entitlement under Part 718, entitlement thereunder is precluded.<sup>4</sup> *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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<sup>3</sup> The administrative law judge permissibly found that the evidence of record was insufficient to establish the existence of total disability pursuant to Section 718.204(b)(2)(i)-(iii) as all of the pulmonary function study and blood gas study evidence was non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 7-8; Director's Exhibits 14, 15; Claimant's Exhibit 2; Employer's Exhibit 2. Additionally, the administrative law judge rationally concluded that the medical opinion evidence was insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) as no physician opined that claimant had a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *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*); Decision and Order at 7-8; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibit 2.

<sup>4</sup> On appeal, claimant challenges only the administrative law judge's failure to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 2-3. As the administrative law judge's finding that claimant failed to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2) is affirmed, we need not address the administrative law judge's additional findings or claimant's arguments thereunder. *See Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge