

BRB No. 97-0997 BLA

BENNY JOHNSON	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)		
KEM COAL COMPANY	)		
	)		
Employer-Respondent	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)	DATE	ISSUED:
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-1731) of Administrative Law Judge J. Michael O'Neill 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 accepted the stipulation of the parties that claimant had thirteen years of qualifying coal mine employment, and adjudicated this claim, filed on July 30, 1992, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(c)(4). Employer responds, urging affirmance. The Director, Office of

Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

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).

In order to be entitled to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, the miner must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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).

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<sup>1</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.203(b), but insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4). Specifically, claimant maintains that the administrative law judge provided invalid reasons for rejecting Dr. Baker's opinion on the issue of total disability. Claimant also asserts that the administrative law judge should have compared Dr. Anderson's assessment of a ten to twenty-five percent pulmonary impairment with the exertional requirements of claimant's usual coal mine employment. Claimant's arguments are without merit. The administrative law judge acted within his discretion as trier-of-fact in according determinative weight to the opinions of Drs. Anderson and Broudy that claimant retained the respiratory capacity to perform his usual coal mine employment, as he found the opinions well-reasoned, comprehensive, and supported by the objective medical evidence of record. Decision and Order at 12; see generally *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucoctic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly accorded Dr. Baker's contrary opinion little weight because he relied in part on the results of invalid pulmonary function studies.<sup>2</sup> Decision and Order at 5, 12; see generally *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Additionally, the administrative law judge determined that Dr. Baker's opinion, that claimant would have difficulty doing sustained manual labor, did not support a finding of total disability because claimant testified that his usual coal mine employment involved no physical exertion.<sup>3</sup> Decision and Order at 12; Hearing Transcript at 10; Director's Exhibit 22. While the administrative law judge acknowledged Dr. Anderson's finding that claimant's ventilatory studies showed a ten to twenty-five percent impairment, in view of the lack of exertion required in claimant's work and Dr. Anderson's opinion that claimant only suffered a mild decrease in pulmonary function, the administrative law judge reasonably accepted Dr. Anderson's conclusion that claimant retained the respiratory capacity to perform his usual coal mine employment. Decision and Order at 9, 12; Director's Exhibit 22; see generally *Wetzel, supra*.

The administrative law judge findings pursuant to Section 718.204(c)(4) are

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<sup>2</sup>Claimant correctly asserts that nonqualifying test results, standing alone, do not establish the absence of respiratory impairment, and notes that case law exists for the proposition that it is error to reject a medical opinion solely because it is based on nonconforming pulmonary function studies. Claimant's Brief at 4, 5. In the present case, however, the administrative law judge permissibly discounted Dr. Baker's opinion because it was based in part upon a study which the administrative law judge deemed unreliable, not simply nonconforming or nonqualifying. Decision and Order at 9, 12; see generally *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984).

<sup>3</sup>While claimant argues that Dr. Baker also stated that claimant should have no further exposure to coal dust, rock dust or similar noxious agents, Claimant's Brief at 4, 7, employer correctly notes that such a recommendation does not support a finding of total respiratory disability. Employer's Reply Brief at 10; see *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

supported by substantial evidence and are affirmed. Inasmuch as claimant has failed to establish the existence of a totally disabling respiratory impairment, *see Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), a requisite element of entitlement under 20 C.F.R. Part 718, *see Trent, supra*, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge