

BRB No. 99-0890 BLA

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

Appeal of the Decision and Order on Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor. Edmond Collett, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (1996-BLA-0921) of Administrative Law Judge Robert L. Hillyard 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.* This case is before the Board for the second time. In the original Decision and Order, the administrative law judge found that claimant established two years and six months of qualifying coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge further found that the evidence was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Rudder v. Director, OWCP*, BRB No. 97-1066 BLA (Jan. 30, 1998)(unpub.), the Board vacated in part the

administrative law judge's years of coal mine employment determination and remanded the case for reconsideration of the evidence in light of several concessions by the Director, Office of Workers' Compensation Programs (the Director), on various periods of claimant's coal mine employment that were not previously raised before the administrative law judge. In addition, in light of the Director's concession that claimant did not receive a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4), and remanded the case for the district director to receive the evidence which the Director would offer to discharge his statutory obligation pursuant to *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) and *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). See 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 718.405(b). Finally, the Board instructed the administrative law judge to reweigh the medical opinion evidence in conjunction with claimant's years of coal mine employment and the exertional requirements of his usual coal mine employment at 20 C.F.R. §718.204(c)(4) in light of *McMath v. Director, OWCP*, 12 BLR 1-6 (1988) and *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

On remand, the administrative law judge initially issued an Order of Remand dated April 30, 1998, so the Director could make a new length of coal mine employment determination and furnish claimant with a complete and credible pulmonary evaluation. Claimant subsequently received a pulmonary evaluation from Dr. Baker, whose medical report was included in the record which was then returned to the administrative law judge by the district director. In his Decision and Order on Remand, the administrative law judge adopted the Director's concession that claimant established eight years and nine months of qualifying coal mine employment. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), but insufficient to establish total disability pursuant to Section 718.204(c). Accordingly, benefits were denied.

In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(4), asserting, *inter alia*, that the administrative law judge failed to follow the Board's instruction to determine, by a comparison with the exertional requirements of claimant's usual coal mine employment, whether the medical opinions of Drs. Vaezy and Baker diagnosing a "mild impairment" could qualify as opinions of total disability. The Director responds, urging affirmance of the denial of benefits.

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'Keefe 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

After consideration of the administrative law judge's Decision and Order on Remand, 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. Claimant initially contends that the administrative law judge erred in failing to make a specific finding of the exertional requirements of claimant's usual coal mine employment in conjunction with the disability assessments contained in the medical opinions of Drs. Vaezy and Baker.¹ In his consideration of the evidence at Section 718.204(c)(4), the administrative law judge noted the Board's remand instructions to compare Dr. Vaezy's diagnosis of a mild impairment with the exertional requirements of claimant's usual coal mine employment. Decision and Order on Remand at 5. The administrative law judge then discussed the fact that Dr. Vaezy did not render an opinion on the extent of claimant's impairment, other than to state that it was "mild," and did not provide an assessment of claimant's physical limitations. Decision and Order on Remand at 5. *See McMath, supra; Cregger v. U. S. Steel Corp.*, 6 BLR 1-1219 (1984). The administrative law judge however determined that since the term "mild" is not used to describe the intensity of impairments by the American Medical Association, he was unable to determine whether or not Dr. Vaezy's diagnosis of a mild impairment could support a finding of total disability. While the administrative law judge, did not successfully follow the Board's remand instructions, he nevertheless, rationally found that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4) by relying on the opinion of Dr. Baker, who also diagnosed a mild impairment, but concluded that the impairment would not prevent claimant from performing his usual coal mine employment. Decision and Order on Remand at 5; Director's Exhibit 50. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987).

¹ The administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence.² Claimant's failure to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson, supra, Trent, supra.* Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

²We reject claimant's general contention that the inadvisability of claimant's return to work in dusty condition is sufficient 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).