

BRB No. 00-0805 BLA

JAMES YOUNG)
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 Claimant-Petitioner)
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 v.)
)
 JAMES RIVER COAL SERVICE)
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 and)
)
 JAMES RIVER COAL COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Timothy S. Williams (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1335) 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-five years and eleven months of coal mine employment and considered this case pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis and found the evidence insufficient to establish that claimant suffered from a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis or total disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.²

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).

¹ 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² We affirm the administrative law judge's length of coal mine employment finding, as this finding is not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on March 9, 2001, to which employer and the Director have responded. Claimant has not submitted a brief.³ The Director asserts that application of the amended regulations will not affect this case. Employer objects to the retroactive application of 20 C.F.R. §§718.101(b); 718.201(a)(2); 718.201(c); 718.204(a); 725.366(b), (c); 725.502; 725.503; 725.607; 725.608; 725.701; 726.8(d) and 726.203(a). Employer asserts that if any of these provisions are applied to this claim, it should be allowed the opportunity to develop new evidence. Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

Initially, we consider claimant's assertions regarding the administrative law judge's finding that claimant has not established total disability.⁴ Claimant asserts that the administrative law judge erred by failing to address the miner's work experience, age and education in his assessment of total disability.

In finding the evidence insufficient to establish total disability, the administrative law judge found that none of the pulmonary function or blood gas studies yielded qualifying values, and therefore found that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(c)(1) and (2)(2000).⁵ The administrative law judge found that 20

³ Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

⁴ The provision pertaining to total disability, previously set out in 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

⁵ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values.

C.F.R. §718.204(c)(3)(2000) was inapplicable because the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure. The administrative law judge found that the record does not contain any medical opinions which indicate that the miner is totally disabled, and therefore found that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(c)(4)(2000). Consequently, the administrative law judge found that claimant failed to establish that he is totally disabled.

The record contains the results of five pulmonary function studies and two blood gas studies. As the administrative law judge found, all of these studies yielded non-qualifying results. We, therefore, affirm the administrative law judge's finding and hold that total disability is not demonstrated by the pulmonary function study and blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Further, since, as the administrative law judge found, the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm this finding and hold that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(iii).

The record contains medical reports of Drs. Wise, Branscomb, Rosenberg, Baker, Lockey and Wicker, all of whom opined that claimant has the respiratory or pulmonary capacity to perform his usual coal mine employment. Director's Exhibits 12, 24, 28; Employer's Exhibits 1-4. As the administrative law judge found, "there are no medical opinions in the record which indicate that the miner is totally disabled." Decision and Order at 10. Inasmuch as this finding is supported by substantial evidence, it is affirmed and we hold that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In addition, we hold that claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), is misplaced. In *Bentley*, the Board held that age, education and work experience are relevant "only to whether or not claimant can perform comparable and gainful work...." *Bentley*, 7 BLR at 1-614. Inasmuch as the total disability inquiry under Part 718 addresses the existence of a totally disabling respiratory or pulmonary impairment and does not require an inquiry into claimant's ability to perform comparable and gainful work, we reject this assertion.

Inasmuch as we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment, one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm the administrative law judge's denial of benefits. Consequently, we decline to address claimant's assertions concerning the administrative law judge's finding regarding the existence of pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge