BRB No. 02-0272 BLA

THOMAS LEE BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HORIZONS COAL, INC.	)	
	)	
and	)	
	)	
GREAT WESTERN RESOURCES	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-

1358) of Administrative Law Judge Joseph E. Kane, (the administrative law judge) 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] Claimant originally filed an application for benefits on April 28, 1997. This claim was denied by the administrative law judge on September 19, 1999. Upon appeals by claimant and employer, the Board affirmed the administrative law judge's findings that the evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3)(2000) and failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3)(2000). *Brown v. New Horizons Coal, Inc.,* BRB Nos. 00-0112 BLA and 00-0112 BLA-A (Oct. 19, 2000)(unpub.). However, the Board remanded the case for the administrative law judge to reconsider whether the preponderance of the medical opinion evidence established the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000) and whether total disability was established at 20 C.F.R. §718.204(c)(4)(2000). Specifically, at Section 718.204(c)(4)(2000) the Board instructed the administrative law judge to "weigh Dr. Baker's opinion that the impairment is respiratory in origin against Dr. Anderson's and Dr. Broudy's view that claimant's impairment is nonpulmonary." Decision and Order at 4. Further, the administrative law judge was instructed to reweigh all of the evidence pertaining to total disability pursuant to Section 718.204(c)(4)(2000). Decision and Order at 5. As to employer's cross-appeal, the Board instructed the administrative law judge at 20 C.F.R. §718.202(a)(4)(2000) to reweigh the medical report of Dr. Anderson, which, along with the opinion of Dr. Baker, the administrative law judge found to have established the presence of pneumoconiosis. The Board affirmed the administrative law judge's finding that Dr. Baker's report established the presence of pneumoconiosis.

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On remand, the administrative law judge again found the presence of pneumoconiosis established at Section 718.202(a)(4), based primarily on the report of Dr. Baker, to which the administrative law judge accorded "significant probative weight concerning the existence of pneumoconiosis." Decision and Order at 9. The administrative law judge declared this report to be "well-reasoned and documented." Id.[2] He rejected the contrary opinion of Dr. Broudy, noting that Dr. Broudy was the only physician of record to have rendered a report opining that claimant does not suffer from pneumoconiosis. *Id.* However, the administrative law judge again found that claimant failed to establish total disability at Section 718.204(b)(2)(iv).[3] Thus, the administrative law judge again denied benefits.

On appeal, claimant asserts that the administrative law judge erred by "failing to follow the mandate of the Benefits Review Board." Claimant argues that, in reassessing the probative value of Dr. Baker's report at Section 718.204(b)(2)(iv), the administrative law judge ignored the Board's order to compare the degree of claimant's impairment to the exertional requirements of claimant's usual coal mine employment. Employer responds, urging affirmance of the Decision and Order denying benefits as supported by substantial evidence. However, employer contests the finding that claimant established the presence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, has filed a statement that he will not participate in this appeal.

The Board must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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 under Part 718, claimant

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[2]Although the administrative law judge found the presence of pneumoconiosis, he declined to credit the opinion of Dr. Anderson to this effect. The administrative law judge noted specifically that he gave Dr. Anderson's opinion "little weight." Decision and Order at 9.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b)(2000), is now found at 20 C.F.R. §718.204(c).

must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement.

Claimant argues that the administrative law judge erred in failing to credit the opinion of Dr. Baker that claimant is totally disabled pursuant to Section 718.204(b)(2)(iv). Specifically, claimant argues that the administrative law judge failed to evaluate whether the mild impairment noted by Dr. Baker could support a conclusion of total disability, and that he failed to compare Dr. Baker's finding of a respiratory impairment to the contrary findings made by Drs. Anderson and Broudy. Notwithstanding claimant's meritorious argument, the administrative law judge provided a valid alternative reason for declining to credit Dr. Baker's opinion. Specifically, the administrative law judge found that the doctor did not provide "an explanation for [his] inconsistent medical conclusions." Decision and Order at 11. The administrative law judge properly noted that Dr. Baker rendered two incompatible opinions, the first one finding total disability due to pneumoconiosis and the later opinion finding no total disability. In his 1994 opinion, Dr. Baker stated that "due to coal workers' pneumoconiosis, chronic obstructive airways disease and bronchitis," claimant is totally disabled. Director's Exhibit 27. Then in 1997, Dr. Baker concluded that pneumoconiosis resulted in only a mild impairment that would not prevent claimant from engaging in coal mine employment. Director's Exhibit 13. Inasmuch as the administrative law judge rationally determined that the two reports cannot be reconciled, we affirm the administrative law judge's finding that Dr. Baker's opinions do not satisfy claimant's burden to establish total disability at Section 718.204(b)(2)(iv). *See Puleo v. Florence Mining Co.,* 8 BLR 1-198 (1984); *Hopton v. United States Steel Corp.,* 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.,* 6 BLR 1-799 (1984). Thus, claimant has failed to establish that he is totally disabled.

Inasmuch as claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, a finding of entitlement is precluded. *Trent, supra*; *Perry, supra.*

In light of the foregoing, we need not address employer's argument that the administrative law judge erred in finding the presence of pneumoconiosis at Section 718.202(a)(4).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge