BRB Nos. 04-0140 BLA
and 04-0140 BLA-A

LOWELL CHAPPELL	)	
	)	
Claimant-Petitioner/	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/27/2004
	)	
WHITAKER COAL CORPORATION	)	
	)	
Employer-Respondent/	)	
Cross-Petitioner	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order - Denying Benefits (02-BLA-5107) of Administrative Law Judge Rudolf L. Jansen on a miner's 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] This case involves a subsequent claim filed on February 8, 2001.[2] In his Decision and Order dated September 30, 2003, the administrative law judge credited claimant with twenty-nine years of coal mine employment, and considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718. In addressing whether claimant established a change in one of the applicable conditions of entitlement, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, he determined that claimant established a change in one of the applicable conditions of entitlement since the denial of the prior claim pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge next found the weight of all of the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). The administrative law judge further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. The administrative law judge also found the evidence of record insufficient, however, to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, he denied benefits. On appeal,

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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.

[2]Claimant filed an initial claim on April 5, 1995. Director's Exhibit 1. Administrative Law Judge Thomas F. Phalen, Jr. denied benefits in a Decision and Order dated January 27, 1998. *Id.* In denying benefits, Judge Phalen determined that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). *Id.* The Board affirmed Judge Phalen's decision denying benefits in a Decision and Order dated February 2, 1999. *Chappell v. Whitaker Coal Corp.*, BRB No. 98-0653 BLA (Feb. 2, 1999)(unpublished). Claimant took no further action in pursuit of benefits until filing his subsequent claim on February 8, 2001. Director's Exhibit 3.

claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability under Section 718.204(b)(2)(iv). Employer has filed a response brief in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, arguing that the regulation limiting evidentiary development, found at 20 C.F.R. §725.414, and applied by the administrative law judge in this case, is inconsistent with the Black Lung Benefits Act and the Administrative Procedure Act and is, therefore, invalid. Employer contends that, even if the regulation were valid, the administrative law judge improperly excluded portions of a medical opinion of Dr. Rosenberg. Employer's Exhibit 1. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to claimant's appeal, in which the Director indicates he does not intend to respond to claimant's allegations of error. The Director also has filed a letter in opposition to employer's cross-appeal, contending that employer's contentions are without merit. Employer filed a reply brief, reiterating contentions raised in its Cross-Petition for Review and brief.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis

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[3]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), that claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 10-16. In addition, employer generally contends that the administrative law judge erred in finding that claimant established a "material change in condition under 20 C.F.R. §725.309." Cross-Petition for Review at 2. We affirm the administrative law judge's finding that a change in one of the applicable conditions of entitlement was established pursuant to Section 725.309 since employer has failed to fully raise and adequately brief its contention in its cross-appeal that the administrative law judge's finding in this regard was erroneous. *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983); Decision and Order at 10.

is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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*).

On appeal, claimant contends that the administrative law judge erred in failing to credit the opinions of Drs. Baker and Hussain as sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant argues that the administrative law judge should have credited the opinions of Drs. Baker and Hussain in view of the fact that each of the doctors based his opinion upon a physical examination, medical and work histories, symptoms, and objective test results.[4] Claimant's contention lacks merit.

We affirm, as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is non-supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). Dr. Baker examined claimant on April 20, 1995, April 3, 1996 and April 21, 2001. Director's Exhibits 1, 11. In his 1995 and 1996 reports, Dr. Baker indicated that claimant's objective studies demonstrated a "mild obstructive defect" and "mild resting arterial hypoxemia." Director's Exhibit 1. In the 1995 report, Dr. Baker did not specifically indicate whether claimant was totally disabled. *Id.* In his 1996 report, Dr. Baker stated that claimant has a "non-disabling degree of respiratory insufficiency," but indicated that claimant "could only work in areas of low concentration [of coal dust] as [working in high concentration areas] may result in worsening of his pulmonary condition." *Id*. Similarly, in his 2001 report, Dr. Baker diagnosed a mild obstructive ventilatory defect, and noted a "class II impairment." *Id*. Dr. Baker then concluded that claimant "should limit further dust exposure," additionally stating: "This would imply the patient is 100% occupationally disabled for work in coal mining or a similar dusty occupation." *Id.* The administrative law judge rationally determined that Dr. Baker's opinion merely advised claimant to avoid further coal dust exposure. Decision and Order at 18. The administrative law judge reasonably found that Dr. Baker's opinion is thus insufficient to establish total disability under Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 18; Director's Exhibits 1, 11.

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[4]Claimant suggests that "a single medical opinion [supportive of a finding of total disability] may be sufficient for invoking the presumption of total disability." Claimant's Brief at 3-4. Claimant has not identified any presumption of total disability that is applicable in this case, however.

We also reject claimant's contention that the administrative law judge erred in failing to accord determinative weight to Dr. Hussain's opinion as sufficient to establish total disability. Dr. Hussain examined claimant on June 27, 2001. Director's Exhibit 12. Dr. Hussain, who administered a pulmonary function study and an arterial blood gas study, both of which were qualifying, indicated that claimant has a "severe impairment," and does not have the respiratory capacity to engage in coal mine employment. *Id*. The administrative law judge determined that Dr. Hussain's opinion was well-reasoned and documented, and entitled to full weight. Decision and Order at 18; Director's Exhibit 12. The administrative law judge also found Dr. Hussain's opinion entitled to additional weight in light of Dr. Hussain's Board-certification in pulmonary medicine. *Id*. The administrative law judge found that Dr. Hussain's opinion was outweighed, however, by the contrary opinions of Drs. Broudy and Myers, who found that claimant is not totally disabled.[5] Decision and Order at 18-19; Director's Exhibit 1; Employer's Exhibit 3. The administrative law judge properly accorded greater weight to the opinion of Dr. Broudy, finding it to be the most persuasive opinion of record because Dr. Broudy had the opportunity to review the medical evidence of record and to most recently examine claimant, on February 12, 2003. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 18; Employer's Exhibit 3. The administrative law judge also properly credited Dr. Broudy's opinion on the basis that the doctor is a pulmonary specialist, and because his opinion was well reasoned and documented, and was supported by the well documented and reasoned opinion of Dr. Myers, who is also a pulmonary specialist. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 18-19; Director's Exhibit 1; Employer's Exhibit 3. Contrary to claimant's suggestion, the administrative law judge was not required to consider, in conjunction with the medical opinions of Drs. Broudy and Myers, the exertional requirements of claimant's usual coal mine work, which included slate picking, janitorial and repair work. Unlike opinions which address only the

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[5]Dr. Broudy examined claimant on February 12, 2003. Employer's Exhibit 3. Dr. Broudy concluded that claimant has mild to moderate chronic obstructive pulmonary disease, and retains the respiratory capacity to perform his usual coal mine employment. *Id*. Dr. Broudy based his opinion on the results of the pulmonary function and arterial blood gas study he administered, as well as his review of all of the evidence of record. *Id*. Dr. Myers examined claimant on February 22, 1995, and opined that while claimant has coal workers' pneumoconiosis, he is physically able, from a respiratory standpoint, to perform his usual coal mine employment. Director's Exhibit 1. Dr. Myers based his opinion on the results of the objective studies he administered. *Id*.

degree of impairment, from which an inference of total disability could be drawn by comparing claimant's job duties to the opinion, opinions which specifically address whether a miner is totally disabled need not be discussed in terms of claimant's job duties. Since these opinions specifically addressed whether the miner could perform his former job, the administrative law judge was not required to further consider the exertional demands of claimant's job in conjunction with their opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Additionally, we hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant only in determining claimant's ability to perform comparable and gainful work, not to establishing total disability from performing claimant's usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *Fields*, 10 BLR at 1-22. We also reject claimant's assertion that, in light of the progressive and irreversible nature of pneumoconiosis, the administrative law judge erred in not finding him totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits, and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). For the reasons discussed above, we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, as claimant does not challenge the administrative law judge's findings that the evidence of record is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 16-17.

Because we affirm the administrative law judge's determination that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. We need not address, therefore, the contentions employer has raised in its cross-appeal challenging the administrative law judge's application of the regulation at Section 725.414, limiting evidentiary development in claims, such as this one, filed after January 19, 2001.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge