

BRB No. 04-0292 BLA

JIMMY ADAMS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 09/15/2004
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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: McGANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-5144) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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 and one-half years of qualifying coal mine employment and adjudicated this

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 apply to this claim filed on March 19, 2001. See 20 C.F.R. Parts 718, 722, 725, and 726.

subsequent claim pursuant to 20 C.F.R. Part 718.² The administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a change in one of the applicable conditions of entitlement previously adjudicated against claimant pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³

² Claimant filed his initial claim for black lung benefits on September 14, 1988, which was denied by the district director on February 23, 1989. Decision and Order at 3; Director's Exhibit 1. Claimant filed his second application for benefits on September 13, 1994. This claim was denied by Administrative Law Judge J. Michael O'Neill in a Decision and Order issued October 24, 1996. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling pulmonary or respiratory impairment. Decision and Order at 3; Director's Exhibit 1. On appeal, the Board affirmed the denial of benefits in *Adams v. Leeco, Inc.*, BRB Nos. 97-0331 BLA and 97-0331 BLA-A (Nov. 7, 1997)(unpub.). Decision and Order at 3; Director's Exhibit 1. Claimant took no further action on that claim and filed the current claim on March 19, 2001. Decision and Order at 3; Director's Exhibit 2.

³ We affirm the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as these findings are not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Director, Office of Workers' Compensation Programs (the Director), argues that the Board should affirm the administrative law judge's denial of benefits because there is no evidence in the record, old or new, that could support a finding of total disability.

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'Keeffe 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, 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.

With respect to Section 718.204(b)(2)(iv), claimant contends that contrary to the administrative law judge's finding, the opinion of Dr. Baker is well-reasoned and well-documented and sufficient to establish total disability. Claimant also contends that the administrative law judge must consider the exertional requirements of claimant's usual coal mine employment in considering an opinion on total disability.

Our review of the record confirms the administrative law judge's determination that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge stated that Dr. Baker found claimant's lungs to be clear upon clinical examination and the results of his pulmonary function and blood gas studies were normal. Decision and Order at 8; Director's Exhibit 11. The administrative law judge observed that although Dr. Baker diagnosed a "Class 1 impairment based on *Guides to the Evaluation of Permanent Impairment* (Fifth Edition) because Claimant's FEV1 and vital capacity were greater than 80% of predicted," the guides equate a Class 1 impairment to a 0% impairment of the whole person. Decision and Order at 8, 15; Director's Exhibit 11. Dr. Baker's report also stated that claimant had a "second impairment, based on the presence of pneumoconiosis, . . ." and that because the *Guides* caution against further dust exposure under these circumstances, it appears that claimant "is 100% occupationally disabled for further work in the coal mines or similar dusty conditions."

Decision and Order at 15; Director's Exhibit 11 at 3. The administrative law judge rationally found that because Dr. Baker merely opined that claimant should limit his exposure to coal dust, the doctor did not render a reasoned medical opinion finding the presence of a totally disabling respiratory or pulmonary impairment.⁴ *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 15; Director's Exhibit 11. Thus, we affirm the administrative law judge's determination that Dr. Baker's opinion did not establish total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(iv).

In addition, the administrative law judge correctly found that the opinion of Dr. Hussain, stating that despite a mild impairment, claimant retained the respiratory capacity to perform his coal mine work, did not support a finding of total disability. Decision and Order at 15-16; Director's Exhibit 10.

Moreover, we agree with the Director's assertion that the record as a whole supports the administrative law judge's determination to deny benefits on the merits. Director's Brief at 6. There are no qualifying pulmonary function or blood gas studies in the record and no physician has diagnosed cor pulmonale with right-sided congestive heart failure. Thus, establishing total disability pursuant to Section 718.204(b)(2)(i)-(iii) is precluded. In addition, none of the medical reports associated with claimant's initial claim or his second claim contains a determination of total disability. Drs. Williams, Wicker, Broudy, Anderson and Myers concluded that claimant had the respiratory capacity to perform his usual coal mine employment, thus precluding establishing total disability pursuant to Section 718.204(b)(2)(iv) as a matter of law. Director's Exhibit 1. Consequently, we affirm the denial of benefits as it is supported by substantial evidence and it is not necessary to address claimant's other contentions.

⁴ The administrative law judge also found that Dr. Baker's second impairment finding is premised on the presence of pneumoconiosis, which is not supported by the preponderance of the evidence. Decision and Order at 15.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge