

BRB No. 06-0335 BLA

JERRY NEEDHAM)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 09/22/2006
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Silas C. Wolf, Jr., Norman, Oklahoma, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-BLA-30) of Associate Chief Administrative Law Judge Thomas M. Burke denying benefits 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). The administrative law judge adjudicated this claim under 20 C.F.R. Part 718, based on claimant's July 3, 2000 filing date. Initially, the administrative law judge denied benefits based on a finding that claimant was not engaged in qualifying coal mine employment and, thus, was not a miner within the meaning of the Act. Decision and Order at 6. The administrative law judge rendered additional findings on the merits, concluding that although claimant established total disability pursuant to 20 C.F.R. §718.204(b)(iv), the medical evidence was insufficient to

establish that claimant was totally disabled due to coal workers' pneumoconiosis.¹ See 20 C.F.R. §§718.203, 718.204(c). Decision and Order at 8, 11. Consequently, the administrative law judge also found that claimant failed to establish entitlement to benefits on the merits. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that he was a miner under the Act. Claimant also contends that the administrative law judge erred in failing to find that he was totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs responds, agreeing that the administrative law judge erred in finding that claimant was not a miner within the meaning of the Act, but asserts that the administrative law judge did not err in finding that disability causation was not established and urges 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'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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).²

Claimant contends that the administrative law judge erred in failing to find that claimant's total disability was due to pneumoconiosis. We disagree. The administrative law judge considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis. Decision and Order at 8-11. In so finding, the administrative

¹ The administrative law judge noted that the Director, Office of Workers' Compensation Programs, conceded the presence of pneumoconiosis in his closing brief, but denied that it was due to coal dust exposure, but rather was due to asbestos exposure for sixteen years. Decision and Order at 2.

² This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit as the claimant was allegedly last employed in the coal mine industry in Arkansas. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3-5; Director's Exhibit 2; Hearing Transcript at 5-8.

law judge considered the medical opinions of record by Drs. Nichols, Brant, and Rose. Director's Exhibits 8, 20, unnumbered post-hearing exhibit dated July 29, 2005. Dr. Brant concluded that claimant was totally disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 20. Drs. Nichols and Rose concluded that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 8, unnumbered post-hearing exhibit; Decision and Order at 10.

In weighing the medical opinions, the administrative law judge found that "Dr. Brant's report is unpersuasive because it is cursory, internally inconsistent, and not documented." Decision and Order at 10. The administrative law judge found that Dr. Brant's observations from a 1991 CT-scan and December 4, 2001 x-ray, indicating evidence of an asbestos-related lung disease, were inconsistent with his diagnosis of a totally disabling coal dust-induced lung disease and lacked supporting documentation. Decision and Order at 10-11. The administrative law judge also determined that the data underlying Dr. Nichols's report did not provide adequate support for his conclusions. The administrative law judge found that Dr. Nichols diagnosed a mild restrictive respiratory impairment due to claimant's inhalation exposures, but did not explain whether the condition was due to asbestos exposure, coal mine dust exposure, or both. The chest x-ray underlying Dr. Nichols's report was interpreted by a Board-certified radiologist as not demonstrating pneumoconiosis. Dr. Nichols found that the x-ray revealed "abnormalities . . . compatible with inhalational lung disease." Decision and Order at 11. The administrative law judge also noted that Dr. Rose, however, concluded that claimant was totally disabled due to respiratory conditions unrelated to coal dust exposure. Decision and Order at 11. Dr. Rose found that claimant's pulmonary impairment was not due to pneumoconiosis, but instead was due to possible asthma and asbestos exposure. The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Rose, based on her superior qualifications and because her report was the most well-reasoned and well-documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, the administrative law judge rationally determined that claimant failed to establish that he is totally disabled due to pneumoconiosis. *Id.* Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge permissibly concluded that the evidence of record does not establish total disability due to pneumoconiosis, claimant has not met his burden of proof under the Act and regulations. *See* 20 C.F.R. §§718.204(c).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark* 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As claimant has failed to establish total disability due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In view of our disposition of this case, we need not address claimant's argument that the administrative law judge erred in failing to find that claimant performed the work of a miner.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge