BRB No. 97-1725 BLA

ELLIS RILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENKILLER MINING SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ellis Riley, Beattyville, Kentucky, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (92-BLA-1393) of Administrative Law Judge Donald W. Mosser 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). This is the third time that this case has been appealed to the Board. Claimant filed a claim in January, 1991. Director's Exhibit 1. The administrative law judge, in a Decision and Order Denying Benefits issued in July, 1993, considered the claim pursuant to 20 C.F.R. Part 718. After crediting claimant with three years of coal mine employment, the administrative law judge

found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1) and 718.203(c). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). In addition, the administrative law judge found, assuming *arguendo* that claimant established total disability, the evidence was insufficient to establish total disability arising out of coal mine employment. *See* 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant appealed, and the Board issued a Decision and Order on November 30, 1994 vacating the administrative law judge's finding regarding years of coal mine employment. The Board affirmed the administrative law judge's finding regarding the existence of pneumoconiosis arising out of coal mine employment as unchallenged on appeal and affirmed the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1)-(3). In addition, the Board vacated the administrative law judge's finding that the evidence was insufficient to establish total disability under Section 718.204(c)(4). Specifically, the Board instructed the administrative law judge to compare on remand the requirements of claimant's last coal mine employment with Dr. Williams's assessment of a "mild" impairment. The Board also directed the administrative law judge to reconsider his Section 718.204(b) finding on remand. Accordingly, the Board affirmed in part, vacated in part, and remanded the case to the administrative law judge for further consideration. *Riley v. Tenkiller Mining Services, Inc.*, BRB No. 93-2350 BLA (Nov. 30, 1994)(unpub.).

On remand, the administrative law judge credited claimant with four years of coal mine employment. In finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), the administrative law judge found that it was impossible to compare claimant's job requirements to Dr. Williams's report, inasmuch as Dr. Williams did not equate claimant's "mild impairment" with claimant's ability to perform coal mine employment, nor did Dr. Williams delineate any of claimant's physical limitations constituting "mild impairment." Further, the administrative law judge discredited Dr. Broudy's opinion of total disability as unexplained in light of invalid pulmonary function studies and nonqualifying blood gas studies that he administered. 1995 Decision and Order on Remand - Denying Benefits at 4. Accordingly, benefits were denied.

Claimant appealed, and the Board, in a Decision and Order issued on April 12, 1996, affirmed the administrative law judge's finding of four years of coal mine employment. With regard to Section 718.204(c)(4), the Board affirmed the administrative law judge's finding that Dr. Broudy's opinion is insufficient to demonstrate total pulmonary or respiratory disability. However, the Board vacated the administrative law judge's findings regarding Dr. Williams's opinion, holding that the administrative law judge must compare Dr. Williams's opinion with the exertional requirements of claimant's usual coal mine employment. Accordingly, the Board vacated the administrative law judge's Section 718.204(c)(4) finding, and remanded the case to the administrative law judge for reconsideration of Dr. Williams's opinion. *Riley v. Tenkiller Mining Services, Inc.*, BRB No. 95-2106 BLA (Apr. 12, 1996)(unpub.).

On remand, the administrative law judge found that the "medium" exertional requirements established by claimant's testimony with respect to his last coal mine employment were not so arduous as to conclude that claimant could not perform those work requirements with the level of impairment diagnosed by Dr. Williams. The administrative law judge also noted that Dr. Williams's report contains absolutely no abnormal physical finding. Further, the administrative law judge noted that while Dr. Williams assessed claimant's impairment as mild, he prefaced such measurement by stating that he was unable to demonstrate significant impairment of the pulmonary system. The administrative law judge thus concluded that Dr. Williams's report was not sufficient to prove total disability pursuant to Section 718.204(c)(4). Accordingly, benefits were denied.

Claimant now appeals without the assistance of counsel, contending generally that the administrative law judge erred in denying benefits. No response brief has been received from employer. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the appeal unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 in a living miner's claim, claimant must establish the existence of 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 to prove 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*).

After consideration of the administrative law judge's Decision and Order on Remand and the evidence of record, we affirm the administrative law judge's finding that Dr. Williams's opinion does not establish total disability as rational and supported by substantial evidence. *See generally Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge correctly noted that Dr. Williams prefaced his diagnosis of mild impairment by stating, "I am unable to demonstrate significant impairment of the pulmonary system."[1] 1997 Decision and Order on Remand at 3; Director's Exhibit 8. Further, the

[1] In his report dated January 17, 1991, Dr. Williams diagnosed chronic obstructive

administrative law judge reasonably stated that Dr. Williams's report contains "absolutely no abnormal physical finding." 1997 Decision and Order on Remand at 3; Director's Exhibit 8; *see Calfee*, *supra*. Moreover, the administrative law judge properly concluded that the "medium" exertional requirements of claimant's usual coal mine employment were not so arduous to conclude that he could not perform these work requirements with the level of impairment diagnosed by Dr. Williams.[2] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Therefore, we affirm the administrative law judge's finding that total disability is not established pursuant to Section 718.204(c)(4). Since we affirm this finding, entitlement may not be established in this case, inasmuch as the Board has previously affirmed the administrative law judge's finding of no total disability at Section 718.204(c)(1)-(3), and total disability is an essential element of entitlement under Part 718. *See Perry*, *supra*.

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pulmonary disease with pneumoconiosis. He noted under "the patient's description of any physical limitations in physical activities like walking, climbing, and lifting" that claimant could walk "on the level for two or three hundred yards at a normal pace before getting short of breath." Dr. Williams concluded that he was "unable to demonstrate significant impairment of the pulmonary system" and that claimant's impairment was "apparently mild." Director's Exhibit 8.

[2] At the hearing, claimant testified that he worked as a crusher operator at Tenkiller mines, which he characterized as requiring "medium" exertion. Hearing Transcript at 17, 19. Claimant also stated that in addition to running the crusher machine with his hands, he had to clean the machine with a large coal shovel, which sometimes involved lifting seventy-five to one hundred pounds. *Id.* at 16-17.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge