BRB No. 97-1428 BLA

DUARD BROWNING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Respondent	)	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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-BLA-1305) of Administrative Law Judge Donald W. Mosser with respect to 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). Claimant filed his first application for benefits on October 8, 1991. Director's Exhibit 34. This claim was denied by the district director on April 3, 1992, on the grounds that claimant did not establish any of the requisite elements of entitlement. *Id.*. Claimant filed a second claim on June 1, 1994. Director's Exhibit 1.

The administrative law judge accepted employer's concession that claimant worked for at least 25 years as a miner and noted that the record contained two claims. The administrative law judge considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard adopted by the United States Court of Appeals for the Sixth Circuit in

Sharondale Corp. v. Ross, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994).[1] The administrative law judge found that the newly submitted x-ray evidence and medical reports of record supported a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4). Upon considering the merits of entitlement, however, the administrative law judge determined that claimant failed to prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §718.204(b), (c)(1), and (c)(4). Employer has responded and urges affirmance of the denial of benefits, but also identifies alleged errors in the administrative law judge's findings under Section 725.309. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibits 4, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the court held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Concerning Section 718.204(b), the administrative law judge stated that even if total respiratory disability could be found from the medical report evidence, such evidence does not prove that pneumoconiosis contributed to the impairment, noting that the source of claimant's problems are his heart condition and smoking. Decision and Order at 12. Claimant argues that the administrative law judge erred in neglecting to address the portions of the opinions of Drs. Traughber and O'Bryan in which they indicated that claimant's pulmonary impairment was attributable, in part, to coal dust exposure. We affirm the administrative law judge's finding that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(b), inasmuch as the administrative law judge permissibly found that the opinions of Drs. Traughber and O'Bryan do not support a finding of total disability under Section 718.204(c)(4). Accordingly, the administrative law judge rationally determined that their opinions do not establish that claimant's alleged totally disabling impairment is due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). *See generally Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

With respect to the administrative law judge's findings under Section 718.204(c)(4), claimant maintains that the administrative law judge erred in determining that the opinions of Drs. Traughber and O'Bryan support a finding that claimant is not totally disabled. Claimant alleges specifically that because Dr. Traughber "deferred to claimant on the question of disability for coal mine employment" and claimant testified that he can no longer do his usual coal mine work, the administrative law judge should have determined that Dr. Traughber's opinion supported a finding of total disability under Section 718.204(c)(4). Claimant's Brief at 7. Claimant also contends that Dr. O'Bryan's medical opinion is not reasoned inasmuch as Dr. O'Bryan did not have an accurate understanding of the exertional requirements of claimant's last coal mine job and did not actually indicate that claimant is capable of performing his usual coal mine employment.

The administrative law judge acted within his discretion in treating Dr. Traughber's conclusions regarding the extent of claimant's impairment as a finding that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Based upon his examination of claimant on August 16, 1994, Dr. Traughber found that claimant has a moderate impairment due to cigarette smoking and coal dust exposure, but is not disabled. Director's Exhibits 13, 14. At his deposition, Dr. Traughber reiterated his determination that claimant is suffering from an obstructive impairment and stated that he would tell claimant to refrain from using cigarettes, to avoid dusty areas, and to avoid crowds during the flu season. Employer's Exhibit 5 at 10-12. Dr. Traughber concluded that, as to actual physical activity,

he would "allow the man to do whatever he feels comfortable doing physically." Employer's Exhibit 5 at 12.

In light of the fact that Dr. Traughber stated specifically that claimant is not disabled, the administrative law judge did not abuse his discretion in finding that Dr. Traughber's opinion does not support a finding of total disability under Section 718.204(c)(4). *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989)(Recommendation that a miner avoid further dust exposure does not constitute a finding of a totally disabling respiratory or pulmonary impairment). With respect to claimant's testimony regarding his capabilities, although an administrative law judge can credit such testimony as corroborative of a medical finding of total disability, he or she cannot base a finding of total disability solely upon the miner's assessment of his functional limitations. *See generally Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). Thus, because the administrative law judge permissibly found that Dr. Traughber's opinion does not support a finding of a totally disabling impairment under Section 718.204(c)(4), the administrative law judge could not defer to claimant's testimony in the manner urged by claimant.

With respect to Dr. O'Bryan's opinion, Dr. O'Bryan examined claimant on May 13, 1996, and noted on Department of Labor Form CM-911 that claimant had worked as a dozer operator, belt mechanic, and front end loader. Employer's Exhibit 3. Based upon his examination of claimant and the objective test results, Dr. O'Bryan diagnosed pneumoconiosis and a mild obstructive impairment. *Id.*. Dr. O'Bryan further indicated that the level of impairment experienced by claimant would not prevent him from performing his last coal mine job of one year's duration. *Id.*. During his deposition, which was held on November 11, 1996, Dr. O'Bryan stated that he did not record, and could not remember, what claimant's last coal mine work was. Employer's Exhibit 7 at 12. He also acknowledged that claimant had "some" pulmonary dysfunction and that the level of impairment caused by this dysfunction would vary depending upon the nature of claimant's job. *Id*. at 12-13. At the same time, the doctor indicated that, based upon the results of the objective testing in the record, there would be no medical restrictions on claimant's activities from a respiratory standpoint. *Id.* at 5. He further stated that claimant could perform the work of a front end loader operator and that he would not put any limitations upon claimant's activities from a pulmonary standpoint. *Id.* at 15.

We affirm the administrative law judge's determination that Dr. O'Bryan's opinion does not support a finding of total disability under Section 718.204(c)(4). Dr. O'Bryan did not state that claimant is totally disabled nor did he describe physical limitations from which the administrative law judge could infer that claimant is suffering from a totally disabling respiratory or pulmonary impairment. Moreover, Dr. O'Bryan stated specifically that claimant's mild impairment would not prevent him from performing his previous coal mine employment. Accordingly, the administrative law judge did not err in finding that Dr. O'Bryan's opinion did not assist claimant in establishing that he is totally disabled pursuant to Section 718.204(c)(4). *See Budash*, *supra*. We affirm, therefore, the administrative law

judge's finding that the medical opinion evidence did not establish total disability under Section 718.204(c)(4), as claimant has not raised any meritorious allegations of error.

In light of the fact that the administrative law judge permissibly found that the opinions of Drs. Traughber and O'Bryan do not support a finding of total disability pursuant to Section 718.204(c)(4), the administrative law judge rationally determined that their opinions were insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b). *See Adams*, *supra*; *Gee*, *supra*. Thus, any error in the administrative law judge's characterization of their opinions regarding the source of claimant's respiratory impairment under Section 718.204(b) is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). The remaining medical opinions of record also do not support a finding that claimant is totally disabled due to pneumoconiosis, as Drs. Anderson and Lane both determined that claimant does not have pneumoconiosis. Director's Exhibits 11, 12. The administrative law judge's finding under Section 718.204(b) is, therefore, affirmed.

Inasmuch as we have affirmed the administrative law judge's determination that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. Thus, we need not address claimant's allegations of error regarding the administrative law judge's consideration of the pulmonary function studies under Section 718.204(c)(1) or employer's arguments concerning the administrative law judge's determination that claimant established a material change in conditions under Section 725.309. Error, if any, in the administrative law judge's findings with respect to these issues is harmless in light of our affirmance of the denial of benefits. *See Johnson*, *supra*; *Larioni*, *supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge