

BRB No. 00-0845 BLA

CLARENCE C. SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Hugh M. Richards, London, Kentucky, for claimant.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0650) of Administrative Law Judge Robert L. Hillyard 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 Based on the April 17, 1997 filing date of the claim, the administrative law judge applied the regulations found at 20 C.F.R. Part 718, and found that

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claimant established five and one-half years of coal mine employment, but failed to establish the presence of pneumoconiosis or total disability and, accordingly, denied benefits. On appeal, claimant contends that the administrative law judge erred in failing to find that claimant's son was not a dependent for purposes of augmentation of benefits and that the administrative law judge erred in failing to properly consider the medical opinion of Dr. Baker.² The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on March 9, 2001, to which the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the Director's brief and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the

² We affirm the administrative law judge's finding of five and one-half years of coal mine employment, and that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3)(2000) or total disability at 20 C.F.R. §718.204(c)(1)-(3)(2000) as these findings were unchallenged on appeal, *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), and the revised regulations have not substantively changed these sections.

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 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*).

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 that there is no reversible error contained therein. Contrary to claimant's argument, substantial evidence supports the administrative law judge's determination that claimant failed to establish the existence of a totally disabling respiratory impairment. The administrative law judge correctly determined that no doctor offered an opinion that claimant was totally disabled and that both objective tests, a pulmonary function study and a blood gas study were non-qualifying.³ Director's Exhibit 13; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *see Worley v. Blue Diamond Coal Co.*, 12 BLA 1-20 (1988). As claimant failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits, and we need not address claimant's other

³ Contrary to claimant's contention, the record contains no opinion by Dr. Bushey. The only reference to Dr. Bushey was made by claimant in his hearing testimony where he stated that Dr. Bushey had examined him and diagnosed black lung. Hearing Transcript 30-33.

contentions on appeal.⁴ *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent, supra*; *Perry, supra*; *Gee, supra*.⁵

⁴ In view of our affirmance of the administrative law judge's determination that claimant offered no medical evidence to establish his claim for total disability, we can reject claimant's request to remand the case for the administrative law judge to explain his determination to give "some weight" to Dr. Baker's opinion on the issue of total disability while finding it unreasoned on the issue of the existence of pneumoconiosis. Decision and Order at 8. Any error would be harmless because it would not compensate for claimant's lack of evidence to carry his burden of proof. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ The letter submitted by claimant to the Board as support of his son's dependency, cannot be considered by the Board. *See* 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge